*718 Hale v Norfolk County Council

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
17 November 2000

Report Citation
[2001] 2 W.L.R. 1481
[2001] Ch. 717

ICLR

Court of Appeal

Chadwick and Hale LJJ

2000 Oct 12; Nov 17

Highway—Extent—Presumption—Plot of building land abutting road— Planning permission for house subject to requirement that strip of land be given to highway—Strip never incorporated in road—Whether local authority entitled to claim highway rights— Public Health Act 1925 (15 & 16 Geo 5, c 71) , s 30

In 1970 the claimant purchased a bungalow fronting a lane in respect of which the defendant council was the local highway authority. The bungalow had been built in 1968 by the claimant's predecessor in title, on land conveyed to him as a building plot by the local district council as identified on a plan prepared by the council in 1967. That plan showed a 20 foot deep strip of the land running along the boundary with the lane, which was itself about 16 feet wide, as being "land claimed by the county council for future carriageway improvements". The plan also had a broken line running parallel with, but some 30 feet inside, the boundary, in the vicinity of which a fence had been erected, probably by the claimant's predecessor in title, and later removed. At the time the planning permission was granted the county council, relying on byelaws and provisions in section 30 of the Public Health Act 1925 [1] , served the claimant's predecessor in title with a notice stating that the strip of land "abutted a new street so that it will be necessary as soon as building commences for you to give the requisite land to the highway ... to a distance of 36 feet from the opposite highway boundary". In 1992 the claimant erected a chain link fence along the boundary with the lane. The council served a notice requiring removal of the fencing and, on the claimant's failure to do so, removed it itself. The claimant issued proceedings seeking a declaration that the land did not form part of the highway, an order that the council replace the fencing and an injunction restraining the council from entering onto the land. The council counterclaimed seeking a declaration that so much of the claimant's land as lay within 36 feet of a hedge on the far side of the lane formed part of the highway and an injunction restraining the claimant from obstructing any part of that land. The judge in the county court dismissed the claimant's action holding that, as a result of the notice served on her predecessor in title, at the time he built the house the strip became subject to public rights of highway. He further held that the broken line shown on the 1967 plan had been placed there by reference to highway needs and that, applying the "fence to fence" presumption the whole of the disputed land was subject to highway rights.

On appeal by the claimant—

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Held, allowing the appeal, that a public right of way over land could arise at common law under the doctrine of dedication and acceptance or by reason of some statutory provision; that Part II of the Public Health Act 1925, which included section 30 , made provisions relating to the public health and safety and did not confer powers to create public rights of way over private land and thus section 30(4) did not deem a person deemed to be laying out a new street by virtue of his building on land abutting the highway to have subjected his land to public rights of way by reason of that fact alone; that, where a fence had been erected by a landowner in order to separate land enjoyed by him from land over which the public exercised rights of way, there was a rebuttable presumption that the land between the fence and the made-up surface of the road had been dedicated to public use as a highway and accepted by the public as such; but that the known facts did not establish a basis for ***719** the inference that the claimant's predecessor in title, in erecting a fence along the broken line, intended to dedicate all the land between that fence and the lane for use as a public highway; and that, accordingly, no dedication of any part of the disputed land had been established and the council was not entitled to claim public rights in respect of it against the claimant (see post, pp 724C-D, 729D-G, 730B-C, 731B-D).

R v United Kingdom Electric Telegraph Co Ltd (1862) 31 LJMC 166 , *Neeld v Hendon Urban District Council (1899) 81 LT 405, CA* , *Offin v Rochford Rural District Council [1906] 1 Ch 342* and *Attorney General v Beynon [1970] Ch 1 considered.*

The following cases are referred to in the judgment of Chadwick LJ:

Attorney General v Beynon [1970] Ch 1; [1969] 2 WLR 1447; [1969] 2 All ER 263
Cubitt v Lady Caroline Maxse (1873) LR 8 CP 704
Hinds and Diplock v Breconshire County Council [1938] 4 All ER 24
Neeld v Hendon Urban District Council (1899) 81 LT 405 , Channell J and CA
Offin v Rochford Rural District Council [1906] 1 Ch 342
R v Inhabitants of Leake (1833) 5 B & Ad 469
R v United Kingdom Electric Telegraph Co Ltd (1862) 31 LJMC 166; 6 LT 378
St Mary's, Islington (Vestry) v Barrett (1874) LR 9 QB 278

The following additional case was cited in argument:

East v Berkshire County Council (1911) 106 LT 65

APPEAL from Judge Langan QC sitting at Norwich County Court

The claimant, Mrs Margery Hale, the owner of Hviskende Traer, Green Lane, Tivetshall St Margaret, Norfolk, issued proceedings in 1992 against the defendant, Norfolk County Council, as the local highway authority, seeking (1) a declaration that part of the claimant's garden abutting the highway, which the council claimed had been dedicated for use as part of the highway, did not form part of the highway; (2) an order requiring the council to replace the fencing along her boundary; and (3) an injunction restraining the council from entering on the land. The council, by a counterclaim, sought a declaration that the disputed land did form part of the highway and an injunction preventing the claimant from obstructing it. On 3 September 1998 the judge dismissed the claimant's action, declaring that the whole of the disputed land formed part of the highway, and ordered the claimant to pay damages to the council of £112.82.

Permission having been given by the Court of Appeal (Roch LJ and Wilson J) on 30 July 1999, the claimant appealed. The grounds of appeal, set out in a notice dated 24 August 1999, were, inter alia, that the land belonged to her, had been maintained by her for some 30 years, had never been used as a public right of way and that she wished it to remain her private land.

The facts are stated in the judgment of Chadwick LJ.

Nicholas Caddick (assigned by the Bar Pro Bono Unit) for the claimant. The effect of the provisions in the local byelaws relating to the laying out of new streets and the notice served on the claimant's predecessor in title is to subject the disputed land to highway rights. Even where land is subject to new streets byelaws it would not without an act of dedication by the claimant and acceptance by the council become part of the highway: see *St Mary's, Islington (Vestry) v Barrett (1874) LR 9 QB 278* .

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Moreover, the *Hale v Norfolk Chadwick LJ CA* ****720*** evidence of the past existence of a fence on that land does not give rise to a presumption of dedication. The law as set out in *Attorney General v Beynon [1970] Ch 1* has no application because the fence was not shown to be referable to the highway. Even if the presumption could arise, evidence of acts of ownership by the claimant over the disputed land is sufficient to rebut it. [Reference was made to *Neeld v Hendon Urban District Council (1899) 81 LT 405* ; *Hinds and Diplock v Breconshire County Council [1938] 4 All ER 24* ; *Offin v Rochford Rural District Council [1906] 1 Ch 342* and East v Berkshire County Council *(1911) 106 LT 65* .]Graham Sinclair for the council. The disputed land is subject to the council's highway rights under the byelaws. Thus, by accepting the conditions attached to the planning consent there was an act of dedication by the claimant's predecessor in title at the time the property was built. The fence line shown on the 1967 conveyance plan set further back than 36 feet from the opposite boundary is in all probability referable to highway needs. [Reference was made to Attorney General v Beynon *[1970] Ch 1* and Sara: Boundaries & Easements, 2nd ed (1996), p 138.] Dedication of the land can also be presumed under section 31 of the Highways Act 1980 from undisturbed use by the public for 20 years from July 1968.Caddick replied.Cur adv vult

17 November. The following judgments were handed down.

CHADWICK LJ

This is an appeal against an order made on 3 September 1998 by Judge Langan QC in the Norwich County Court in proceedings brought by the appellant, Mrs Margery Hale, against Norfolk County Council. Permission to appeal was granted by this court (Roch LJ and Wilson J) on 30 July 1999.

Mrs Hale is the owner of property known as Hviskende Traer at Tivetshall St Margaret in Norfolk. The property fronts onto a roadway, known as Green Lane, in respect of which the council is the local highway authority. Mrs Hale occupies a detached single storey dwelling house on the property. The house, which was built in or about 1968, stands some way back from the roadway, in its own garden. The dispute between Mrs Hale and the council concerns that part of her garden, to a depth of 30 feet 6 inches or thereabouts at its widest point, which is immediately next to the made up carriageway over Green Lane. That part of the garden is shown coloured blue on the plan annexed to the particulars of claim and it is convenient to refer to it as "the blue land".

It is common ground that the blue land is in the ownership of Mrs Hale. The dispute is whether, as the council contends, the blue land has been dedicated for use as part of the public highway. The dispute came to a head in April 1992, when Mrs Hale erected several low posts and a chain along the boundary where the blue land meets the carriageway. The council served a notice under section 143 of the Highways Act 1980 requiring her to remove the posts and chain; and, upon her failing to do so, did so itself. That led to the present proceedings, in which Mrs Hale claimed a declaration that the blue land does not form part of the highway, an order requiring the ****721*** council to replace the posts and chain and some boundary stones (which, also, she had placed on the blue land) and an injunction restraining the council from entering upon the blue land. The council counterclaimed for a declaration that the blue land (or, in the alternative, so much of the blue land as lay within 36 feet of the opposite, or far, edge of the carriageway) does form part of the public highway and for an injunction restraining Mrs Hale from obstructing the blue land (or such part of it as might be part of the highway) by erecting posts or placing boundary stones upon it.

The action was tried by Judge Langan QC on 2 and 3 September 1998. Mrs Hale conducted her case in person. At the conclusion of the argument the judge gave judgment against her. He observed that she seemed to be under a serious misapprehension as to her rights in law and as to what it was that the council were seeking to establish. He dismissed her claims; he declared that the whole of the blue land formed part of the public highway; he awarded the council damages in the sum of £112.82, to reflect the cost of removing the posts and chain; and he ordered Mrs Hale to pay the council's costs on scale 2. Mrs Hale appeals against the whole of that order.

The council's claim to highway rights over the blue land is founded on an alleged act of dedication by Mrs Hale's predecessor in title, Mr Arthur Wright, at or about the time that he built the dwelling house in which Mrs Hale now resides. Mr Wright conveyed the property to Mrs Hale and her late husband, Mr Sidney Hale, in 1970. It is not suggested that anything done by Mr or Mrs Hale in relation to the blue land could amount to the dedication of that land for use as part of the public highway.

It is necessary to examine, in some detail, the circumstances in which Mr Wright acquired the property now known as Hviskende Traer. The property was conveyed to him as a building plot by the Depwade Rural District Council under a conveyance dated 3 July 1968. The building plot (plot 2) was identified by measurement and by reference to a plan annexed to the conveyance. The conveyance plan is itself derived from an earlier plan ("the 1967 plan") which appears on its face to have been prepared

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in April 1967 by the engineer and surveyor's department of the district council. Plot 2 is one of three plots shown on the 1967 plan; the three plots having together an area of 0.625 acres or thereabouts and being part of OS No 295. The area of the three plots is shown to be enclosed on the north and east sides by a barbed wire stock fence. The western boundary, which is shown to be unfenced, abuts the Green Lane carriageway. The land to the south of the three plots had already been developed by the erection of local authority housing. The local authority housing development is set back from the Green Lane by a service road in the form of a crescent. The service road lies to the east of the Green Lane and gives access to it. The south western corner of the area comprising the three plots shown on the 1967 land is formed by the northern end of the service road at the point where the crescent meets the Green Lane carriageway.

The 1967 plan identifies the three plots by measurement. Plot 3 comprises the eastern portion of the area to be sold off. Plot 1 comprises the north western portion. Plot 2 (which was to be acquired by Mr Wright) occupies most of the south western portion; but is separated from the southern boundary (where the land to be sold off abuts the local authority housing development) by a 15 foot strip which gives access from the service road to plot 3. The plan shows the plots separated by a "post and wire fence 3 feet high", depicted as a broken line. It is, however, unclear whether, at the **722* time when the 1967 plan was prepared or at the date of the conveyance of plot 2 to Mr Wright (July 1968), the inter-plot boundaries were in fact defined by fences or other physical features on the ground. Paragraph 3 in the schedule to the 1968 conveyance required the purchaser, before commencing to build on the plot, to erect a three strand post and wire fence on the southern and eastern boundaries of the land conveyed. It is reasonable to assume, in the context of a sale-off of building plots evidenced by the 1967 plan, that the conveyances to the purchasers of plot 1 and plot 3 will have contained similar fencing covenants; so that the inter-plot boundaries which were defined by measurement at the time of the sales would become defined on the ground as the result of fences to be erected by the respective purchasers. The only contrary indications are contained in material which was not, strictly, in evidence before the judge. Mrs Hale argued, in her closing submissions at trial, that the fences had been put up by "Edwards" for the district council before the plots were sold off. She produced a document containing copies of extracts from the minutes of Depwade Rural District Council held in the Norfolk Public Records Office. The minutes record, on 17 October 1966: "Construction A provision of entrances, fencing to building plots at Tivetshall St Margaret. Edwards & Edwards Norwich." They record, also, on 14 November 1966: "Sale of building plots Committee Minutes no 7110(A)."

The 1967 plan includes two features which are of particular importance in the context of the present dispute. First, it shows, hatched, a strip 20 feet in depth along the length of the western boundary and immediately to the east of the Green Lane carriageway. That strip ("the hatched strip") is described on the 1967 plan as "claimed by Norfolk County Council for future c/w improvements". The hatched strip extends along the whole of the western boundary of plot 1; and extends along so much of the western boundary of plot 2 as abuts the Green Lane carriageway—that is to say, along the western boundary of plot 2 to the point where that boundary is formed by the service road. Second, the 1967 plan shows a further broken line extending from the northern boundary of plot 1 to the southern boundary of plot 2, orientated more or less north to south and set back some 30 feet or more from so much of the western boundary of those two plots as abuts the Green Lane carriageway. The position of that line (to which, for convenience, I shall refer as "the broken line") is identified by detailed measurement. The measurements show the point at which access to plot 1 from the Green Lane carriageway is to be obtained over a driveway (with sight lines); and the point at which access to plot 2 is to be obtained from the service road. The position of the broken line on the 1967 plan is such that it is aligned with (and could be regarded as a continuation of) the line of a hedge which is shown on the eastern side of that part of the service road which is in front of the local authority housing development. Again, it is unclear whether, at the time when the 1967 plan was prepared, that broken line was defined by any physical feature on the ground. If the plots themselves were not so defined, it is difficult to think why there should be anything in place on a line in that position. It is difficult to think of any reason why, before building had commenced on the area of land to be sold off, there should be a fence or hedge in that position; and identification of the position of the broken line by detailed measurement would have been unnecessary if there had been a physical feature on the ground, given that this was not to be the boundary of the land sold off.
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The blue land is that part of Mrs Hale's property (formerly plot 2) which lies between the broken line and the western boundary formed by the Green Lane carriageway and the service road. The effect of the service road is such that the shape of the blue land can be likened to that of a saucepan—with the base formed by the Green Lane carriageway and the top by the broken line, and with the handle pointing down the line of the service road. Part of the blue land—to a depth of 20 feet from the Green Lane carriageway—is within the hatched strip shown on the 1967 plan; the remainder—having a depth of 10 feet or more—lies between the hatched strip and the broken line.

Before acquiring plot 2 Mr Wright had made an application for the permission to carry out development which he required under the Town and Country Planning Act 1962. Permission for the erection of a bungalow and garage was first granted on 16 October 1967. At or about the same time he was given notice by Norfolk County Council in form GD 10. The notice was in these terms:

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> "Erection of bungalow at Green Lane, Tivetshall St Margaret"Public Health Act 1925" Section 30 , New Streets Byelaws"With reference to the accompanying notice of permission under the Town and Country Planning Act 1962, issued by the Depwade Rural District Council acting as delegate planning authority for the Norfolk County Council, I have to inform you that the highway on which the land in question abuts has been declared a new street under section 30 of the Public Health Act 1925 for the purpose of the application thereto of the county council's New Street Byelaws. The road is not now of the width required by the byelaws and it will be necessary as soon as building commences for you to give the requisite land to the highway at a level of 4 inches above the crown of the carriageway to a distance of 36 feet from the opposite highway boundary and set back the boundary of your land accordingly. Please acknowledge receipt on the form below."

There is no evidence that Mr Wright did acknowledge receipt of that form; but, equally, there is no reason to think that he did not receive it. The permission granted on 16 October 1967 was subsequently revoked and replaced by a further permission granted on 14 May 1968. The grant of that latter permission was expressed to be "subject to due compliance with the byelaws (local Acts, orders and regulations) and general statutory provisions in force".

Section 30 of the Public Health Act 1925, to which reference is made in the council's GD 10 notice, was in these terms, so far as material:

> "(1) Where it appears to the local authority that the whole or any portion of an existing highway will be converted into a new street as a consequence of building operations which have been, or are likely to be, undertaken in the vicinity, the local authority may by order declare such highway, or such portion thereof as may be specified in the order, to be a new street for the purpose of the application thereto of their byelaws with respect to new streets or of any provision in a local Act with respect to the width of new streets ..."(4) Upon an order under this section coming into operation any person who shall commence to erect a new building upon land abutting ***724*** on or adjoining the highway, or portion of the highway, by the order declared to be a new street, shall, in relation to that land, be deemed to be laying out a new street within the meaning of the byelaws of the local authority with respect to new streets, or of any provision in a local Act with respect to the width of new streets."

Byelaws with respect to new streets were made by the county council in July 1933. Byelaw 3 required that:

> "Every person who shall lay out for use as a carriage-road a new street intended to be the principal means of access to any building shall except as hereinafter provided lay out the street of the width of 36 feet at the least ..."

In that context "width" as applied to a new street means "the space intended to be used as a public way measured at right angles to the direction of the street": see byelaw 1. The proviso to byelaw 3 had no application in the case of an existing highway (such as Green Lane) which was declared to be a new street in pursuance of section 30 of the 1925 Act. Byelaw 13 imposed penalties by way of fine; and byelaw 14 empowered the council to remove, alter or pull down any work begun or done in contravention of the byelaws.

The 1933 byelaws, as made, did not extend to the parish of Tivetshall St Margaret. They were extended to that parish by an addition made in 1937 which came into operation on 1 January 1938. Green Lane (there described as an unclassified road) "from its junction with the Harleston to New Buckenham Road B1134 south-westwards to the boundary between the parishes of Tivetshall St Margaret and Tivetshall St Mary" was declared to be a "new street" for the purposes of the application thereto of the county council byelaws by an order made by the council on 4 March 1959. The order was expressed to be made under section 30 of the Public Health Act 1925.

The effect of the 1933 byelaws and the 1959 order, in conjunction with section 30(4) of the 1925 Act, was that, on commencing in or about 1968 to erect a building on plot 2, Mr Wright was deemed to be laying out a new street; and was required by byelaw 3 to lay out that street "of the width of 36 feet at the least". It was that, no doubt, which led the relevant officer of the district council, when preparing the 1967 plan, to identify the hatched strip—extending 20 feet back from the near edge of the carriageway—as land claimed by the county council for carriageway improvements; the near edge of the carriageway of this

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unclassified road being 16 feet or thereabouts from the far side of the existing highway. And it was that which led the county council, when giving the GD 10 notice to Mr Wright, to refer to the need to set back the boundary of his land to a distance of 36 feet from the far boundary of the highway.

The judge held that the effect of the 1933 byelaws and the 1959 order, in conjunction with section 30(4) of the 1925 Act, was that, on or before building commenced on plot 2 and without any further act by Mr Wright as owner of that land or any acceptance by the public, such part of that plot as lay within 36 feet of the far boundary of the highway became annexed to and part of the highway. He said in his judgment:

> "The council's first contention is that so much of the blue land as lies within 36 feet of the opposite highway boundary is subject to the council's highway rights, pursuant to the council's byelaws and the new **725* streets order. In view of the history of the matter and, in particular, of the byelaws which I have recited, I can see absolutely no answer to this contention ... Quite plainly, Green Lane has been constituted as a new street and, quite plainly, a minimum of 36 feet must lie within the bounds of that new street."

In the light of his conclusion that the whole of the blue land had become subject to public rights of highway as a result of presumed dedication by Mr Wright, the order which the judge made was not restricted to so much of the blue land as lies within 36 feet of the far boundary of the highway. The question whether the judge was correct in the view which he expressed in the passage to which I have just referred does not arise unless and until this court is persuaded that the order which the judge did make should be set aside. Nevertheless, it is, I think, convenient to consider that question before going on to examine the basis on which the judge reached the conclusion that the whole of the blue land was the subject of presumed dedication.

It is trite law that a public right of way over land may arise either at common law, under the doctrine of dedication and acceptance, or by reason of some statutory provision: see *Halsbury's Laws of England* , 4th ed reissue, vol 21 (1995), para 64. Examples of the creation of public rights of way under statutory powers may be found in Part III of the Highways Act 1980. Where a highway is created by statutory powers, no act of the land owner or user by the public is needed to complete its creation: see *R v Inhabitants of Leake (1833) 5 B & Ad 469* . But where the statute does no more than authorise the setting out of a public road, no highway comes into existence (absent adoption by user) until the road has been set out in substantial conformity with the statutory requirements: see *Cubitt v Lady Caroline Maxse (1873) LR 8 CP 704* .

The Public Health Act 1925, as its long title recites, was enacted:

> "to amend the Public Health Acts 1875 to 1907 and the Baths and Washhouses Acts 1846 to 1899 in respect of matters for which provision is commonly made in local Acts and for other purposes relating to the public health."

It would be surprising, therefore, to find that the Act conferred powers to create public rights of way over private land. And, to my mind, it is clear that it does not. Part II of the Act ("Streets and Buildings"), is concerned with matters of health and safety. Sections 29 to 32 ("New Streets") are directed to ensuring that new streets (in which are included existing highways which become streets as a result of building operations on adjoining land) are made up to standards (including width) which satisfy the need to maintain or improve public health and safety. In this respect the 1925 Act, and the earlier Public Health Acts which it replaced, were the successors to the Metropolis Management Acts 1855 and 1862. The mischief at which sections 29 to 32 of the 1925 Act are directed is the same whether the street is or is not dedicated to the public as a highway: see *St Mary's, Islington (Vestry) v Barrett (1874) LR 9 QB 278* , 285. There is nothing in section 30(4) of the 1925 Act which requires that a person who is deemed to be laying out a new street because he is building on land abutting or adjoining an existing highway shall be deemed, by that fact alone, to have subjected his land to public rights of way. Nor can that result be derived **726* from the 1933 byelaws, which are as applicable to private streets as they are to streets dedicated and adopted as highways.

I accept that, in many cases, it may well be possible to infer, from acts done by the landowner in the course of laying out a new street in accordance with existing byelaws, that the owner intends to dedicate the land on which those acts are done to public use as part of the highway. And it may well be possible to infer acceptance by the public from user of that land as part of the highway; for example, where the dedicated land forms a continuation of an existing verge or walkway next to the carriageway. But the creation of public rights of way by that means is an example of the operation of the common law doctrine of dedication and acceptance. It is not an example of the creation of rights under statutory powers.

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In my view the judge was wrong to hold that the effect of the 1933 byelaws and the 1959 order, in conjunction with section 30(4) of the 1925 Act, was that, on or before building commenced on plot 2 and without any further act of dedication by Mr Wright as owner of that land or any acts from which acceptance by the public could be implied, such part of that plot as lay within 36 feet of the far boundary of the highway became annexed to and part of the highway.

The question, therefore, in the present case, was whether Mr Wright did something in relation to plot 2 from which it would be appropriate to infer an intention to dedicate the whole or some part of the blue land to public use as part of the highway; and, if so, whether there was evidence of acceptance of that dedication by the public. The acts upon which the county council relied are pleaded in paragraphs 11 and 12 of its defence and counterclaim:

> "(11) When erecting the bungalow which he later conveyed to [Mrs Hale] Mr Wright erected a fence or hedge along the fence line appearing on the plan deposited with his planning application, being the eastern or longest side of the area coloured blue on the plan annexed to the particulars of claim and bearing the measurements 47 feet, 9 feet 6 inches and 11 feet ('the original line'). The original line was at all material points a distance in excess of 36 feet from the opposite side of the carriageway of Green Lane."(12) Further, the defendant council contends that: (a) by establishing a fence line more than 36 feet from the opposite side of the carriageway Mr Wright intended to and did dedicate the whole of the area coloured blue on the above plan as part of the highway; (b) since then, and for upwards of 20 years, the area has been used by the public as of right as a highway."

"The original line" referred to in that pleading is the line shown on the 1967 plan to which I have referred earlier in this judgment as "the broken line". As I have already indicated it is unclear whether the broken line was a fence line—in the sense that it was on the line of an existing fence—before plot 2 was conveyed to Mr Wright; and the better view, as it seems to me, is that it was not. Further, to describe the broken line as "more than 36 feet from the opposite side of the carriageway" presents less than a complete picture of the true position; the true position is that the broken line is at least 46 feet from the far boundary of the Green Lane—being (as appears from the 1967 plan) at least 10 feet to the east of the hatched strip. So, if Mr Wright intended to dedicate the whole of the blue land to public use as part of the highway, he **727* was throwing into the highway some 50% more land than was required by the GD 10 notice served on him by the county council; and this would have been obvious to him from the 1967 plan on which the hatched strip had been marked.

Mrs Hale in her witness statement signed on 12 October 1996 accepted that, at the time that she and her late husband purchased Hviskende Traer from Mr Wright, there was a post and wire fence in the position of the broken line. She did not accept that that post and wire fence was erected by Mr Wright. The judge made no finding on that point; but it seems to me more likely than not that it was. The plan annexed to the conveyance to Mr Wright is based upon the 1967 plan. The 1968 conveyance contains the covenant by Mr Wright to erect a three strand wire fence on the on the south and east boundaries to which I have already referred. It also contains a covenant, in paragraph 4 of the schedule: "Not to erect any wall or fence of any kind on the west side of the land hereby conveyed without first obtaining the consent in writing of the vendors." A covenant in that form would be inapposite if there were already a fence on the west side of plot 2: in those circumstances the appropriate restriction would be against erecting a wall or fence "between the existing fence on the west side of the land and Green Lane". The probability, therefore, is that Mr Wright erected the fence on the west side of plot 2 which, as Mrs Hale accepts, was there at the time of her purchase; that he did so at or about the same time as he erected post and wire fences on the east and south sides of plot 2; and that he did so with the consent of the Depwade Rural District Council as "the vendors" under the1968 conveyance.

The judge summarised the district council's submission in the following passage of his judgment:

> "The argument is this; that the fence line was placed where it was in all probability by reference to highway needs. The balance of the blue land (that is to say all that lying west of the original fence line) was, therefore, also dedicated prior to Mrs Hale's purchase for highway use. In support of this argument, the council prays in aid the 'hedge to hedge' principle as explained in *Attorney General v Beynon [1970] Ch 1* , 12-13, 15 by Goff J, and the rural district council plan from April 1967, to which I have already referred, and the fact that the alignment of the fence line provides for visibility at the junction of a loop road leading to certain houses and for future carriageway widening on Green Lane itself."

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In that context "the balance of the blue land" means such part of the blue land as lies between the broken line and the hatched strip; and the "loop road" is a reference to the service road or crescent which fronts the pre-existing local authority housing development.

The judge reached the conclusion, as he said "on balance", that the district council was right. He held "the fence line was in all probability placed where it was by reference to highway needs; that the hedge to hedge principle applies; and that, accordingly, the whole of the blue land is subject to highway rights".

An early statement of what has become known as the "hedge to hedge" presumption can be found in the proposition left to the jury by Martin B in *R v United Kingdom Electric Telegraph Co Ltd (1862) 31 LJMC 166* , 167:
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> "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, prima facie, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers."

Commenting on that proposition, when the case came before the Court of Queen's Bench *(1862) 6 LT 378* , 379 Crompton J (with whom Blackburn J agreed) said:

> "Taken altogether, I think it comes to this, that, prima facie, when you look at a highway running between fences, unless there is something to show the contrary, the public have a right to the whole, and are not confined to the metalled part of it."

In *Neeld v Hendon Urban District Council (1899) 81 LT 405* the claim was to highway rights over a strip of land formerly part of the waste of the manor, and separated by a ditch from both the metalled highway and a grass strip beside the metalled highway. Both the Queen's Bench Division and the Court of Appeal held that there was ample evidence to rebut any presumption. But, after consideration of the decision in the *United Kingdom Electric Telegraph* case, Channell J said, at pp 406-407:

> "The result of that decision seems to me to be that where there is a high road running between two fences at some distance away from the part of the high road that is usually used, a question of fact arises whether those are the fences or boundaries of the high road. If that be so, this decision comes to little or nothing more than that the action of the highway authorities in metalling a particular part of the road does not limit the rights of the public to that part. That is a very clear proposition, and it is by no means clear that the judges [in the *United Kingdom Electric Telegraph* case] ever intended to go beyond that point ... Of course it is a question of degree in each case whether or not there is a substantial piece of waste, and then comes the question whether the fences between the inclosed land and the waste were put up with any reference to the highway or whether they were put where they are for some other reason. I am inclined to think that in each case that question ought to be decided before any question of presumption with regard to the space which in fact may be found to exist between the fences ... before considering the question of presumption, you must first consider whether the fences in existence were put up in reference to the highway, and are fences or boundaries of the high road in the sense in which Crompton J used the expression in *R v United Kingdom Electric Telegraph Co Ltd* , or whether they are simply boundaries separating the inclosed land from the waste."

Neeld's case went to the Court of Appeal. Lord Russell of Killowen CJ expressed his agreement with the observations of Channell J, and went on, at p 409:

> "It seems to me very difficult to give assent to such a general proposition as this, that, under all conditions where you find a metalled road bordered by unmetalled margins and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is ***729** highway. The question whether such a space is all highway would depend to a great extent, I think, on many other circumstances—such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the

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> road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway. It seems to me that it is not safe to say, as a general proposition, without knowing the conditions of each particular case, that in such a case as I have mentioned all the space between the hedges is part of the highway."

Smith LJ, at p 409, accepted the observation of Crompton J in the *United Kingdom Electric Telegraph case 6 LT 378* as a correct statement of the law. Vaughan Williams LJ restated the presumption in these terms, at p 410:

> "The presumption is that prima facie, if there is nothing to the contrary, the public right of way extends over the whole space of ground between the fences on either side of the road; that is to say, that the fences may prima facie be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated. But in the case of the waste of a manor there is another obvious reason for which fences may be put up, namely, to separate the adjoining closes from the waste. I therefore doubt if any presumption can be said to arise in the case of a road going across the uninclosed waste of a manor."

A few years later Warrington J had to consider whether to apply the presumption in *Offin v Rochford Rural District Council [1906] 1 Ch 342* . After considering the passages in the *United Kingdom Electric Telegraph* case and *Neeld's* case which I have set out, he said, at p 354:

> "It seems to me that the result [of those two cases] is this—that the mere existence of fences on either side of a highway is not enough to raise the presumption. You have to find whether those fences are prima facie to be taken to have been made in reference to the highway, and, therefore, to be the boundaries of the highway, and, further, I think that, having regard to the judgment of Vaughan Williams LJ, if you find a fence by the side of the highway, then prima facie that fence is the boundary of the highway, unless you can find some reason for supposing that it was put up for a different purpose."

In *Hinds and Diplock v Breconshire County Council [1938] 4 All ER 24* , 30g, after an extensive review of the authorities, Singleton J expressed himself content to adopt that passage as a correct statement of the law. But he found, on the facts of that case, that the fence in question "bore no relation to the highway, and no one had any thought or intention of dedicating to the highway the portion between it and the highway": see p 31d. The editorial note, at p 24, seems to me to be an accurate summary of the position as it appeared to the judge in that case:

> "Where there is a metalled track, the first presumption is that the highway is confined to such track. If there are fences on both sides of the highway, then the prima facie presumption is that the whole space between the fences forms the highway. This presumption may be rebutted by the fact that the fences do not form a continuous line following the line of the highway. In that event, very slight acts of ****730*** ownership on the part of the adjoining owner will serve to displace the above presumption."

In *Attorney General v Beynon [1970] Ch 1* , 12 Goff J pointed out:

> "the mere fact that a road runs between fences, which of course includes hedges, does not per se give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put up by reference to the highway, that is, to separate the adjoining closes from the highway or for some other reason. When that has been decided then a rebuttable presumption of law arises, supplying any lack of evidence of dedication in fact, or inferred from user, that the public right of passage, and therefore the highway, extends to the whole space between the fences and is not confined to such part as may have been made up."

But he went on to accept, on the basis of his understanding of the decision of Warrington J in *Offin's case[1906] 1 Ch 342* , that "one is to decide that preliminary question in the sense that the fences do mark the limit of the highway unless there is something in the condition of the road or the circumstances to the contrary."

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Warrington and Goff JJ were plainly correct, as it seems to me, to emphasise that the first question to be decided is whether the fence was erected (or the hedge established) in order to separate land enjoyed by the landowner from land over which the public exercised rights of way. In other words, did the landowner intend to fence against the highway? If that question is answered in the affirmative, then there is a presumption, which prevails unless rebutted by evidence to the contrary, that the land between the fence and the made-up or metalled surface of the highway has been dedicated to public use as highway and accepted by the public as such. It is unnecessary to prove an intention to dedicate; or to prove acceptance by actual user. Both dedication and acceptance will be inferred. And it follows that, where that question can be answered in the affirmative in relation to the fences or hedges on both sides of a made up or metalled surface used as a highway, there will be a presumption that the whole of the land between those fences or hedges has been dedicated to, and accepted for, highway use. That is the basis for the "hedge to hedge" presumption.

It seems to me much less clear that there is any foundation for a presumption of law that a fence or hedge which does, in fact, separate land over part of which there is an undoubted public highway from land enjoyed by the landowner has been erected or established for that purpose. It must, in my view, be a question of fact in each case. To take an obvious example: there could be no room for any such presumption unless the highway predated (or was contemporary with) the fence or hedge. If it were unknown which came first, I can see no reason in principle for making an assumption—or adopting a presumption—that the landowner fenced against the highway rather than that the highway followed the line of the existing fence. Whether it is right to infer, as a matter of fact in any particular case, that the landowner has fenced against the highway must depend, as Lord Russell of Killowen CJ observed in *Neeld v Hendon Urban District Council 81 LT 405* , 409 on the nature of the district through which the road passes, the width of the margins, the regularity of the line of hedges, and the levels of the land adjoining the road; and (I would add) anything ***731** else known about the circumstances in which the fence was erected. If nothing is known as to the circumstances in which the fences were erected, the fact that the soil of a highway and the adjoining land on each side was once in common ownership and that the highway is separated from the adjoining land by continuous fence lines may well enable a court properly to infer that the landowner has fenced against the highway; that is to say, "that the fences may prima facie be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated", per Vaughan Williams LJ, at p 410. But it is, I think, wrong to treat the remarks of Vaughan Williams LJ in *Neeld's* case as authority for a presumption of law that, whenever it is found that a highway runs between fences, the fences were erected for that purpose.

The question, in the present case, is whether it is correct to infer, from the facts that are known as to the circumstances in which Mr Wright erected a fence on the western side of plot 2, that he intended to dedicate all the land between that fence and Green Lane (the blue land) for public use as a highway. That question is not to be answered, as it seems to me, by reliance upon any supposed presumption of law. It is to be answered by reference to the known facts. The following facts are of particular relevance. First, the broken line shown on the 1967 plan (and on the 1968 conveyance plan) could not have been intended to mark the limit of the highway. There are two reasons for that conclusion: (i) that the broken line is set back from the carriageway by a distance which is at least 10 feet greater than that required under the new street byelaws; and (ii) that the plan itself shows the extent of the land (the hatched land) which was required for highway use. Second, there is at least one obvious purpose of the broken line: to show the position of the driveways which were to give access to plot 1 and plot 2. The position of the driveways is fixed by the precise dimensions shown on the plan. Third, the alignment of the broken line with the existing hedge line on the western side of the local authority housing development, the configuration of the junction of the service road with Green Lane and the positioning of the driveways suggest strongly that the broken line was intended to be a building line—that is to say, a line to the west of which there was to be no building on plot 1 and plot 2. Fourth, the 1968 conveyance imposes no obligation on the purchaser to erect a fence on the broken line; rather, it imposes a prohibition (at paragraph 4 of the schedule) against erecting any wall or fence of any kind on the west side of plot 2 without obtaining the consent in writing of the district council, as vendors. Taking these matters together, the proper inference, as it seems to me, is that the fence erected on the broken line was put there because (a) Mr Wright wished to enclose the garden of the bungalow that he had built (or was about to build) on plot 2 and (b) that was the position for which the district council was willing to give consent—having regard to a perceived need to preserve sight lines at the junction of the service road and Green Lane. A further possibility is that, understanding that he had to erect a fence on the southern and eastern boundaries, he simply followed the plan and erected a fence on the western boundary as well. In any event, on the known facts there is no basis for an inference that the former fence was erected where it was because Mr Wright intended to dedicate the land between the fence and Green Lane for use as a public highway. In my view it is most unlikely that that would have been his intention.

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The position is no different if (which, in my view, is unlikely) Mrs Hale is correct in her submission that the district council caused the fences to be erected before the plots were sold off. There is no reason at all, in those circumstances, to suppose that the fences were erected by reference to the highway. That hypothesis would be incompatible with the hatching on the 1967

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plan, with the GD 10 notice served on Mr Wright, and with the covenants in the 1968 conveyance. But the covenants in the 1968 conveyance are, themselves, a strong reason for concluding that, whatever it was that Edwards were paid to do in 1966, it was not to erect a fence on the broken line.

The judge made no finding as to the actual use of the blue land by the public as part of the highway. It may be that he took the view that the application of the hedge to hedge presumption made it unnecessary for him to do so. The presumption enabled acceptance by user to be presumed. On the view which I take, the question of acceptance does not arise. There is nothing from which an intention to dedicate can be inferred; and, absent an intention to dedicate on the part of the landowner, acceptance by the public is irrelevant. But, in so far as it may be said that an intention to dedicate is to be inferred from acquiescence by the landowner in user by the public, it is pertinent to have in mind that, in the present case, there was no evidence of acquiescence on the part of Mr Wright; and the evidence pointed strongly against acquiescence by Mr or Mrs Hale.

The evidence showed that the blue land was maintained by them as an extension of the garden at Hviskende Traer. They kept the grass mown and they established a circular flower bed in the centre of the blue land. For the first 20 years, or thereabouts, of Mrs Hale's ownership, no one attempted to use the blue land as part of the highway. Sadly, a dispute arose between Mrs Hale and her neighbour, the owner of the former plot 3, as to the position of their common boundary; and that, it seems, led the neighbour to drive her car across the blue land in purported exercise of a claimed public right. Mrs Hale objected strongly, and it was her resistance to the claimed right, I think, which led her to erect the posts and chain which have given rise to the present dispute with the county council. If it had been necessary for him to make a finding as to the actual use of the blue land by the public, the judge would have been bound to reach the conclusion, on the evidence before him, that there had been no public use since 1970. But, as I have indicated, he thought that that question did not arise. I agree (but for different reasons) that it does not.

I am satisfied that no public right of way over the blue land, or any part of it has been established. Whether or not the county council could exercise their powers under the byelaws applicable to new streets, or under section 232 of the Highways Act 1980, in relation to the hatched land are questions which do not arise on this appeal.

For the reasons which I have set out in this judgment, I would allow this appeal.

HALE LJ

I entirely agree. There are four essential points.

First, it seems to have been assumed that, merely because the new streets byelaw required that a new street be laid out at a minimum width, this was in itself sufficient to constitute the required amount of land a highway. The byelaw in question says no such thing: it merely requires the ***733*** person laying out the street to do so to a particular width. The statutory provision under which the byelaw was extended to an existing road also does no such thing: it merely deems a person such as Mr Wright to be laying out a new street, so that the byelaw applies. The object of the legislation was to ensure that properties facing one another were not too close together. The "new street" in question here happened to be an existing highway but the byelaw could equally apply to private roads over which there was to be no pubic right of way. It was a condition of Mr Wright's planning permission that he dedicate a minimum of 36 feet from the opposite boundary to the highway but that does not mean that he must be taken to have done so.

Second, there is no evidence of any act of dedication by Mr Wright, or by his successors in title, and no evidence of any acts of acceptance by the public, over any of the land in question.

Third, the presumption of dedication of all the land running between hedges or fences can only arise if there is reason to suppose that the hedge or fence was erected by reference to the highway: that is, to separate the land over which there was to be no public right of way from the land over which there was to be such a right. Where matters are lost in the mists of time, it must often be possible to draw such an inference from the layout on the ground. In a conventional road running between hedges or fences, even if the verges are of varying widths and shapes, this may well be the obvious conclusion. It is not surprising, therefore, that the cases regarded this as the prima facie position. But that is not the same as elevating this preliminary factual question into a presumption of law.

Fourth, in this case there is no reason to infer that this particular fence was put up in order to separate the private land from the public right of way. Its position on the ground does not suggest this. What little is known about the circumstances of its erection does not suggest this. The probabilities do not suggest this. Who, when building a bungalow on a comparatively small plot of

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land, would give up more of their garden to the public than they had to? They would be much more likely to continue to treat all of the land they owned as private to them unless and until the authorities enforced the planning requirement. The indications are that that is just what happened here. Whatever other steps might have been available at some time to the authorities in this case, action under section 143 of the Highways Act 1980 was not amongst them.

Representation

Solicitors: Law and Administration, Norfolk County Council,Norwich.

Appeal allowed with costs. Damages assessed at £300. Permission to appeal refused. (H D)

Footnotes

1 Public Health Act 1925, s 30:
see post, pp 722G-723A.

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