

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HHJ OPPENHEIMER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th December 2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE McFARLANE

and

SIR STEPHEN SEDLEY

Between :

JOHN DEVANNEY

Appellant

- and -

THE MAYOR & BURGESSES OF THE LONDON
BOROUGH OF HOUNSLOW

Respondent

John DEVANNEY appeared in person
Simon ALLISON (instructed by **London Borough of Hounslow**) for the **Respondent**

Hearing dates: 4th December 2012

Judgment

Sir Stephen Sedley:

1. Mr Devanney has for a number of years operated a mobile café from a layby on the outskirts of Heathrow Airport. The critical questions in these proceedings are exactly where and exactly when he has done so. The answers will determine whether Mr Devanney has established adverse possession sufficient to defeat Hounslow's registered freehold title.
2. The material strip of land lies along the south side of Earhart Way, a service road which runs roughly east-west. At its eastern end the strip tapers out. At its western end it is contiguous to, and was once continuous with, a strip owned by BAA. The dividing line between the two strips is in line with security barriers which run north-south across the adjacent carriageway of Earhart Way. It is common ground that by early 2004 Mr Devanney was in occupation of the strip owned by Hounslow and the correspondence implies that after that time a fence, which is an extension of the line of the barriers, was erected as a physical division between the two strips.
3. There is no dispute that in order to establish a prescriptive title Mr Devanney must prove 12 years' uninterrupted possession of the Hounslow strip from at latest 13 October 1991. The reason is, in short, that s.15 of the Limitation Act 1980, which sets a 12-year limit on actions for the recovery of land, is disapplied by s.96(1) of the Land Registration Act 2002 from 13 October 2003, the date of the latter's coming into force. From then on, any prescriptive title has had to be established by registration, which has not happened here, or by making out the defence set out in section 98 (1) and paragraphs 1 and 5 (4) of Schedule 6 to the Land Registration Act 2002, which the Appellant cannot and does not attempt to do. In consequence, in order to resist Hounslow's claim for recovery of the land, Mr Devanney has to show that by 13 October 2003 he had enjoyed 12 years' continuous adverse possession of it.
4. On the trial of Hounslow's action, Judge Oppenheimer, in a closely reasoned judgment, found that Mr Devanney had started trading on the land in 1990 and had erected a shed and a toilet there, but had then left for Ireland and not returned until 1996. He did not, however, reject Mr Devanney's evidence that during those years his brother Martin had run the business on his behalf and Hounslow was able to adduce no evidence showing the contrary before 1999.
5. What satisfied the judge that Mr Devanney's possession had not been continuous over the requisite period were two main things. One was an aerial photograph, purportedly taken in 1999, showing no vehicle or shed on the land. The other was the oral evidence of two witnesses, to which we will come.
6. The aerial photograph dated 1999 was regarded by the judge as sufficient in itself to rebut Mr Devanney's case. It showed nothing significant on the land in the way either of sheds or of a mobile café. Mr Devanney challenged it at trial by pointing this out and contending that the photograph could consequently not be authentic. Since then, however, he has assembled a series of maps in support of his contention that there is something radically wrong with the photograph. Without formally admitting them, we have looked at them so as to be sure that no injustice has occurred.
7. These maps show, Mr Devanney submits, that the roundabout which appears at the lower right hand corner of the photograph was not constructed until 2003 or 2004. He

suggests therefore that the photograph has been doctored by pasting in the roundabout. Let it be assumed that this is right. It means that the scene shown in the photograph is authentic but for the presence of the roundabout. On Mr Devanney's own case before us, the photograph still shows no significant presence on the land apparently at a date when continuity of occupation was crucial.

8. The judge considered the date of the photograph with great care and concluded that the 1999 attribution was reliable. He recorded:

“It was purchased by BA in July 1999 and it is on a CD or CD-Rom with an embedded file which cannot be altered, which shows the date of the photograph as July 1999.”
9. This alone was, and still is, enough to answer Mr Devanney's claim. It shows that at least one point of time within the 12-year period neither van nor shed was on the land. It was one thing to argue, as Mr Devanney did at trial, that the 1999 date could not be correct precisely because it showed no van or structure. It is another thing to argue, as Mr Devanney did before us, that a photograph reliably logged in 1999 has since been tampered with. But neither submission is capable of undermining the judge's finding about what the photograph showed.
10. The judge found that it was later in 1999 that Mr Devanney brought a catering van on to the land, where it was seen by Mr Linley, a senior BA employee. Mr Linley's evidence, together with that of Mrs Bhatti, a property manager for Hounslow, formed a further element in the council's case that the land had been vacant earlier in 1999. But their evidence was not crucial and does not require further analysis here.
11. What can relevantly be said in relation to the photographic evidence, however, is that it does not stop with the 1999 picture. An aerial photograph taken in June 2003 shows what must be Mr Devanney's van and sheds to the west of the barrier, that is to say on BAA's land. By contrast, a photograph taken from a similar vantage point in September 2006 shows them to the east of the barrier, on the land claimed by Hounslow. This is further evidence of non-occupation of the land within the 12-year period.
12. The remainder of the council's evidence, in particular a letter of 14 January 2004 from BAA's to BA's property asset manager, corroborates the inference, based on the photographs, that it was in late 2003 or early 2004 that Mr Devanney moved his van and structures eastwards from BAA's part of the strip to Hounslow's. The letter travels into immaterial matters relating to a licence to occupy a different piece of land, but none of it casts any doubt on the photographic evidence.
13. When Mr Devanney applied for permission to appeal, Lord Neuberger MR refused permission on the ground, among others, that there was ample evidence for the judge's conclusion, that there was no basis on which this court could properly reverse him, and that the new evidence, even if not previously available, would not alter the outcome. On renewal of his application Mr Devanney persuaded Tomlinson LJ (and, having heard him ourselves, we can well see how he did so) that there were unexplained discrepancies in the evidence and that the licence had been a red herring.

Tomlinson LJ gave him permission to appeal, leaving to the full court the question of admitting new evidence.

14. For our part, we have not gone into the prior availability of Mr Devanney's new cartographic evidence. We have thought it fairer to look at it in order to see what difference, if any, it could make. For the reasons we have given, it could make none.
15. The appeal must accordingly be dismissed. The stay on possession granted by Tomlinson LJ will cease to operate 28 days from the date when this judgment is formally handed down.

Lord Justice McFarlane: I agree

Lady Justice Arden: I also agree.