Judgment 57/2003

Smith v Cornell
Court of Appeal
(Civil Appeal 254)
18th December, 2003

Appeals from eviction order, injunction and summary judgment as to costs – appellant's claim to ownership based on a verbal conveyance and uninterrupted possession for more than twenty years – criteria for award of costs on full indemnity basis – criteria for summary judgment – appeals dismissed.

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 18th day of December, 2003 before Richard Charles Southwell, Esq., QC Presiding, Peter David Smith Esq., QC and Patrick Stewart Hodge Esq., QC

KATHLEEN EDNA SMITH

Appellant

V

CAROLINE CORNELL

Respondent

In the appeals by the Appellant from the following decisions by the Royal Court:-

(i) Order for the eviction of the Appellant from land at Les Messuriers in the parish of the Forest, made on 17th June, 1998;

(ii) Injunction restraining the Appellant from placing animals or goods upon the said land, and award of full indemnity costs in favour of the Respondent as respects the eviction, made on 8th October, 1998; and

(iii) award of summary judgment in favour of the Respondent in respect of costs totaling £8,040.90, made on 16th August, 1999;

THE COURT, having heard the Appellant in person and in default of appearance by the Respondent GAVE JUDGMENT in the terms attached hereto and DISMISSED all three appeals;

AND THE COURT REFUSED an application by the Appellant for leave to appeal to Her Majesty in Council.

K. H. TOUGH
Registrar of the Court of Appeal

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THURSDAY 18TH DECEMBER 2003

IN THE COURT OF APPEAL OF GUERNSEY

Before

Richard Charles Southwell, Esq., QC; presiding
Peter David Smith, Esq., QC
Patrick Stewart Hodge, Esq., QC

KATHLEEN EDNA SMITH v. CAROLINE CORNELL
(Civil Appeal No. 254)

Judgment delivered by Peter David Smith, Esq., QC

1. In 1997 the Respondent began proceedings in the Royal Court, seeking the eviction of the Appellant from a meadow at Forest, and identified in the records of the States Cadastre as "H504" ("the meadow"). In her Defences the Appellant contested the Respondent's entitlement to an eviction order. She averred that she was the owner of the meadow, she and her mother and father having been in continuous uninterrupted possession of it, in good faith, for a period in excess of twenty years; further, or in the alternative, that in or about the summer of 1968, the Respondent's mother, Mrs. Jessica Valerie Youd, had orally conveyed the meadow to the Appellant's mother and father and their heirs; and that, further or in the alternative, if the Respondent was the owner of the meadow, the Appellant had not received sufficient notice to quit.

2. The Respondent disputed the Appellant's claim of ownership and averred that her mother had permitted the Appellant to graze her goats on the meadow in return for the Appellant looking after the hedges and douits, something the Respondent alleged the Appellant had failed to do. This arrangement was alleged to have been made between 1986 and April 1989. The allegation that the meadow had been orally conveyed to the Appellant's mother and father and heirs was denied, and it was asserted that such would have been impossible under Guernsey Law. The need for a notice to quit over and above the eviction summons was contested.

3. The proceedings came on for hearing before the Deputy Bailiff (now the Bailiff) and three Jurats on 15th June 1998. Mrs. Youd said in evidence that she had bought the meadow in 1968 for the purpose of keeping horses there for her daughter's use and that was what she did after it was purchased. Eventually the meadow was rented to a Mr. and Mrs. Heaume. Mrs. Youd went to England in 1977, and at that time the Heaumes were still the tenants. Subsequently, a Mr. Torode became tenant of the meadow. Mrs. Youd returned to Guernsey to live in 1986 and, at about that time, Mr. Torode ceased to be the tenant of the meadow. Subsequently, the Appellant's mother asked if the Appellant could graze her goats in the meadow and Mrs. Youd agreed to this in return for the Appellant keeping the douit clean and the hedges cut. In 1996 Mrs. Youd sold the meadow to her daughter, the Respondent.

4. In cross-examination Mrs. Youd denied having bought the meadow for the Appellant's parents. She denied that the Appellant and her family had used the meadow both prior to and since she had purchased it. It was put to her that the Appellant had not had any goats since she was a little girl and had only donkeys at the time of the alleged agreement between Mrs. Youd and the Appellant's mother. Mrs. Youd said that the Appellant had some animals at the material time, either goats or donkeys, and that she thought she had goats.

5. The Respondent confirmed her mother's evidence as to the purchase of the meadow in 1968 and the Respondent's use of it for horses. She said that this stopped about two years after her marriage in 1970. She left Guernsey in 1976 to live permanently in England, but had been aware of the Heaumes' tenancy in the early 1970s. The Respondent had bought the meadow from her mother in 1996. She was aware that the Appellant was using the meadow at the time "on a part-time grazing basis." In 1997 the Respondent asked the Appellant to vacate the meadow because she wanted to turn it into a memorial park for her deceased daughter. The Appellant had agreed, but had since changed her mind. She denied that Appellant's donkeys had been in the meadow for the last eighteen or twenty years.

6. Mr. Jonathon Heaume was called on behalf of the Respondent. He and his wife had come to Guernsey in November 1973, bringing a horse with them and they brought over another horse a little later on. He had rented the meadow from Mrs. Youd from about 1974 in order to keep the horses in it. Mr. Heaume's marriage had broken up in 1978 and he and his wife had divorced in that year. He continued to look after the horses for about six months thereafter. Then his ex-wife had taken over the meadow together with another field, which they had also used for the horses. The meadow had been used in the summer but not in the winter, although Mr. Heaume kept an eye on it over the winter.

7. Mr. Michael William Torode told the Royal Court that he had been tenant of the meadow, and of another piece of land also owned by Mrs. Youd, jointly with Mrs. C. Heaume (Mr. Jonathon Heaume's ex-wife) from 1980 until 1985 or 1986. He and Mrs. Heaume, who had lived together as man and wife, separated in early 1986 and he ceased to have any interest in the meadow at that time, although Mrs. Heaume had continued in occupation. The meadow tended to be too wet for grazing in the winter, but in the summer Mr. Torode would put one or two horses on the meadow and also a heifer and a steer. He had paid rent to Mrs. Youd in respect of the two pieces of land, and he had received a letter from the Income Tax Authority in 1987, and which he produced to the Court, chastising him (as he put it) for failing to deduct the tax from the rent he paid in respect of 1985 before remitting the balance to Mrs. Youd. Mr. Torode denied that there were donkeys in the meadow during his tenancy although he had seen them there in more recent times. He denied that the last time he had been in possession of the meadow was in 1976.

8. The Appellant called Mr. Philip Edward Saunders, with whom she had lived as man and wife since 1978. He described fencing the meadow off in 1976 so that the Appellant's dog could exercise there when she was at work. Furthermore, the Appellant had kept a goat in the meadow until 1979 when the goat had died and he, Mr. Saunders, had buried it in the meadow. The Appellant's father had looked after the stream crossing the meadow and the roadside hedge, and Mr. Saunders said that he started cutting the hedge in 1980, and had been doing so ever since. He said that Mr. Torode was wrong in his allegation that he had kept animals in the meadow during the period from 1980 to 1986.

9. Mr. Michael Marshall was called by the Appellant. He could not remember Mr. Torode being in the meadow. Mr. Marshall did not know Mr. Heaume and did not remember him being on the land. The meadow was fenced off between 1970 and 1977 or 1978. Since then he had seen donkeys in the meadow. Mr. Marshall had seen the Appellant taking donkeys to the meadow many, many times during the period 1980 to 1987. He had also seen the Appellant and Mr. Saunders working in the meadow as far back as the early 1980s.

10. The Appellant called her mother, Mrs. Gwendolin Smith, as a witness. Mrs. Smith said that the Appellant had got the meadow and that she had had her donkeys in it for about twenty odd years.

11. The Appellant gave evidence on her own behalf. She said that there was an understanding that goats belonging to herself and other members of her family could go into the meadow during the period Mrs. Youd rented it before she had bought it. In 1967/68 Mrs. Youd gave the meadow to the Appellant's father as an act of friendship for the purposes of access to adjacent land. She denied the Respondent's allegation that she, the Respondent, had used the meadow for her horses until about 1972. After he was given the meadow, the Appellant's father tended it by cutting the hedge. Mrs. Youd did not pay him to do this. Her father allowed a Mr. Mauger to put steers and heifers in the meadow up til 1976. Then in 1976 the Appellant's father allowed Mr. Torode to put his steer in the meadow. Apart from that Mr. Torode was not in the meadow and he was mistaken in his evidence to the contrary. The Appellant's father died in 1986 and she said that after that she treated the meadow as her own. Since 1980 she had used the meadow for her donkeys. The Appellant denied that Mrs. Youd had agreed between 1986 and 1989 to allow grazing rights on the meadow at Mrs. Smith's request.

12. When pressed in cross-examination in relation to her allegation that Mrs. Youd had bought the meadow for her father in 1968, the Appellant said that her father had asked Mrs. Youd to buy it on the basis that if his daughter (the Appellant's sister) and her husband obtained permission to develop adjacent land, to which the meadow gave access, Mrs. Youd would be paid for the meadow. However, development permission was not forthcoming but Mrs. Youd nevertheless made a gift of the land to the Appellant's father. The Appellant thought that the reason for this was that her father and mother had helped Mrs. Youd at a time when her marriage broke up. In turn, the Appellant's father had given her the meadow in 1971.

13. At the end of the Appellant's evidence, the Deputy Bailiff permitted a further witness, Mr. Robert du Putron, Mrs. Cornell's former husband, to give evidence. He denied telephoning the Appellant seeking permission to erect a pine tree in the meadow in memory of the deceased daughter, to which we have already referred.

14. At the end of the evidence the Deputy Bailiff ruled that, there having been no contract passed before the Royal Court, the Appellant's claim was limited in its basis to prescription. A verbal conveyance would not suffice to pass title. As to prescription, he ruled that, although faith is an essential requirement, in the absence of any allegation of bad faith this has to be presumed and that, therefore, all that the Appellant had to show was uninterrupted possession for at least twenty years.

15. The Deputy Bailiff summed up to the Jurats and they found in favour of the Respondent. A stay of execution of two weeks was allowed. The Respondent applied for costs on a full indemnity basis and the Deputy Bailiff stood this application over until a date could be fixed.

16. The Appellant appealed (for convenience we call it "Appeal No. 1 - Eviction") and sought an extension of the stay of execution until the end of October 1998. In response, the Respondent made an application for security for costs. On 2nd July 1998 the Appellant was evicted from the meadow by Her Majesty's Sheriff. On 10th September 1998, the Respondent applied for an injunction against the Appellant *"... restraining her whether by herself, her servants, agents or otherwise howsoever for going upon, staying at, occupying or leaving animals or goods on [the meadow]...."*

17. On 15th September 1998 the Deputy Bailiff sat to hear the Appellant's application for a stay and the Respondent's applications for costs on a full indemnity basis and for an injunction. He refused the Appellant's application for a stay and ordered that the applications in respect of costs and for an injunction be adjourned sine die. However, on 8th October 1998, the Deputy Bailiff sat again and heard those applications. Oral evidence was given by a Mr. David Walter De La Mare, a litigation clerk, employed with the firm of Advocates acting for the Respondent. He described visiting the meadow on 1st October 1998, and seeing and photographing four donkeys there. The Appellant denied that they were her donkeys and, indeed, asserted that what appeared to be the head of a live donkey in one of the photographs was, in fact, the head of a pantomime horse. The Deputy Bailiff conducted a vue de justice. He held that the donkeys were indeed those of the Appellant. The Deputy Bailiff made an order restraining the Appellant in the terms sought by the Respondent and also ordered that the Appellant paid the Respondent the costs of the eviction proceedings on a full indemnity basis.

18. On 16th November 1998, the Appellant filed a Notice of Appeal against the injunction ("Appeal No. 2 - Injunction") and, in response, the Respondent filed an application for security for costs. On 16th August 1999 the Deputy Bailiff awarded the Respondent summary judgment against the Appellant in respect of the Respondent's taxed costs of the action for eviction and the application for the injunction - a total of £8,040.90. On 16th August 1999 the Appellant filed a Notice of Appeal in respect of the order for summary judgment ("Appeal No. 3 - Summary Judgment"). Thereafter there were further proceedings, including interlocutory applications to and orders of the Court of Appeal culminating in directions, given on 25th September 2003, designed to enable this Court to perform its role in relation to the three appeals, fairly, efficiently and expeditiously.

19. Dealing first with Appeal No. 1 - Eviction, we preface our consideration of the Appellant's arguments with the observation that she, a personal litigant, does not always express herself with clarity either orally or in writing. Doing the best we can we summarise her points as follows:

    (i) The Royal Court ought to have preferred the version of events articulated by the Appellant and her witnesses.

    (ii) All of the people who gave evidence to the Royal Court in support of the Respondent's case misled the Court. The Appellant canvassed numerous examples of the respects in which, according to her, their evidence was incorrect. In particular the Respondent's Advocate had confused Mrs. Youd as to which field was actually the meadow; Mr. Heaume had never used the meadow; Mr. Torode's use of the meadow was limited to some months in 1976 when he had been permitted to keep a cow there by the Appellant's father; Mrs. Heaume and Mr. Torode had rented another field, not the meadow.

    (iii) According to the Appellant, a statement from a Mr. Edward Callaway, if introduced on appeal, would prove that the Respondent's witnesses were not

telling the truth. Furthermore, a number of other persons (including the Appellant's sister and two brothers) could give evidence corroborating the Appellant's case.

(iv) The Appellant's letters, which contain the true facts, had been withheld from the Royal Court.

(v) At the end of August 1997 the Respondent had sought the agreement of the Appellant for the placing of a tree in the meadow in memory of the Respondent's deceased daughter, thereby impliedly acknowledging the Appellant's ownership. The Appellant had agreed but, subsequently, the Respondent had gone back on the agreement.

(vi) In his summing-up to the Jurats the Deputy Bailiff failed to mention the meeting between the Appellant and the Respondent adumbrated in paragraph (v) above or explain how the Appellant's version of it tended to supported her case.

(vii) The Respondent's Advocate had not researched the Respondent's case thoroughly. Had he done so, there would have been no need to bother the Court.

(viii) The Appellant produced a large excerpt from the transcript of the evidence of the trial annotated with comments on the portions she disagreed with.

(ix) The Appellant questioned why title deeds had not been produced in the Royal Court, implying that had they been produced they would have tended to support her case.

(x) The Appellant hinted at a conspiracy between the Deputy Bailiff and the Advocates acting for her opponents in the instant case and two other cases involving disputes between the Appellant and other neighbours to, as it were, do the Appellant down. Furthermore, she complained of "dirty tactics" on the part of the Respondent's Advocate at the trial and of Advocates deceiving the Royal Court and the Court of Appeal.

(xi) Mrs. Tapper (formerly Mrs. Heaume) had not been called as a witness.

(xii) There had not been a vue de justice.

(xiii) There was confusion between the meadow and a field in the vicinity; and

(xiv) No rent book had ever been produced.

20. We deal with these points in the order in which we have listed them above.

(i) The Appellant had every opportunity to put her case to the Royal Court. She cross-examined the Respondent and her witnesses. She gave evidence on her own account and she called and examined witnesses on her own behalf. She made submissions to the Royal Court. The Jurats had the opportunity, not available to us, of seeing and hearing the parties and their witnesses. They obviously preferred the evidence of the Respondent and her witnesses to that of the Appellant and her witnesses. The Appellant was unable to demonstrate, by means of either her oral or written submissions to us, that it was not open to the

Jurats to make the choice they did or that the choice they made was the wrong one.

(ii) The Appellant has not succeeded in demonstrating to us that the Respondent or her witnesses misled the Royal Court. We have considered very fully all of the examples canvassed by the Appellant. They were either raised, or could have been raised, before the Royal Court. None of them is sufficiently cogent to enable us to rule that the Royal Court ought to have come to a different conclusion.

(iii) No statement from Mr. Callaway nor any material from the Appellant's brothers or sisters or any other persons has been placed before us. If any of these people have evidence going to the facts that were in issue at the trial they could have been called as witnesses. They were not called and no acceptable reason has been advanced by the Appellant which would enable us to receive evidence from any of these people at this stage even if they have something relevant to say.

(iv) We have read the Appellant's letters. There is nothing in any of them which could possibly have made the slightest difference had they been introduced into evidence at the trial.

(v) Included in the bundle of documents placed before us by the Appellant there is a letter from the Respondent of 16th September 1997 which purports *"... to confirm our agreement made following our recent meeting whereby you agreed to vacate my field by the end of this month."* This letter supports the Respondent's version of the meeting at the end of August 1997 as does another letter to the Appellant, and included in her bundle, dated 24th October 1997, from Advocate J.B. Green, who was advising the Appellant, and which sets out her instructions given on 7th October 1997. The Appellant's inclusion of this letter in her bundle has the effect of waiving privilege. This roughly contemporaneous correspondence tends to refute the suggestion that the Respondent ever acknowledged the Appellant as owner of the meadow.

(vi) The Deputy Bailiff indicated that whatever the Appellant had discussed with the Respondent in 1997 did not seem to him to be relevant. We do not agree with this view. In our judgment, if the Respondent had acknowledged the Appellant's ownership, even only in recent times, this would have been something the Jurats could reasonably have taken into account in reaching their decision. Therefore, each side's evidence on the point should have been mentioned in the summing-up. However, this lacuna would enable us to allow this appeal only if it has given rise to a miscarriage of justice (see Helmot v. Smith, Court of Appeal, unreported). We do not consider that this error has given rise to a miscarriage. This is confirmed by the letters referred to in (v) above.

(vii) The Appellant was unable to persuade us that there was anything that could have been found which could have caused the Respondent's Advocate to take a different view of the strengths of his client's case.

(viii) These comments merely demonstrate that the Appellant disagreed with the gravamen of the evidence produced on the Respondent's behalf. The comments, of themselves, do not suffice to enable us to allow this appeal.

(ix) Some title deeds were produced to us. There was nothing in them, nor, as far as we are aware, in any title deeds we have not seen, tending to support the Appellant's case or refute the Respondent's case.

(x) There is absolutely no evidence, direct or indirect, of any such conspiracy or any dirty tricks or other misbehaviour on the part of any Advocate.

(xi) It is a matter for the parties to choose their witnesses. There can be all sorts of reasons for not calling witnesses. In our judgment no inference can be drawn from the failure to call Mrs. Tapper. After all, she could have been called by the Appellant if she has evidence helpful to her.

(xii) There was a vue de justice, but it was conducted by the Deputy Bailiff in October 1998 in relation to the injunction application. It is a matter for the Court of trial to determine whether or not a vue de justice will help it reach the right decision. The Appellant has not persuaded us that a vue de justice was essential to the just determination of the eviction proceedings.

(xiii) This point has been investigated very carefully and we have been referred to the relevant maps. We are satisfied that there has been no confusion and that the Jurats understood clearly that the land in question was that identified as "H504" in the States Cadastre.

(xiv) In our opinion the availability or absence of a rent book is not determinative of the question of whether or not a tenancy existed.

21. Accordingly, we reject Appeal No. 1 – Eviction. As to Appeal No. 2 – Injunction, the Deputy Bailiff was entitled, on the basis of the evidence he heard, to conclude that the Appellant's donkeys were on the meadow. Nothing that the Appellant told us at the hearing of this appeal would justify our interfering with the decision to grant the injunction. Accordingly, we reject Appeal No. 2 – Injunction also.

22. As to Appeal No. 3 – Summary Judgment, this arises out of the outworking of the order of the Royal Court that the Appellant pay the Respondent's costs of the eviction proceedings on a full indemnity basis. Appeal No. 1 – Eviction must be deemed to include an appeal against the costs order made in respect of the eviction proceedings and to this we now turn.

23. The power to award costs on a full indemnity basis is set out in Rule 48 of the Royal Court Civil Rules, 1989. The material portions read as follows:

(3) Notwithstanding the provisions of the Royal Court (Costs and Fees) Rules, 1981 or of any other rule of Court or enactment, the Court may, in the circumstances mentioned in paragraph (4), order that costs or security for costs shall be paid on a full or partial indemnity basis.

(4) The circumstances referred to in (3) are as follows:-

(a) where, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the Royal Court (Costs and Fees) Rules, 1981; or

(b) where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court."

24. The application for costs was heard by the Deputy Bailiff on 8th October 1998. He considered that the only ground open to the Respondent was that of unreasonableness. He concluded that the Appellant's defence of the Respondent's claim had been unreasonable and, accordingly, made an order that the Respondent's costs be taxed on a full indemnity basis.

25. The Deputy Bailiff did not specify his reasons, but his conclusion must have been reached on the basis of the arguments advanced by the Respondent's Advocate. These proceeded on the basis that the Appellant's defence that Mrs. Youd had given the meadow to the Appellant's family was preposterous; that her defence that she was a tenant and had not received notice to quit had no legal basis as at the trial the Appellant's case was that she was an occupier not a tenant; and that the unanimous decision of the Jurats must have involved a finding that the Appellant and Mr. Saunders had been telling lies (Mr. Marshall was exonerated "because he was so vague he could not really think of anything" and Mrs. Gwendolin Smith because, it was argued, she gave no substantive evidence at all). The Appellant's objective, it was argued, was simply an attempt to get the meadow by means of fabricated evidence.

26. In our judgment, it was open to the Deputy Bailiff to hold, as he appears to have done, that the evidence of the Appellant and her partner had been fabricated. To defend a claim on the basis of fabricated evidence is patently unreasonable. Therefore, we consider that the costs order made by the Deputy Bailiff was justified and accordingly we uphold it.

27. As to the appeal against summary judgment, it is clear from the decision of this Court in the Monument Company Limited v. Gaudion and Another (unreported) that the Bailiff (as the Deputy Bailiff had become by 16th August 1999) was obliged to grant summary judgment to the Respondent. Advocate Loveridge had been appointed to tax the Respondent's costs and had given the Appellant an opportunity to make representations to him. However, her representations related not to the quantum of the costs but to the substantive decision of the Royal Court. Before the Bailiff the Appellant complained only, and for the first time, as to items claimed in respect of research carried out by the Respondent's Advocate. However, the Appellant disputed these items very much on the same sort of basis as she has disputed the substantive decision. In these circumstances we consider that the Bailiff was right to order summary judgment and we reject this appeal also.

28. We should add that in 2002 the meadow was sold by the Respondent to a Mr. and Mrs. A.C. Marquis'. They have declined to participate in these proceedings on the ground of the expensive legal representation. Instead, they have written to H.M. Greffier expressing concern as to the Appellant's threat to put her donkeys in the meadow "whatever the Courts say." We are not in a position to adjudicate as to what the Appellant may have said to the Marquises or what she meant by anything she said, but she must understand that if she defies an order of the Court she acts at her peril.

29. Finally, we express our gratitude to Her Majesty's Greffier who has worked long and hard to marshall voluminous documentation and present it to us in a form which has enabled us to deal, we hope, justly and effectively with these appeals.

SOUTHWELL, JA: And that is the judgment of the Court. Any further matters arise? (Pause) Right, thank you very much. The Court will now proceed to the next-

MISS SMITH: Can I appeal on this?

SOUTHWELL, JA: I'm afraid you don't ask questions Miss Smith. Are you asking for leave to appeal?

MISS SMITH: Yes please.

SOUTHWELL, JA: No, Miss Smith, it would be quite wrong for the Court to encourage you in any way to pursue an appeal in a case which has no proper merit or basis whatever.

MISS SMITH: Well you didn't mention about the two Jurats on the … (inaudible) case.

SOUTHWELL, JA: Miss Smith, we have completed our decisions on this case. Thank you very much.

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I, Suzanne Margaret O'Neill hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

……. Suzanne M. O'Neill
Friday 9th January 2004

