

# James Hay Pension Trustees Limited v Cooper Estates Limited

Case No: HC 04 C 00089

High Court of Justice Chancery Division

20 January 2005

**Neutral Citation Number: [2005] EWHC 36 (Ch)**

**2005 WL 62312**

Before: The Honourable Mr. Justice Hart

Date: 20/01/2005, Hearing dates: 29,30 November, 1 December 2004

From The Bristol District Registry

## Representation

- Mr Gary Cowen (instructed by Burges Salmon) for the Claimant.
- Mr David Hodge QC (instructed by Blake Laphorn Linnell) for the Defendant.

## APPROVED JUDGMENT

THE HONOURABLE MR. JUSTICE HART

1. This is a claim for rectification of a transfer dated 22<sup>nd</sup> October 1999 whereby the claimant ("James Hay") transferred certain land to the defendant ("Cooper"), and for consequential rectification of the land register.

2. James Hay is and was at all material times the trustee of a pension scheme of which the principal beneficiary is a Mr Throup. It owned land at Chard, Somerset, which it had acquired in 1997 from Dalgety Agriculture Limited ("the James Hay land"). It was envisaged by Mr Throup that part of the James Hay land would be occupied by a company owned by himself and his wife, Coker Engineering Ltd ("Coker"). Mr Throup contemplated re-developing the remainder of the James Hay land. In 1998 James Hay made a planning application for use of the James Hay land for two business units. Redevelopment of the James Hay land for residential purposes was not possible while it remained an asset of the pension scheme.

3. To the south of the James Hay land was other land which was ripe for development for retail warehouse user and which was owned by Coker ("the Coker land").

4. In 1998 Coker marketed the Coker land to developers, provoking particular interest from Leehampton Developments Limited ("Leehampton"). In November 1998 Coker agreed heads of terms for the sale of the Coker land to Leehampton. These contemplated that part of the land being sold would be provided by James Hay out of the James Hay land. It was also envisaged that Leehampton should construct a road into the James Hay land to adoptable standards within one year of completion. This road would link to (and indeed be a continuation of) the new road which would be required for the purposes of the retail warehouse on the Coker land providing highway access to and from Furnham Road.

5. In due course contracts were exchanged on 12<sup>th</sup> August 1999 between James Hay and Coker as vendors and Leehampton as purchasers for the sale by the former to the latter of the parcels of land required for Leehampton's proposed development. Separate arrangements existed between Leehampton and Cooper, whereby the acquired site was to be vested on completion in Cooper, and whereby a lease was to be granted of the retail development to RMC UK Ltd trading as Great Mills.

6. The site dealt with by the contracts and subsequent transfer consisted of the Coker land and three parcels of James Hay land. One of those parcels of James Hay land was that originally envisaged by the Heads of Agreement; another was land required for sightlines for the new access from Furnham Road; the third consisted of a parcel of land comprising part of the site of the new roadway which was to be constructed into and over the James Hay land. This is the parcel of land which has given rise to

the present dispute.

7. Plan B attached to the Particulars of Claim ("Plan B") shows, by reference to the features which now exist on the site (principally the new road), the boundary between the James Hay land and the Coker land at the critical point as the line BB. The contract and subsequent transfer were by reference to a plan which showed the relevant parcel as comprising that shown on Plan B as BBDD.

8. The transfer contained a covenant by Cooper to construct the roadway from Furnham Road and its extension into and over the James Hay land to "adoptable standards". It also reserved to James Hay a right of way over the roadway so far as constructed on the land acquired by Cooper.

9. In due course during the following year the new roadway was constructed in accordance with the covenant, the work being done by Leehampton's contractors. Leehampton and Cooper also agreed with the highway authority on the extent to which the latter would adopt the roadway. That had been the subject of a Section 106 Agreement entered into by Coker and James Hay on 12<sup>th</sup> August 1999. The s.106 Agreement had obliged Leehampton and Cooper to complete what were there described as "the Highway Works" and to offer them for adoption. The Highway Works were not, however, defined so as to include the whole of the new roadway and the limit of the adoption was not stated in the s.106 Agreement, although the plan attached to the s.106 Agreement indicated it provisionally as the line AA on Plan B.

10. It appears that in about February 2000 formal agreement was reached with the highway authority on the limit of adoption. That limit was the line which is represented by the line CC on Plan B. Actual adoption of the new roadway to that line CC appears not to have been effected until some time in 2003.

11. By 2003 James Hay was actively exploring the possibility of developing the retained James Hay land for residential use. In that connection, it became necessary for it to be able to offer for adoption the remainder of the roadway (which had been constructed to adoptable standards), i.e. from the line CC and continuing into the James Hay land. At that point James Hay came to appreciate that it was not in a position itself to offer for adoption the area of the roadway represented on Plan B as the quadrilateral CCDD (the distance between CC and DD being some 14 feet) but would need Cooper's co-operation in order to do so. When the position was explained to Cooper, Cooper appreciated for the first time that the combined effect of the transfer to it of the land up to the line DD, coupled with the fact that the road had thus far only been adopted up to the line CC put Cooper in the position of being able to hold James Hay to ransom.

12. These proceedings are the result. Cooper would never have been in a position to hold James HHHay to ransom had any of the following situations obtained, namely:

- i) if the conveyancing had been done by reference to the line CC, instead of the line DD;
- ii) if a covenant had been taken from Leehampton and Cooper to offer for adoption all the land up to DD, or
- iii) the limit of adoption agreed with the highway authority in February 2000 had in fact extended up to the line DD.

13. James Hay's claim is that the conveyancing should have been done by reference to the line CC instead of the line DD, and that the fact that it was not was the result of a mistake which can be cured by rectification. Cooper resists that claim on the ground that, whatever may have been agreed or intended by James Hay and Leehampton, Cooper never had the intention of acquiring anything other than what was ultimately transferred to it.

14. The parties are agreed that for James Hay to succeed in its claim it must show that the parties had a common continuing intention in respect of the amount of land to be transferred by James Hay, that there was some outward expression of accord in relation thereto, that the intention continued at the time of the transfer, and that by mistake the transfer did not reflect that common intention: see the summary of the relevant law by Peter Gibson LJ in *Swainland Builders Ltd -v- Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71, at paras 32–34.

15. One critical issue is how it came about that any parcel of James Hay land at this point came to be included in the sale at all, and how that parcel was identified in the negotiations between the parties. The relevant negotiations involved four sets of parties and their respective solicitors, namely (1) Coker and James Hay, acting by Mr Throup, and represented by Mr Martin of Batten & Co. Solicitors

("Battens"), with a Mr Thomas also participating as James Hay's in-house solicitor; (2) Leehampton, acting by Mr Ford and Mr Scott, and represented by Mr Stimson of Bond Pearce, solicitors; (3) Cooper, acting by Mr George Gough-Cooper its then managing director, and represented by Mr Ian Howlett of Blake Laphorn, solicitors; and (4) RMC UK Ltd (trading as Great Mills). There was no material contact directly between the Cooper team and the James Hay team. All James Hay's contact was with Leehampton.

16. I heard oral evidence on behalf of James Hay from Mr Throup, Mr Ford and Mr Scott, and on behalf of Cooper from Mr George Gough-Cooper, Mr Howlett and Mr David Gough-Cooper, the present managing director of Cooper. In addition a witness statement of Mr Thomas was admitted. The evidence took an unusual procedural course as a result of Mr Ford and Mr Scott not being available until the third day of the trial. Mr Hodge on behalf of Cooper volunteered to call his evidence before Mr Ford and Mr Scott were called. He also did not object to the latter supplementing their witness statements by oral evidence in chief which turned out to be more extensive, and more particular in certain respects, than had perhaps been expected.

17. Mr Throup's evidence was that he had, throughout the negotiations with Leehampton, insisted that the new roadway should not only be constructed to adoptable standards but should actually be adopted up to the boundary of James Hay's retained land. This was initially contemplated as being up to the line BB. His evidence (in his witness statement) was that:

"... it was around this time [5<sup>th</sup> May 1999] that either Jim Scott or David Ford approached me and told me that they needed a section of James Hay's land for the access road. I think they said it was because of the Highway Authority's requirement that an adopted road must have a hammerhead at its end to allow vehicles to turn on the adopted road, and it turned out that this encroached over the boundary into James Hay's land. [33] I was quite prepared to accommodate this requirement, but there would have been no sense in letting the buyers having more land than was actually needed for the hammerhead ..."

18. Mr Ford and Mr Scott gave evidence which was to similar effect save as to the timing, and reasons for, the inclusion of the parcel of James Hay land. The situation which they, as the developers, had to cater for was, in the first instance, the extent to which the highway authority would agree to adopt the new access to Furnham Road. By February 1999, negotiations with the highway authority for the purposes of the contemplated s.106 Agreement had resulted in an indication that the limit of adoption would be a point 25 metres back from the traffic lights at the new junction (which is represented by the line AA on Plan B). That left an area of roadway between AA and BB which they proposed would be left in Coker's ownership, would be constructed to adoptable standards, and over which Great Mills would have rights of access subject to an obligation to pay a maintenance contribution. Great Mills, however, objected to this on the ground that liability for a maintenance contribution was likely to be productive of disputes. Great Mills argued that it would be better for the whole section of road to BB to be adopted. Inquiry of the highway authority revealed that it was not prepared to adopt the roadway up to the point BB. Leehampton therefore proposed a solution, which appeared to be acceptable to Cooper, to Great Mills and to Battens, namely that this section (i.e. AA to BB) would be transferred to Cooper who would grant the necessary rights of way to Coker and James Hay.

19. According to Mr Scott, when Mr Throup heard of this proposal he was very unhappy. He said that the road would have to be adopted up to the boundary with the James Hay land. In order to solve this problem, Leehampton made further inquiry of the highway authority. The solution suggested by the highway authority was to create a hammerhead or turning point at the relevant boundary by moving the gates of the proposed warehouse 9 metres back, and then, drawing a line from the centre of the gates to the centre of the roadway, to create a limit of adoption 9 metres back into James Hay's land from that centre point in the roadway.

20. This solution created the requirement for James Hay to transfer an additional piece of land (namely that represented by BB:CC on Plan B) to Cooper. The only direct contemporary evidence for CC having been identified as the relevant line consisted of a plan produced by Leehampton to Bond Pearce under cover of a letter dated 11<sup>th</sup> March 1999 on which there was coloured yellow the portion of roadway up to point AA (contemplated as being adopted by the draft s.106 Agreement) and coloured blue the land from AA to CC.

21. If that is an accurate account there was clearly agreement between James Hay and Leehampton as to the exact dimensions of the parcel to be transferred. These were not, however, correctly transferred into the plans which were used in the conveyancing documentation. The initial mistake appears to have been made by Leehampton's architect in producing a plan (B1/295), which was sent to Blake Laphorn by Bond Pearce under cover of a letter dated 21<sup>st</sup> May 1999 which shows the relevant boundary at a point which is beyond CC but well shy of DD ("the B1/295 line"). This initial mistake was then repeated in all subsequent plans produced in connection with the proposed contract until, shortly prior to exchange, a fresh plan was produced on which the relevant boundary was shown at the point now marked DD on the Plan B. This was the plan used in the contract and the subsequent transfer (or, more accurately, one of the plans so used: both instruments in fact also used another plan to show the extent of the roadway to be constructed on the James Hay land). There is no documentary evidence which offers a satisfactory explanation for why this fresh plan located the boundary at line DD rather than on the B1/295 line. The contemporary documentary evidence shows that the fresh plan was drawn so as to correct an altogether different mistake in its immediate pre-contractual predecessor. The "new" line DD may simply have been a copying mistake. Or it may have been the product of an intentional, albeit mistaken attempt to draw the line more accurately: the mistake made by the author of the plan being to scale the 9 metre measurement from the BB boundary line rather than from the end of the subtended line drawn from the centre of the now re-located gates of the retail unit.

22. There is no doubt, on the account given by Mr Throup, Mr Scott and Mr Ford, that they had agreed that the parcel to be transferred by James Hay was dictated by the indication which had been given by the highway authority as to its willingness to adopt the whole section of roadway serving the retail development. A parcel defined by that criterion would meet Mr Throup's requirement that the new road should actually be adopted up to the boundary with James Hay's retained land. Although the proposed contractual documentation (including the s.106 Agreement) did not oblige anyone actually to offer that parcel for adoption, it was as a practical matter inconceivable that, once the roadway had been constructed to adoptable standards, it would not in fact be offered for adoption up to the point at which the highway authority had agreed in principle to adopt it, i.e. the point CC. It would simply have been in no one's interest for the adoption not to have been offered. This indeed is what in due course happened without controversy of any kind.

23. None of the witnesses called by Cooper was in a position to give any direct evidence which cast doubt on the account given by the claimant's witnesses of the genesis of the inclusion of a part of James Hay's land in the site being acquired. Mr Hodge, however, submitted that the account must have been mistaken. His thesis was that there could not have been any agreement which linked the relevant boundary to a limit of adoption indicated by the highway authority at CC because on the available documentary evidence no such indication was given until February 2000 (see the revised highways plan at B3/892). He submitted that the notion of there having been some earlier agreement that the roadway was going to be adopted up to the line CC was inconsistent with the correspondence which took place in April 2000 between Bond Pearce and Blake Laphorn and between RMC's solicitor Mr Bottle and Bond Pearce concerning rights of way and maintenance contributions after it had become apparent that the roadway was to be adopted up to line CC.

24. I was not persuaded by this submission. Some explanation has to be found for the fact that a defined parcel of James Hay's land was being included in the sale. The only plausible explanation is that tendered on behalf of the claimant, that is that it was the parcel which was known would be required by the highway authority if the roadway was to be adopted up to the entrance to the Great Mills site rather than simply to point AA (which was all that was apparently required by the draft s.106 Agreement and, accordingly, necessary for the planning permission). Unless Mr Throup and Leehamptons had ascertained what that highway authority requirement was prior to exchange of contracts it would not have been possible to identify any particular part of the James Hay land as necessary to be included in the site being sold. The April 2000 correspondence simply indicates that Great Mills had not been told of this at the time.

25. Mr George Gough-Cooper's oral evidence in cross-examination was also consistent with an identified parcel of land having been deliberately included in order to meet a requirement which had been ascertained prior to exchange of contracts. His evidence was that his belief was that the additional parcel was required by the planning permission, presuming that it was to provide a turning facility. If that was his belief at the time, it was partly right and partly wrong. It was right inasmuch as the purpose of the parcel was to provide a turning facility, but wrong in that there was no planning requirement for such a turning facility. The requirement arose from Mr Throup's desire that the

roadway should not only be built to adoptable standards, but should actually be adopted up to the boundary with James Hay's retained land.

26. What then did Cooper intend to acquire? The earliest reference to the point in the contemporary documentation is an attendance note of a meeting held on 25<sup>th</sup> February 1999 and attended by representatives of Cooper and Leehamptons. In the context of discussions which there took place concerning progress on the s.106 Agreement, the document records the observation:

"There is also a section of road which will not be adopted but will be in the ownership of Cooper Estates. This would be for the development of two further units which are planned."

27. I am satisfied that the section of road here being referred to was the section AA:BB, although (as will appear below) this was not clear at the time to Cooper. By this stage the highway authority had indicated the line AA as the limit of adoption. That the line CC was not at this date being contemplated by Leehamptons seems clear from the letter sent by Bond Pearce to Battens on 1<sup>st</sup> March enclosing a plan which showed the area AA:BB hatched in red with the manuscript legend "Rights of access to be granted to Coker Engineering" and identified the line AA as "approximate line of adopted highway". The reference on 25<sup>th</sup> February 1999 to the "two further units which are planned" was reference to the business units for which planning permission was being sought by James Hay on its land.

28. On 4<sup>th</sup> March 1999 Mr Howlett of Blake Lapthorne wrote to Bond Pearce in relation, inter alia, to the proposed s.106 Agreement, saying:

"I understand that there is a section of road which will not be adopted but which will be included in the sale to remain in private ownership; please provide a plan identifying this area."

29. This request was not answered until 11<sup>th</sup> March 1999 when Mr Stimson of Bond Pearce wrote in the following terms:

"Further to the previous correspondence on the above, I now enclose a copy of a section from the Highways drawing on which we have indicated the area of the new access road to be adopted coloured yellow and that area of access road which is to be included in the purchase over which Coker Engineering and their successors will be given rights of way until such time as it and the remainder of the road which is being constructed to adoption standards is adopted by the local authority."

The yellow colouring on the enclosed plan indicated the area from Furnham Road to AA. The plan only indicated one other piece of land, and did so by blue colouring. That area was parcel AA:CC. A more careful letter would have included the words "coloured blue" immediately before the words "that area of the access road which is to be included in the purchase", but, in my judgment, the letter can only be sensibly read in conjunction with the plan as if those words had been included.

30. Cooper were thus being told that an area of land with a boundary at CC was being included in the site to be acquired and that it was contemplated that at some stage in the future it would be adopted, that future stage being the point at which the remainder of the roadway to be constructed over the retained James Hay land would be adopted.

31. On James Hay's case, this letter and plan (the B1/138 plan) have a critical importance in the case, since it was the combined failure of Leehampton's and James Hay's respective advisers correctly to transpose this plan into the contractual documentation and, in consequence, into the transfer plan that constitutes the mistake which it seeks to rectify. Mr Gough-Cooper, in his oral evidence, maintained that the letter and the plan had no enduring significance so far as he was concerned. He said that he had assumed that the letter dated 11<sup>th</sup> March from Bond Pearce had been prompted by a letter dated 10<sup>th</sup> March to Bond Pearce from South Somerset District Council which had indicated that the highway requirements in respect of the industrial land (i.e. the James Hay land) would be significantly different from those in relation to the Coker land, that therefore the current draft s.106 Agreement should therefore restrict itself to the latter, and that a separate s.106 Agreement would be needed in relation to the industrial land. In the witness box he maintained that he believed that the

<sup>th</sup> March letter from the District Council had subsequently been countermanded by a letter dated 17<sup>th</sup> March from Leehampton to Poulston Lees which gave the information that the District Council had now decided that it would be unnecessary to have two s.106 Agreements, the highway provision requirements of the industrial application being capable of being dealt with by planning condition.

32. This evidence was an ingenious attempt to reduce to nothing the significance of the 11<sup>th</sup> March letter and its enclosed plan. It demonstrated Mr Gough-Cooper's intelligence, and his thoroughness in preparing for his evidence. The letter dated 17<sup>th</sup> March was not at the time in the trial bundles but Mr Gough-Cooper was able to recall it and produce it from Cooper's files over a lunch adjournment. I was not persuaded by his oral evidence as to the significance attached by him at the time of the letter of 17<sup>th</sup> March. I do not see why, in any event, the fact that the highway requirements for the industrial application were not to be dealt with by planning condition rather than by a s.106 Agreement deprived Bond Pearce's letter of 11<sup>th</sup> March 1999 of its force as an answer to the question originally posed by Mr Howlett in his letter of 4<sup>th</sup> March 1999.

33. Thereafter, as already noted, a mistake was made in the plan subsequently supplied by Bond Pearce to Blake Laphorn under cover of their letter of 21<sup>st</sup> May 1999 replying to the latter's request (by letter dated 18<sup>th</sup> May) for "the intended lease plan, and indeed the plans intended to be used with the other documentation". This plan mistakenly showed the relevant boundary at what I have described as the B1/295 line: i.e. beyond CC but well shy of the DD line.

34. It was, therefore, by reference to a plan showing this B1/295 line that Mr Gough-Cooper in due course recommended the project to his board by memoranda dated 7<sup>th</sup> and 22<sup>nd</sup> July 1999. The memoranda referred to Leehampton's obligation to put forward for adoption the access road to AA ("the land coloured blue") and noted James Hay's retention of a right of way over that land and the area ("the land coloured yellow") between AA and the B1/295 line.

35. I have already described the further eleventh hour revision to the contract plan which moved the already mistaken B1/295 line to the even more mistaken line DD. Mr Gough-Cooper told me that he noticed this change at the time. He said that he had been content for Leehampton to agree this boundary with James Hay, had seen that the line "was moving" and assumed that they were "getting it right". He said that he had no reason to suppose that a mistake had been made in the final plan.

36. Thus Cooper (a) knew that the parcel of James Hay land was included because it was required for the purposes of a turning area in connection with the development; (b) thought that the northern boundary of that parcel was being correctly shown on the various plans with which it was presented.

37. I return to the question what did Cooper intend to purchase? Was it simply the parcel required for the turning area? Or was it the parcel as finally shown on the plan attached to the Transfer? Mr George Gough-Cooper now wishes to say that it was the latter: Cooper is the innocent (or as Mr Hodge put it the adventitious) recipient of a ransom slip. In his oral evidence, however, Mr Gough-Cooper made it quite clear that the exact position of that boundary was not a concern to him. What did concern him was that what was being acquired was sufficient to enable any planning conditions to be complied with. He believed, wrongly as it happens, that the requirement for the turning place was such a condition. He had no intention of acquiring more than was necessary to satisfy this (in fact non-existent) condition. He noticed that the line of the relevant boundary shifted in the final stages prior to 12<sup>th</sup> August. He assumed that this was part of a process of the solicitors (Battens and Bond Pearce) "getting it right". In this context, "getting it right" implies a belief in the existence of an objective measure by reference to which there was a "right" answer. The belief was justified. There was such an objective measure: it was the line which the highway authority had indicated as necessary if the section of road beyond AA was to be adopted, and it was necessary as a turning area. It was not, however, a condition of the retail planning permission that that section of the road should be adopted.

38. Cooper intended to purchase by reference to a line which it intended to be agreed between Leehampton and James Hay relying on Leehampton to get it "right". It did not intend to purchase any more than this. James Hay and Leehampton agreed what was, for both their purposes, the "right line" i.e. (CC). I think it fair, on Mr Gough-Cooper's evidence, to say that Cooper intended to purchase land up to CC and no more.

39. The question can be tested by assuming that Mr Gough-Cooper's erroneous belief that the right line was dictated by a planning condition had in fact been correct. In those circumstances had a mistake been made in the contract plan in the other direction, such that the planning condition could not be satisfied, Cooper would clearly have been able to assert that it had intended to purchase up to

the line of that requirement. Cooper was in fact correct that the line was dictated by a requirement albeit not a planning requirement. It intended to purchase to the required line. The fact that it did not have a clear idea of the basis of the requirement does not now enable it to deny its intention.

40. Accordingly, I have concluded that James Hay and Cooper had a common continuing intention in respect of the amount of land to be transferred by James Hay. There was in my judgment sufficient outward expression of accord in the Bond Pearce letter to Blake Laphorn dated 11<sup>th</sup> March 1999 and the accompanying B1/138 plan. Accordingly in my judgment James Hay is entitled to an order that the transfer plan be rectified.

41. Cooper is a proprietor in possession for the purposes of paragraph 3 of Schedule 4 to the Land Registration Act 2002, and the register cannot therefore be rectified unless the court is satisfied that it would be unjust not so to order. I am so satisfied. Cooper is the accidental owner of a small parcel of land which it never intended to acquire and which is of no use to it save as a means of extracting a ransom payment from James Hay, a stance which however legitimate commercially does not commend itself to this court as in any way meritorious. Moreover, as Mr Hodge himself recognised in his closing speech, the result for which he contended in the trial as a whole would have been a harsh one. It would be harsher still if, having found James Hay entitled to rectification of the transfer, I were to deny it rectification of the register.

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