Neutral Citation Number: [2023] EWHC 2787 (Ch)

This judgment was handed down by release to The National Archives on 7 November 2023 at 14:30pm.

Case No: BL-2021-000461

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 November 2023

Before :

MR JUSTICE RAJAH

- -

Between :

(1) South Tees Development Corporation
(2) South Tees Developments Limited

Claimants

- and -

P D Teesport Limited

Defendants

-and-

Teesworks Limited

Third Party

- -
- -

Zoë Barton KC and Daniel Petrides instructed by Forsters LLP for the Claimants
Andrew Walker KC and James Mitchell instructed by DWF Law for the Defendants
Katherine Holland KC and Admas Habteslasie instructed by Taylor Wessing LLP for the Third Party

Hearing date: 11 October 2023

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Approved Judgment

Mr Justice Rajah:

1. This judgment deals with applications for permission to amend by the Claimants and the Third Party at the conclusion of opening statements on 11 October 2023. The Court sat late to conclude those applications. Save in respect of one proposed category of amendments (described below as the Capacity plea), I dismissed the applications. Time did not permit me to also deliver a reasoned judgment. These are my reasons.

The background

2. This is a trial to determine the existence, extent, and purpose of several rights of way that the Defendant claims to enjoy over industrial land near Middlesbrough.

3. The land was the site of the former British Steel steelworks which were most recently owned by Tata Steel and Sahaviriya Steel Industries Limited. The steel works were permanently closed in October 2015. The First Claimant is a Mayoral Development Corporation established by statutory instrument that is seeking to develop the site, and the Second Claimant is its subsidiary. They have acquired a substantial amount of land in four areas known as South Bank, Lackenby, Redcar and South Gare. The Third Party is the joint venture partner of the Claimants in the redevelopment of the site and is said to have options to acquire the Claimants' land.

4. The Defendant is the statutory port authority for the port of Teesport and the River Tees. The Defendant owns land known as "Teesport", which is almost surrounded by the land owned by the Claimants and by the Third Party. The Defendant also owns the Redcar Jetty and land, including the breakwater and lighthouse, at South Gare.

5. In its Defence and Counterclaim, the Defendant contended that it had several rights of way to, and across, the Claimants' land to access Teesport, the Redcar Jetty and its land at South Gare. In its skeleton argument for trial the Defendant dropped a number of its claims to rights of way, and has filed amended pleadings to reflect that. For the purposes of these amendment applications the relevant remaining claimed rights of way have been described as Access Route 1, Access Route 5 and the Swan Hunter right of way:

    i) Access Route 1 is an alleged prescriptive right of way which runs from Teesport along the river and would connect Teesport with the highway at Smiths Dock Road.

    ii) Access Route 5 is an alleged right of way by implication or necessity to connect the Redcar Jetty to a highway. Only part of Access Route 5 is on the Claimants' land. The rest is on land currently owned by Redcar Bulk Terminal Ltd ("RBT"), who is not a party to these proceedings.

    iii) The Swan Hunter right of way is allegedly an express right of way arising under a conveyance dated 3 December 1946 which runs from a parcel of land located by the Arthur Taylor jetty on the river through the South Bank site towards the site of the old Grangetown Railway Station.

6. On 15.03.2021 the Claimants issued a claim seeking negative declarations that the Defendant does not enjoy any rights of way (or other easements or interests) across its land. The Defendant filed a Re-Re-Amended Defence and Counterclaim on 29.11.2022. The Claimants filed a Re- Re-Amended Reply and Defence to Counterclaim on 14.12.2022. On the same date, the Third Party filed a Defence to Counterclaim (having been added to the proceedings in November 2022). Before joinder the Third Party had said that its pleaded case was intended largely to piggyback the case of the Claimants.

7. The case was initially listed for a 10 day trial in February 2023, but that trial window was vacated after a PTR before Michael Green J because the time estimate was inadequate. By then disclosure was complete and witness statements had been exchanged. The Defendant had served statements from 24 witnesses to deal with the pleaded points in issue. Experts' plans had also been prepared based on the existing pleadings and there had been discussions between the experts.

8. At the first PTR, Michael Green J also made a number of case management orders, one of which was to direct the Defendant to file and serve a detailed schedule fully particularising all of its claims to access rights by reference to the relevant documentation, witness evidence and pleadings. After a number of extensions, the schedule was eventually served on 21 April 2023.

9. It is significant that on 13 January 2023 Michael Green J ordered an expedited trial on the application of the Claimants and the Third Party. The Claimants and the Third Party made a positive representation to the court that the case was ready for trial or would be as soon as expert evidence was finalised. There was no indication that the shape of the case might change once the schedule ordered by Michael Green J at the PTR, attended by the Claimants and the Third Party, had been served, or that the schedule was in any way necessary to enable them to understand the case they had to meet.

10. On 16 June 2023, the Claimants and the Third Party served their pre-trial checklists. The Third Party's solicitors certified that they believe that no further directions were required before trial, while the Claimants' solicitors certified that the only further application that might be required in due course related to an unidentified issue in respect of the Claimants' expert. Even though the original schedule of rights had been served almost 2 months earlier there was no hint that an amendment application might be made.

11. On 18 July 2023 there was a second PTR before Mr Robin Vos (sitting as a Deputy High Court of Justice), who gave detailed directions for the conduct of the trial. They included provision for the trial bundles, the use of technology, including for taking evidence by video link, and the approval of a trial timetable.

12. The trial was listed to commence in the first week of October 2023.

13. On 26.7.2023, just before the court vacation, the Claimants and the Third Party applied for permission to make substantial amendments to their statements of case (i.e. to the Claimant’s Re-Re- Amended Reply and Defence to Counterclaim, and to the Third Party’s Defence to Counterclaim). The Defendant opposed the amendments to the extent that they introduced four new defences to the Defendant’s counterclaim:

first, a defence alleging abandonment and/or relinquishment of rights over the Swan Hunter right of way and Access Route 1 ("the Abandonment/Extinguishment plea"); second, a defence alleging that the Defendant's interests were not overriding interests under paragraph 2 of Schedule 3 of the Land Registration Act 2002 ("the Land Registration plea"); third, a defence alleging that the Defendant's statutory predecessor did not have the power to accept the grant of (or to reserve) easements ("the Capacity plea"); and fourth a defence that RBT's ownership of land immediately adjacent to Redcar jetty defeated the Defendant's claims to Access Route 5 ("the RBT plea").

14. Master Brightwell adjourned the application as regards the Capacity Plea and the RBT plea to me as the trial judge. He refused permission to amend to raise the Abandonment/Extinguishment plea (but without preventing the Claimants and Third Party seeking to make a further application at trial if they could provide better particulars); and he granted the Claimants and the Third Party permission to amend in respect of the Land Registration plea. He also made consequential directions for amendment of the pleadings, disclosure and witness statements.

15. The Defendant successfully appealed Master Brightwell's order permitting the Land Registration plea to Trower J. I am indebted to Trower J for his careful judgment, not least for his summary of the procedural history much of which I have adopted above. Two particular points made by Trower J in his judgment are relevant to these applications. Firstly, he rejected the argument on behalf of the Claimant and the Third Party that the Master had found that the Defendant's Schedule of Rights was necessary for the Claimants and Third Party to understand the case they had to meet. Trower J described it instead as "*a tool for trial*". Secondly he said, at paragraph 75:

> *"One of the principal reasons why I think the master was wrong in his approach on this point is that at the PTR in December the third party sought an expedited trial and renewed that application at the beginning of January, when it was granted. I agree with Mr Walker's submission that it is incumbent on an applicant seeking such relief in proceedings which have been active for almost 2 years, to make sure that the case really is ready for trial and that, if there are any amendments then contemplated, they are at least identified at that stage so that the court can take their impact into account when deciding what order it is appropriate to make."*

I agree with that observation.

16. In her trial skeleton argument dated 27 September 2023 on behalf of the Third Party, Ms Holland made clear that the Claimants and the Third Party would be renewing the application in respect of the Abandonment/Extinguishment plea as well as pursuing the two categories of amendment adjourned by the Master to me.

17. The trial commenced on 3 October with 2 days set aside for judicial pre reading.

18. On 5 October, the day on which the Claimants opened the case in court, a draft of the proposed amendments the Third Party was seeking was served on the Defendant and the Court, accompanied by a Note in support. I indicated that I would deal with the amendment applications after the parties had opened their respective cases. And so it was not until midday on 11 October that Ms Holland rose to introduce the amendment

applications. During the midmorning break which immediately preceded her doing so, the Claimants' counsel handed to the Defendant's counsel the latest iteration of the abandonment/extinguishment plea. The Third Party required more time to bring its proposed amendments into line with the Claimants and so its version of the amendments it sought on the abandonment/extinguishment plea were produced at 2pm. Mr Walker, on behalf of the Defendant complained with obvious justification that he had no opportunity to digest the nuances of the latest changes.

19. No formal application by form N244 was issued for this renewed abandonment/extinguishment plea which had been refused by Master Brightwell. No evidence was filed, either in support of the original application in August or in support of these renewed and adjourned applications to explain why the applications were being made at this late stage of proceedings.

Summary of the proposed amendments

20. The Capacity plea is that the Defendant's statutory predecessors were not conferred the power to acquire easements and therefore had no capacity to do so. This raises a pure point of law. The Defendant opposes the amendment on the basis that it has no merit. All parties were content for me to adjourn consideration of that issue to closing submissions and I have done so.

21. The remaining proposed amendments can be summarised as follows.

    i) In relation to Access Route 1 the Master rejected as insufficiently particularised the proposed plea that Access Route 1 was extinguished. While the Claimants and Third Party were not able to show me the inadequately particularised draft which was before the Master, the current draft simply proposes to assert that Route 1 is extinguished in circumstances where it is no longer available for use because it no longer physically exists and it is alleged that there is no practical possibility of it ever again benefitting the Defendant's land. No further factual particulars are given.

    ii) In relation to the Swan Hunter Right of Way it is pleaded by the Claimants and the Third Party that the physical roadway corresponding to the route had ceased to exist by 2001 and they rely on laches. Before the Master they sought to amend to raise a plea that in the circumstances it has been "relinquished, abandoned, or otherwise extinguished". The Master rejected that amendment as insufficiently particularised. In the renewed application they wish to amend that plea to remove the assertion that the roadway has ceased to exist and instead to assert that the access points of the route have not existed since 1938 and 1950 and that in the circumstances it has been "relinquished, abandoned, or otherwise extinguished".

22. It is already pleaded by the Claimants at paragraph 3.2.1 of the Amended Particulars of Claim that the Redcar Jetty is separated from the Claimants' land by the Redcar Bulk Terminal. The Claimants and Third Party now wish to plead a number of further factual statements to similar effect and to plead a number of legal submissions as to the consequences for the Defendant's claim to an easement by implication or necessity.

The legal framework

23. The relevant principles to apply in considering an application to amend were summarised by Lambert J in *Pearce v East and North Hertfordshire NHS Trust [2020] EWHC 1504 (QB)*:

> "10. The legal framework is not in dispute and can be stated succinctly here. The starting point is CPR 17.3 which confers on the Court a broad discretionary power to grant permission to amend. The case-law is replete with guidance as to how that discretionary power should be exercised in different contexts. I need cite only two cases which taken together provide a helpful list of factors to be borne in mind when considering an application such as this: *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] EWHC 1345 (TCC)* and *Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm)* . From those cases, I draw together the following points.
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> a) In exercising the discretion under CPR 17.3 , the overriding objective is of central importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.
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> b) A strict view must be taken to non-compliance with the CPR and directions of the Court. The Court must take into account the fair and efficient distribution of resources, not just between the parties but amongst litigants as a group. It follows that parties can no longer expect indulgence if they fail to comply with their procedural obligations: those obligations serve the purpose of ensuring that litigation is conducted proportionately as between the parties and that the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately is satisfied.
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> c) The timing of the application should be considered and weighed in the balance. An amendment can be regarded as 'very late' if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason. Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. A heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The timing of the amendment, its history and an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise: there must be a good reason for the delay.
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> d) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' to the disruption of and additional pressure on their lawyers in the

> run- up to trial and the duplication of cost and effort at the other. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission. If allowing the amendments would necessitate the adjournment of the trial, this may be an overwhelming reason to refuse the amendments.
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> e) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise."

Discussion

24. In relation to RBT, to the extent that the proposed amendments are pleas of fact, they are duplicative of what is already there. To the extent that they are legal submissions they are not appropriate for a pleading. Ms Holland submitted that they were not necessary amendments but they did no harm as they at least gave notice to the Defendant of the points the Claimants and Third Party intended to take. Mr Walker's concern was that the amendments might be relied upon to raise the contention that the Defendant's claim is flawed because RBT are not a party to the proceedings – even though that is not said expressly in the amendments. Mr Walker's concern arises from things which had been said by Ms Holland before the Master and in the Claimants' and Third Party's skeleton arguments for trial. Both Ms Holland and Ms Barton confirmed that they do maintain that it is critically relevant that RBT is not a party and that the relief sought by the Defendant should not as a consequence be granted even if the Defendant is otherwise successful. Much more difficult to pin down with them was whether that contention, or any contention, based on RBT not being a party was based on the matters intended to be pleaded by these amendments. It would be wrong for an issue to be taken about non-joinder of RBT by way of new amendment at this stage when the Defendant has no opportunity to address it, whether that be by joining RBT or filing evidence or taking some other step. The right course at this stage is to say that either it can be raised on the existing pleadings or it cannot. It would put the matter beyond doubt if these duplicative and inappropriate amendments were not allowed.

25. In relation to the abandonment/extinguishment application as it relates to the Swan Hunter right of way, this was initially presented as raising purely questions of law. However Ms Barton accepted that the amendments are not based on agreed facts. The proposed amendments allege that the right of way was abandoned by the building of a pipeline blocking the way at one end and the removal of a subway at the other which resulted in it being blocked by railway lines. There is no evidence on those issues except what is shown on plans and maps considered by the experts. The experts were not asked to consider or report on the access points on which the Claimants and Third Party now seek to rely. Ms. Barton says she will have to cross examine the Defendant's expert on matters which he has not been asked to consider. The Defendant's expert was the first witness and due to be called immediately after the disposal of these applications. In my judgment it would have been unfair to the Defendant to allow their expert to be cross examined on matters on which he had not been instructed to consider at all and the relevance or significance of which he did not know.

26. There are other facts which need to be pleaded and proved to make good this plea, but are not mentioned in the proposed amendment. A plea of abandonment requires proof of a mental element on the part of the abandoner. I was referred to *Tehidy Minerals Ltd v Norman [1971] 2 QB 528* at 553 where the Court of Appeal said:

> "*Abandonment of an easement or profit à prendre can only, we think, be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right to themself or attempt to transmit it to anyone else*."

27. So it is inevitable that if a properly pleaded plea of abandonment were permitted there would have to be an exploration of who did what and when in relation to the access points to the Swan Hunter route, and what intention can objectively be attributed to the Defendant in relation to it. That is not currently an issue in this case at all, and even now the proposed amendment gives no particulars of the facts on which the Claimants and the Third Party intend to rely to prove the necessary intention.

28. The Defendant has had no notice of the detail of this proposed amendment until immediately before this application was made. Even if it was a purely legal argument based on undisputed facts, there would be an issue as whether it was fair at this stage of the trial to make them consider a substantive new point while trying to progress with the case as they understood it they had to meet.

29. In fact it is not a pure question of law and the relevant facts are not all undisputed. There has been no attempt to see if the parties have relevant documents which shed light on what might have been agreed or discussed in relation to either the oil pipeline or the subway. The Defendant has not been able to investigate whether it can produce factual evidence which meets the claim, or indeed whether it might have some other legal answer to it.

30. Turning to the Access Route 1 amendments, it is possible for an easement to be extinguished by supervening circumstances which mean that "*there is no practical possibility of its ever again benefitting the dominant tenement in the manner contemplated by the grant*" (Gale on Easements, 21st edition para 12-01). It is on this basis that the proposed amendment to assert the extinguishment of Access Route 1 is made. It was also presented as being made on agreed facts and raising a pure point of law. As explained by Ms Holland, the Claimants' case is that since these proceedings have begun they have commenced development works which have blocked Access Route 1. No other facts are relied upon by the Claimants and Third Party in support of the extinguishment plea, and Ms Holland made clear that she would restrict herself to the mere fact that her client has destroyed Access Route 1 by its own actions since the proceedings have begun. Ms Holland says these are agreed facts. She relies on paragraph 126 of the Defendant's skeleton argument which says that "*a significant part of Access Route 1 has (since the proceedings began) been built over*". This was not a formal admission, but simply background information for a quite separate point which the Defendant was trying to make. Further, the proposed amended case does not address the question of whether there is any practical possibility of the easement benefitting the dominant tenement again, which is not agreed. There is an obvious issue as to whether it is open to the Claimants to rely on their own actions to block a route in the face of litigation seeking declaratory relief as to that route in support of a defence of extinguishment. There would need to be an investigation of what the Third

Party and the Claimants have done on South Bank and whether or not the steps taken are permanent or capable of being reversed. At present those are simply not issues in this trial and the Defendant has not come prepared to meet them. So, the full plea raises issues beyond what is agreed, and beyond what the evidence will address.

31. A striking feature of this case is that neither the Claimants nor the Third Party filed evidence to provide a formal explanation for the timing of this application. This is a serious failing. As Lambert J observed, an explanation for the lateness of an amendment application is a matter for the amending party. There must be a good reason for the delay. Both the Claimants and the Third Party have brushed over their obligation to explain.

32. When pressed by me, Ms. Holland submitted that the need for an amendment arose from a review in July which was carried out after the Defendant's Schedule of Rights was received. As Trower J observed the Schedule of Rights was simply intended as a tool for trial. I do not see how any of these proposed amendments can be said to arise from its service. Ms Barton said frankly that in relation to RBT it had not occurred to her until very recently that the Defendant might not have made arrangements with RBT for formal rights of way over RBT's land. In relation to the proposed Swan Hunter amendment she said it was not until a close examination of the plans prepared by the experts that the issues about the access points came to light.

33. I do not regard any of these explanations as amounting to a good reason for an amendment at this stage of proceedings. The Claimants have had ample time to review the case since service of the Defence and indeed the pleadings have gone through several bouts of amendment since then. The Third Party should have reviewed the case when it was joined as a party.

34. The position is made more serious by the fact that both the Claimants and the Third Party positively represented to the Court in January that the case was ready for trial when renewing their application for an expedited trial. It is simply not acceptable to declare a case ready for expedited trial and only then to conduct a "review". If in fact the Claimants and Third Party could not review the case until they had received the Defendant's Schedule of Rights (which I do not accept), then they could not have said to the Court in January that the case was ready for trial.

Conclusion

35. I am satisfied that the balance of justice in whether to allow or refuse these amendments comes down firmly in favour of refusal. The amendments, if allowed, will change the scope of the factual issues to be investigated at trial. There is no good reason for these amendments being made at this stage. None of the parties want an adjournment but the consequence is that the Defendant would face considerable injustice in having to scramble to meet the new issues and will have lost the opportunity to require disclosure, make investigations, join parties and call evidence to answer them. To the extent that the Claimants and the Third Party are unable to advance their amended case that is a consequence of their own conduct in not raising those amendments until this late stage.