The Battle of Ireby Fell

Andrew Bruce discusses the recent decision in *Walker & Scott v Burton & Bamford* relating to rectification of the Land Register

IN BRIEF

- Dispute as to title to a Lancashire Fell ends up in the Court of Appeal.
- Landowner registered as proprietor of the Fell by reason of his being the Lord of the Manor.
- But, landowner subsequently fails to establish his title to Lordship of the Manor.
- Yet, villagers fail to rectify the Register to extinguish landowner's title to the Fell.

Ireby (population 60) is a tiny village in Lancashire. It is situated at the highest point in Lancashire and close to the county boundary with West Yorkshire. For the past eight years it has been the site of "a rather old fashioned un-neighbourly dispute with some unusual feudal bits and some land registration bits tacked on". This dispute culminated in the Court of Appeal's decision in *Walker & Scott v Burton & Bamford* [2013] EWCA Civ 1228, [2013] All ER (D) 146 (Oct) on 14 October 2013. This article considers the land registration issues associated with the dispute.

Background

The protagonists in the dispute are Mr Burton (a retired banker from Maidstone), his wife Ms Bamford (a business consultant), and various villagers from Ireby. On 1 September 2000, Mr and Mrs Burton purchased the freehold of Over Hall Farm (the Hall), which is just to the north of Ireby, together with some 39.25 acres of land and various outbuildings from Mr and Mrs Stephen Brown. The Burtons were duly registered as freehold proprietors of the Hall on 28 September 2000.

Although there was no mention of either the Lordship or the Fell in the sale particulars or the conveyancing documents, on 6 October 2003 Mr Burton made a statutory declaration that a conveyance taken by the Stephen Browns (the sellers of the Hall) in 1995 had included the "Manor or reputed Manor of Ireby". Mr Burton believed that on the purchase of the Hall from the Stephen Browns, the Manorial Title had also been transferred to him. On 8 October 2003, Mr Burton applied to the Land Registry for first registration of the Lordship (at that time, but not now, it was still possible to register title to a Lordship at the Land Registry). The application was granted and, as a result, with effect from 10 October 2003 (the date the application was received by the Land Registry) the Burtons were deemed to have registered title to the Lordship.

> ***"Villagers in Ireby were irritated by the Burtons' actions. They resented the acquisition of manorial rights & the exploitation of them"***

On 3 February 2005, Mr Burton made a further statutory declaration. This declaration referred to the registration of the Lordship of the Manor and to Ireby Fell as unregistered land adjoining the Hall. Mr Burton stated that to the best of his knowledge, "Ireby Fell has always been in the ownership of the Lord of the Manor of Ireby" as evidenced by articles of agreement dated 16 May 1836 in which it was recited that "the Freehold and Inheritance of and in the soil of the said Common or Fell is vested of right in the Lord of the Manor of Ireby". Mr Burton claimed that the Fell was waste of the Manor of Ireby (ie manorial land which had been less fertile than the rest of the manorial holdings and had therefore been left open, uncultivated and unoccupied. The local community enjoyed manorial waste as a communal resource for cattle grazing and as common pasture for sheep). As a consequence of Mr Burton's application to the Land Registry, with effect from 21 February 2005 the Burtons were registered as first freehold proprietors of the Fell.

Prior to the Burtons' registrations, the ownership of the Fell had been uncertain. It had been considered by a Commons Commissioner in 1978 who concluded that, with no one claiming ownership of the Fell and there being no evidence of ownership, the Fell should be registered as a common, subject to the protection of the local authority under s 9 of the Commons Registration Act 1965.

Villagers in Ireby were irritated by the Burtons' actions. They resented the acquisition of manorial rights and the exploitation of them. The Burtons put up a gate, posted a printed notice that they were in possession of the Fell, imposed formal controls over the use of the Fell through agreements for sheep grazing and sporting rights and sent out letters of objection to the parking of cars on grass verges in the village. However the villagers could not claim ownership of the Fell for themselves, instead, in an application made on 9 May 2007, several of the villagers applied under para 5(a) of Sch 4 to the Land Registration Act 2002 (LRA 2002) to alter the register by closing the title of the Burtons in respect of both the Lordship and the Fell. The villagers claimed the Lordship had never been acquired by the Burtons's predecessors-in-title, rather it had been assumed by the owners of the Hall during the late 18th/early 19th centuries, and thus the registrations were a mistake.

The proceedings

On 30 August 2007, the dispute between the villagers and the Burtons was referred to the adjudicator to HM Land Registry. Because (initially, at least) the villagers claimed no rights themselves to either the Lordship or the Fell, the Burtons applied to strike out the application as the villagers had no *locus standi*. This move failed, as it was held that there is no legal requirement to claim an interest in the registered land where the application is to the registrar for the alteration of the register as a matter of public law (per Edward Cousins on 14/05/09 in REF/2007/1124). Anyone could object to the registration of the Fell without asserting a better title to it, or any title to it.

The substantive hearing before the deputy adjudicator to HM Land Registry took place in the summer of 2010. The deputy adjudicator found:

- The Lordship had either been vested in the Crown by statute in 1540 or had become extinct by the mid-17th century. As no new mesne Lordships could be created after 1290 (by reason of s 1 of Quia Emptores 1290 (which is still in force)) the Burtons could not establish title to the Lordship and

accordingly this title should be closed.

- The Burtons had no claim, independent of the Lordship, to the Fell. As such their registration as proprietors of the Fell was a mistake.
- Paragraph 6(2) of Sch 4 to LRA 2002 was engaged because after 2005 (and prior to the date of the villagers' application to close the title, namely 9 May 2007) the Burtons took control of the Fell (by erecting a notice and granting grazing and shooting rights) such that they were in "possession".
- There had been no lack of proper care by the Burtons. Mr Burton's statutory declaration dated 3 February 2005 was not only honest, but reasonable, and based on a careful and proper assessment of what was then known to Mr Burton.
- It would be inequitable to close the title to the Fell in the light of the Burtons' expenditure on it.
- It would not be unjust for an alteration to the Fell title not to be made. Given that the parish council did not support the villagers' application, it was "far better that the fell should be owned than left in limbo" (contra *Paton v Todd* [2012] EWHC 1248 (Ch), [2012] All ER (D) 164 (May) per Mr Justice Morgan).

The villagers were dissatisfied with the outcome, notwithstanding their success in relation to the Lordship title. They therefore appealed. However, Jeremy Cousins QC sitting as a deputy high court judge upheld the deputy adjudicator's decision ([2012] EWHC 978 (Ch)). Still unhappy, a further appeal was lodged with the Court of Appeal. The essence of the villagers' complaint was the perceived illogicality of the result:

- the Burtons had only been registered as proprietors of the Fell because they had been registered as holding the Lordship;
- the Burtons title to the Lordship had been closed and it had been established that this registration had been a mistake; and
- why then should the Burtons continue to be registered as proprietors of the Fell?

Points to note

- Pleadings matter. The villagers' arguments on lack of care were fatally damaged by the failure to plead the point. As a consequence no proper evidence was adduced on this point at the trial. Lord Justice Mummery commented (at [99]): "... there is the...fatal flaw in the appeal that the lack of care point was not raised in relation to the registration of the Fell... The point was not pleaded...."
- Issues of possession are always fact-sensitive. Ownership of the Fell ultimately depended upon the Burtons establishing their possession as at the date of the villagers' objection to the registration. The Burtons' acts of possession were sufficient given the particular nature of the land.
- Specific legislative provisions are rarely disapplied in favour of "simple justice" Paragraph 6(2) of Sch 4 to LRA 2002 required specific matters to be considered and the fact that consideration of those matter led to a conclusion which provided a windfall to the Burtons did not mean the result was unjust.
- Seeking rectification without asserting title is dangerous. The villagers relied upon the fact that title to the Fell was owned by the Crown. However the Crown was never joined to the proceedings and never sought to make its own submissions, preferring instead simply to "reserve" its position. There was thus "an air of unreality in the enthusiasm with which [the villagers pressed] claims for Crown...title to the Fell" (per Mummery LJ at [18]).

The Court of Appeal, however, explained away this apparent illogicality. There was a fundamental difference in nature between the Lordship and the Fell (notwithstanding that both were, prior to 13 October 2003, capable of registration). The Lordship was an incorporeal hereditament, whereas the Fell was land. Paragraph 6(2) of Sch 4 to LRA 2002 was not relevant to the Lordship title as the Lordship was not land. It was, however, relevant to the title to the Fell. As Lord Justice Mummery said (at [95]): "The consequential nature of the mistaken registration of the Fell does not result in the disapplication or downgrading of paragraph 6(2)."

Burden on villagers

It was for the villagers to show that lack of proper care caused or substantially contributed to the mistaken registration of the Fell. Given that they had not even pleaded the point and that the Burtons had engaged reputable solicitors to act in connection with the registrations, had obtained an express conveyance of the Lordship and had obtained documentary evidence relating to the Lordship dating back to 1836, it was unsurprising the deputy adjudicator had found that this was not a case of lack of care causing the mistaken registration.

It was not unjust to leave the Burtons as the registered proprietors of the Fell. It was relevant to note that no one else (such as the Crown) asserted title against the Burtons and that ownership carried responsibilities as well as privileges. Moreover there was credible evidence that, since entering into possession of the Fell, the Burtons had invested time, effort and money in improving the Fell and its management. Finally, the fact that the Lordship registration had been corrected did not, of itself, make it unjust not to correct the Fell registration. NLJ

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