

Hunter Vs. Fox

Hunter Vs. Fox

SooperKanoon Citation : sooperkanoon.com/945174

Court : House of Lords

Decided On : Apr-08-1964

Judge : Lord Reid, Lord Viscount Radcliffe, Lord Guest, Lord Pearce

Appeal No. : No.

Appellant : Hunter

Respondent : Fox

Judgement :

LORD REID

After the narrative quoted supra, his Lordship continued]-The whole case as presented to your Lordships turns on the words "at present" in this provision. The appellant maintains that, when one looks at the provision as a whole, it is at once apparent that the inclusion of these words must be due to a blunder, that they neither add to, nor subtract from, the meaning of the rest of the provision, and that they should be disregarded. The respondent maintains that they introduce an ambiguity or render the meaning of the whole provision uncertain, and that, therefore, the whole provision is invalid and unenforceable.

No authority precisely in point was cited, and I think it best to begin by recalling the principles which govern this class of case. This is a negative servitude, and it is common ground that words purporting to create such a burden must be construed strictly, there being a presumption for freedom. This provision appears in the

Register of Sasines, which is open for all to see, and a purchaser is entitled to rely on the faith of the record. He is not concerned with the intention of the person who created the burden: he is concerned with the words which appear in the Register of Sasines. Then there arises the question of what is meant by a strict construction. I can think of no stricter method of construction-and none was suggested in argument-than to ask whether a reasonable man with a competent knowledge of the English language could have any real doubt about the meaning of the provision read in its context in the disposition. If the words are self-contradictory, or so obscure that one has to grope for the meaning, then the provision is ineffective, and it is also ineffective if it is ambiguous or reasonably capable of having more than one meaning. There can be no benevolent construction in the sense of spelling a meaning out of obscure phraseology or preferring one of two or more reasonably possible meanings. But if the meaning is clearly apparent, that is sufficient to satisfy the test of strict construction. I can find neither reason nor authority for holding that defective drafting which does not obscure the meaning of the provision is enough to invalidate it.

This provision purports to bind the original disponee and all who derive right from him not to plant or allow to grow shrubs or trees, and not to build erections of such a nature as to exclude a clear and open view of the sea from the dominant tenement. It is not argued that such a provision is too indefinite in its nature to be a valid negative servitude, so your Lordships do not have to consider that matter. The only question is whether the presence of the words "at present" renders invalid what would otherwise be a valid reservation of a servitude.

I think that it must at once be apparent to any reader that the insertion of the words "at present" must have been due to some mistake, because they do not make sense as they stand. If those words have any meaning at all in this context, they must refer to the present time, and it is not credible that anyone would set out to create a servitude which was only to have effect "at present." Moreover, the whole of the rest of the provision is appropriate to create an ordinary servitude with permanent effect.

Faced with these words one's natural reaction is to begin to speculate as to what words the conveyancer can have intended to use. It is possible to suppose at least two alternatives. He may have intended to say "so as to exclude or prevent a clear and open view," or he may have intended to say "so as to exclude the present clear and open view." But as I have already said, the conveyancer's intention is irrelevant. In *Anderson v. Dickie* 1915 SC (HL) 79, Lord Kinnear said, at pp. 82 and 83:

"I apprehend that no weight can be allowed to inferences of probability from the surrounding circumstances, or to any evidence of intention, even if it were more than conjectural....in deciding whether a singular successor is effectually restricted in the use of his property, it is not the intention to be gathered from other sources, but the import and effect of the deed itself, that matters,"

and Lord Dunedin said, at p. 90:

"No doubt the intention of the conveyancer was clear enough, but the singular successor, who is entitled to trust to the records, has nothing to do with intention."

In that case it was sought to use intention to set up something which was *ex facie* invalid. In this case the only purpose of seeking the conveyancer's intention would be to create an ambiguity out of apparently meaningless words. In both cases it seems to me that we must simply take the words as we find them.

If instead of "at present" the words had been "at Peebles" it would have been quite obvious that they had no place in this provision, and I would think it clear that the presence of such words, or a blank, or a mere jumble of letters would not have invalidated an otherwise complete and valid provision. Of course, if the provision were incomplete without the words inserted in error, and could only be made complete by reading in words which were not there, that could not be done. But mere meaningless surplusage is not, in my view, fatal.

So the question is whether these words are meaningless surplusage or whether they can reasonably be supposed to have some meaning in this context so as to qualify the rest of the provision. The ground of the Lord President's opinion is, I

think, summed up in two sentences:

"In my view, accordingly, this is a case where there is a clear ambiguity as to the meaning of the provision in question and in particular the meaning of the words 'at present' in the deed. If so, then in the light of the authorities, where we are considering a real burden in a question between parties neither of whom was an original party to the arrangement, the burden, if ambiguous, is unenforceable."

I do not see how to reach a conclusion that there is ambiguity without considering what words the conveyancer can have intended to insert instead of "at present," and the Lord President appears to have reached his conclusion by doing that. But in my view, that is what we must not do. Ambiguity means that there is more than one possible meaning. The question here seems to me to be whether the words "at present," taken as they stand in this context, have any meaning at all: or rather whether they can reasonably be supposed to have any meaning at all. I cannot find any plausible meaning for the words, and, therefore, it seems to me that they are mere surplusage. If this is right, I do not think that their presence can be held either to obscure or to render ambiguous the meaning of the provision as a whole. I would therefore allow the appeal. As the respondent does not object to the form of the Lord Ordinary's interlocutor, I think that it should simply be restored.

LORD VISCOUNT RADCLIFFE.-I agree.

LORD GUEST

The construction of clause (Tertio) in the disposition by Colin Alfred Stuart Parker in favour of Mrs Thomson, dated 16th December 1958, has resulted in a difference of opinion in the Courts below. The Lord Ordinary has held that this clause constituted a valid and effective negative servitude of prospect enforceable by the appellant against the respondents. The First Division of the Court of Session has found that the servitude is invalid and unenforceable. I find the reasoning of the Lord President, who delivered the judgment of the Court, difficult to follow. In one passage of his judgment the Lord President indicates that the servitude does not make sense owing to the words "at present" and in another passage he says-"In my view, accordingly, this is a case where there is a clear ambiguity as to the

meaning of the provision in question, and in particular the meaning of the words 'at present' in the deed," and he proceeds to suggest some explanations for the presence of the words "at present." Both these views cannot be correct. The ambiguities suggested are created by altering the words or transposing them. In my opinion, we must read the clause as it stands, without speculation as to the reason why these words are there. I accept the meaning of "at present" as "now" attributed to the words by counsel for the respondents. There is no sensible meaning to be given to these words which would militate against the servitude being a perpetual burden on the lands. So reading the words as meaning "now", they are just nonsense in the context in which they are found. The clause (Tertio) assumes that there are not any present obstructions to "a clear and open view of the sea" and speaks de futuro as to the obligations of the disponee. The references to "my said disponee and her foresaids" (i.e., her heirs and assignees whomsoever) and to "me or my successors" reinforce this view. I agree with the Lord Ordinary that the words "at present" neither add to nor subtract from the meaning of the remaining words of the provision. In these circumstances a Court is entitled, in my opinion, to treat the words as pro non scripto. I therefore think that the appellant is entitled to the declarator in the terms granted by the Lord Ordinary. I would therefore allow the appeal.

LORD PEARCE

I have had the advantage of reading the opinion of my noble and learned friend, Lord Reid, and entirely agree with it.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com