



Neutral Citation Number: [2018] EWHC 1959 (Ch)

Case No: HC07C02289

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS & PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/07/2018

Before :

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

JOHN HENRY LOOSE

Claimant/Part
20 Defendant

- and -

(1) LYNN SHELLFISH LIMITED

Defendants/

(2) JOHN WILLIAMSON

Part 20

(3) STEVEN WILLIAMSON

Claimants

(4) MARTIN GARNETT

(5) JASON LEMAN

(6) ERIC OUGHTON

- and -

MICHAEL GEORGE LE STRANGE MEAKIN

Second Part 20 Defendant

Mr Michael Davey QC (instructed by **Parkinson Wright LLP**) for the **Claimant**
Mr Guy Fetherstonhaugh QC and Mr Philip Sissons (instructed by **Andrew Jackson LLP**)
for the **Defendants**

The **Second Part 20 Defendant** did not appear and was not represented

Hearing dates: 15th, 18th and 19th June 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

Mr David Halpern QC :

1. I am asked to determine the seaward boundary of a several fishery (i.e. an exclusive right to fish) in a defined area of The Wash near Hunstanton, north east of King's Lynn, Norfolk ("the Right"). The Right is vested in the Second Part 20 Defendant, who has let it to the Claimant. The Right is commercially valuable, because the area over which the Right extends ("the Area") contains rich beds of cockles and mussels.
2. The current proceedings were started in 2007, but there has been sporadic litigation over the Right since at least the mid-nineteenth century. The current proceedings went to the Supreme Court, who gave judgment on 13th April 2016 ([2016] UKSC 14; [2017] AC 599). The facts are summarised in the judgment of Lords Neuberger and Carnwath ("the Judgment"), with whom the other Justices agreed. As no additional issues of fact arise (save in relation to expert evidence), I do not need to set out the facts.
3. As is explained in the Judgment, the Defendants are local fishermen who (along with other members of the public) have a public right to fish for shellfish on the foreshore, save insofar as this is excluded by the Right. It is common ground that the Area runs from the 1872 line of Wolferton Creek in the south to the parish boundary between Thornham and Holme in the north. The eastern boundary is uncontroversial, since the Second Part 20 Defendant also owns the land adjoining the foreshore above the high-water mark. The dispute concerns the seaward boundary of the Area, which is (loosely speaking) its western boundary.
4. The Defendants have accepted that the owner of the Right has excluded the public for many years from collecting shellfish, not merely on the foreshore within the Area, but also on a large sandbank known as Stubborn Sand, which was formerly offshore but is now attached to the foreshore. For this reason, the Defendants conceded in the Supreme Court that Stubborn Sand falls within the Area and is therefore subject to the Right. No similar concession was made in relation to sandbanks which were formerly detached from Stubborn Sand and lay further out to sea, but which have subsequently become attached to it ("the Relevant Sandbanks"). I have been asked to rule on five Relevant Sandbanks, viz. Ferrier Sand, Ferrier Inner Middle Sand, Outer Ferrier Sand, South Sunk Sand and Sunk Sand.
5. The Supreme Court decided (i) that the seaward boundary of the Area is, in general terms, the line of lowest astronomical tide ("LAT") from time to time, with the result that the boundary is a fluctuating one, and (ii) that the Relevant Sandbanks lie outside the Area and are consequently not subject to the Right. The Judgment gives two reasons for concluding that the Relevant Sandbanks are not subject to the Right:

"71 For present purposes, there are two distinctions of significance between the notion that the low tide mark boundary of the Foreshore fluctuates and the notion that attaching sandbanks become part of the Foreshore. First, the low tide mark will presumably, at least normally, shift relatively gradually, whereas, although the silting up of the channel will be gradual, the attachment of the whole of a previously detached sandbank to the Foreshore will happen at one moment. It is true that a channel between a sandbank and the foreshore will silt up gradually, but the question whether a

sandbank has become joined to the foreshore must surely be tested by reference to a particular point in time, and we would have thought that it would be when the tide has receded past the point where the sandbank has or could become joined to the foreshore – i e low tide. In that connection, it was implicitly accepted by the respondents that there would be a specific point at which a former sandbank would become joined to the foreshore: they did not suggest, for instance, that the prescriptive right would attach to a sandbank at low tide but not at high tide.

72 Secondly, and particularly importantly in this context, the public will have had the right to take fish (including shellfish) from such a sandbank, at least until the moment when it becomes attached to the Foreshore. In those circumstances, at least in the absence of any specific evidence that the Estate in fact took shellfish and excluded the public from doing so, as of right from sandbanks as they became attached to the Foreshore, we do not think that it would be right to assume that the Estate did in fact behave in this way.”

6. The Supreme Court referred back to the Chancery Division the determination of the seaward boundary by applying these two conclusions. This is the task which I now undertake.
7. Just as the line of LAT along the foreshore varies as the sea advances or retreats over the years, so the shape, size and position of the Relevant Sandbanks change with the passage of time. However, although a philosopher might find it difficult to say whether any identifiable sandbank which bore a name in the nineteenth century is still recognisable as the same sandbank in the twenty-first century, the court has to do the best it can. As both parties agreed, this requires the court to look chronologically at the changes which have occurred in each Relevant Sandbank, to find the point in time at which each part of such sandbank became attached to Stubborn Sand, and to fix the seaward boundary by plotting the line of joinder, albeit that different sandbanks, and different parts of the same sandbank, will have become attached to Stubborn Sand at different times.
8. The experts are in agreement that there are two processes at work which have caused the Relevant Sandbanks to become attached to Stubborn Sand. One is that the Relevant Sandbanks have drifted towards the foreshore; the other is that the channels which separated the Relevant Sandbanks from Stubborn Sand have become silted up. The first of these processes has the effect of narrowing the channel; the second of making it shallower. The boundary line should be drawn where the channel ran before it disappeared, whether as a result of narrowing or of becoming silted up.
9. Both sides recognise that it is impossible to do this with precision, given that each chart or survey merely gives a snapshot at a particular date and that there are some considerable gaps in the data available, but that the court must do the best it can. Mr Guy Fetherstonhaugh QC, who appeared with Mr Philip Sissons for the Defendants, said that, if there was a gap in the evidence, the court should rely on the presumption

that rights against the Crown are to be construed restrictively (Judgment at [51] to [53]). It is fair to say that this submission was prompted by me and that, on reflection, I agree with the view expressed by counsel in their respective written closing submissions that the burden of proof has little or no role to play. Unlike cases such as *Rhesa Shipping Co SA v. Edmunds* ("*The Popi M*") [1985] 1 WLR 948 at 955-6, this is a case where the court needs to make a finding one way or the other and cannot simply conclude that neither side has proved its case.

10. This exercise will produce a boundary which is partly fixed and partly fluctuating. It will be fluctuating in accordance with changes in LAT in places where there are no Relevant Sandbanks for the time being (but will become fixed in due course if further Relevant Sandbanks become attached). It will be fixed where it marks the line of joinder of a Relevant Sandbank to Stubborn Sand, but only during such period as the line of joinder continues to be within the Area. If, and insofar as, the high-water mark moves out to sea beyond the Relevant Sandbanks, so that they and Stubborn Sand become permanently dry, or if (conversely) the line of LAT moves inshore beyond Stubborn Sand, so that Stubborn Sand and the Relevant Sandbanks are permanently under water, there will no longer be any Right over the Area.

The extent of the Defendants' concession relation to Stubborn Sand

11. The first issue which I must decide is whether the Defendants' concession in relation to Stubborn Sand (paragraph 4 above) is limited to the physical extent of Stubborn Sand in 1872 or whether it extends to Stubborn Sand as it is today. The issue does not matter insofar as the boundary is a fluctuating one, since to that extent the boundary is the LAT line from time to time. However, it matters in relation to Ferrier Inner Middle Sand, because that sandbank was not specifically mentioned as a Relevant Sandbank in the Defendants' skeleton argument.
12. For the reasons given in the Defendants' written closing submissions, I am satisfied that the concession was limited to Stubborn Sand as it was in 1872 and that the Relevant Sandbanks therefore include Ferrier Inner Middle Sand. This accords with the Appellants' Case to the Supreme Court, which concluded at paragraph 118 that:

“(g) The Respondents' fishery must therefore be confined to the only area regarding which they are able to show long historic use – the Stubborn Sand.

(h) The seaward limit of the Stubborn Sand is limited to the midpoint of the channel separating it from the Offshore Sandbanks, of which the best evidence is the boundary fixed in 1872.”

However, the concession operates only in respect of any sandbanks which joined Stubborn Sand after 1872. It does not prevent the seaward boundary from fluctuating as a result of changes in Stubborn Sand since 1872 which are not caused by the joinder of another sandbank.

The exercise undertaken by the experts

13. In order to define those parts of the boundary which are fixed, it is necessary to find the date when each Relevant Sandbank first became attached to Stubborn Sand and to plot the point of attachment. The same exercise is repeated as more parts of that sandbank become attached, until one has a line representing the entirety of the joinder of each Relevant Sandbank to Stubborn Sand.
14. The exercise is undertaken by reference to historic charts, surveys and other information. The information on these historic documents requires careful analysis and adjustments in at least two respects:
 - i) Adjustments in order to show LAT: Data before the early 1970s is not given in respect of LAT but in respect of different ways of measuring low tide, such as low water, low water ordinary springs, low water springs or mean low water springs.
 - ii) Adjustments to zero: During the early years of the twentieth century, figures were usually "ODL", meaning that Ordnance Survey Liverpool was taken to be zero. More recently, the figures are usually "ODN", meaning that OS Newlyn is taken to be zero.

One consequence of making these adjustments is that the colouring on charts, which distinguishes between land, foreshore/sandbanks and sea, may be misleading, since it does not draw the line between foreshore/sandbank and sea at LAT.

Mr Maloney

15. Mr Martin Maloney gave expert evidence for the Claimant. He has worked as a land surveyor in the field of hydrographic surveys since 1981 and has particular experience in the field of dredging.
16. Mr Fetherstonhaugh submitted that Mr Maloney made errors which betrayed his lack of relevant expertise:
 - i) His report stated: "It is assumed that LAT is the same as the stated Chart Datum for Hunstanton as 3.75m below OD." He relied for this statement on a manuscript adjustment to field notes supplied by the UK Hydrographic Office ("UKHO") Tidal Branch. The typed field notes said: "Hunstanton Chart Datum is 10.47 ft. below Ordnance Datum (Newlyn)." The manuscript adjustment said: "LAT datum is 12.30 ft (3.75m) below OD(N)". In his second report Mr Maloney corrected the adjustment from 3.75m to 3.55m. In my judgment, Mr Maloney's error was caused by an error in the UKHO field notes and was not due to any lack of expertise on the part of Mr Maloney.
 - ii) Mr Fetherstonhaugh also submitted that Mr Maloney failed to appreciate that the charts showed a dashed line around some of the Relevant Sandbanks, which was said to mean that these sandbanks had not been surveyed, or not adequately surveyed. However, Mr Michael Davey QC, for the Claimant,

referred me to a document headed Symbols and Abbreviations Used on Admiralty Paper Charts, which I accept makes it clear that the dashed lines in question merely show that the depth of contours is approximate.

17. Whilst I accept that Mr Maloney does not have formal qualifications which are as extensive as those of Dr Taylor, he is suitably qualified to give relevant expert evidence, save that he does not have (and did not claim to have) Dr Taylor's expertise in respect of tides. I shall consider below the extent to which tidal evidence is relevant.
18. Mr Maloney explained in his report and his oral evidence why he tended to prefer fair sheets produced from Admiralty surveys to Admiralty charts:
 - i) Survey sheets record depth soundings which are taken in rows. The rows are relatively close together and are comprised of numbers in tiny print, which (to the naked eye) give each row the appearance of a line. It is only by enlarging the page that one can see the individual numbers. Accordingly, the survey sheets contain an enormous amount of information, but in a form which would not be readily intelligible to the average mariner.
 - ii) Charts are designed primarily as a navigational tool for mariners and not as boundary definition maps. They are compiled from surveys and other data, but the data is filtered so that the reader is not overburdened with information. The process of filtering tends to highlight the shallower areas, since these are usually the areas of greatest risk for mariners. In other words, charts tend to be shoal-biased.
 - iii) Charts are prepared from the most recent available data, but not every part of the area covered by a chart will have been surveyed recently. Accordingly, the date of the chart might give a misleading impression as to the age of the information on it. Modern charts have an index giving the sources of information, but the index does not specify which parts of the chart are based on which information; older charts do not have an index.
19. Conversely, he accepted that the advantage of charts over survey data is that they are produced more frequently than surveys (or, at least, more frequently than surveys to which he was able to gain access). He was permitted by UKHO to photograph the fair sheets from only four surveys, viz. 1917, 1920, 1953 and 1970.
20. Save for using the 1873 chart to show the position of Wolferton Creek (the agreed southern boundary), Mr Maloney did not use information prior to 1917, since it was not sufficiently reliable. He relied on the fair sheet drawings of the four surveys mentioned above and on a bathymetric survey made by the Environment Agency in 2006-7. Finally, he referred to the most recent electronic chart produced by UKHO in 2016. He noted that the 2016 chart shows areas to be above LAT which are shown as below LAT in the 2006-7 survey, leading him to conclude either that there was more recent survey data available which he had not seen or that the chart was overly cautious.

21. He worked on the assumption that the line of greatest depth between two formerly detached sandbanks was likely to be the line of joiner, since the deepest channel between the two would have been the last to become silted up.
22. He divided the seaward boundary into five stretches, starting at the southern end. The first stretch is the old line of Wolferton Creek.
23. The second is the stretch between Ferrier Sand and Stubborn Sand. The 1917 and 1920 fair sheets showed that Ferrier Sand was connected to Stubborn Sand at its southern end, but that there was an inlet separating the northern and central parts of Ferrier Sand from Stubborn Sand. The inlet still existed in 1952 and in 1970, but was becoming progressively narrower and shallower. He drew the boundary based on an estimate of the middle of the old channel between the two.
24. The third stretch is the area around Ferrier Inner Middle Sand. (The sandbank in question was also described as the “unnamed” sandbank. I agree with Mr Davey that it does not matter whether it comprises Ferrier Inner Middle Sand or is a different sandbank; what matters is that it is an offshore sandbank which at some point became attached to Stubborn Sand.) Mr Maloney was instructed to proceed on the assumption that this sandbank was part of Stubborn Sand. He fairly acknowledged that this assumption did not fit well with the survey information which he had investigated. The third stretch continues northwards between the northern tip of Ferrier Sand and the southern tip of Outer Ferrier Sand. He said that there were no Relevant Sandbanks along this stretch, and hence that the boundary was the LAT line. This evidence is predicated on Ferrier Inner Middle Sand not being a Relevant Sandbank. I have already concluded that it is to be treated as a Relevant Sandbank (paragraph 12 above). Once that adjustment is made, it is wrong to say that there are no Relevant Sandbanks in this stretch. Consequently I reject his evidence as to this stretch of the boundary.
25. The fourth stretch is the area between Outer Ferrier Sand, South Sunk Sand and Stubborn Sand. He said that Outer Ferrier Sand joined Stubborn Sand before 1952 and that the area between Outer Ferrier Sand and South Sunk Sand was difficult to assess, for the following reasons:
 - i) There was a three-way joiner between the north-eastern tip of Outer Ferrier, the southern tip of South Sunk Sand and Stubborn Sand.
 - ii) South Sunk Sand moved south-west by about 3 kilometres between 1917 and 1970 and perhaps by a further 1.6 kilometres between 1970 and 2016.
 - iii) The eastern side of South Sunk Sand had not become attached to Stubborn Sand according to the 2006-7 survey, but he accepted that it had become attached according to the 2016 chart.
26. The fifth stretch is the boundary between Sunk Sand and Stubborn Sand. He said that Sunk Sand is not joined to Stubborn Sand, save in the 2016 chart, and accordingly the boundary simply follows the LAT of Stubborn Sand. However, he drew two lines: one based on the 2006-7 survey and the other (including a much larger area within the Area) based on the 2016 chart.

27. For the reasons explained below, in my judgment the fourth and fifth stretches of the boundary do not depend merely on whether the 2006-7 survey is to be preferred to the 2016 chart, but depend critically on the points of joinder between South Sunk Sand/Sunk Sand and Stubborn Sand.

Dr Taylor

28. Dr Steve Taylor gave expert evidence for the Defendants. He has impressive qualifications and is a consultant in tidal analysis and hydrography. Mr Davey wisely did not seek to challenge his expertise or experience.
29. Dr Taylor made two obvious errors in the position of his boundary line but I am satisfied that these are simple errors in applying his method and do not cast doubt on his impartiality or on his expertise and experience. In the first place he made an error in his delineation of the old course of Wolferton Creek. Secondly, he made an error when plotting the boundary based on the 1953 chart, because he mistakenly failed to copy the line between Outer Ferrier Sand and Stubborn Sand which he had fixed by reference to the 1924 chart.
30. Mr Fetherstonhaugh submitted in closing that Dr Taylor had made further minor errors, which had become apparent from an analysis of the 2006-7 bathymetric survey. In my judgment it would be wrong to permit the Defendants to cherry-pick material from the 2006-7 survey. The exercise performed by Dr Taylor can never be more than an approximation and I consider that it is fairer to both parties for the court to stick to his chosen method.
31. Dr Taylor's method was to use chart data (by reference to ODL, ODN or LAT) and tidal data (based on tidal information in historic charts). These two sources of data resulted in differences which did not exceed one foot. He preferred tidal data where it was available, since tidal observations would have been made locally and were likely to be more accurate.
32. He accepted that chart data was sometimes based on surveys of different parts of the area conducted at different times, but he said that examination of the fair sheets sometimes showed corrections by hand which would be incorporated into the relevant chart. It might also be the case that a chart would incorporate material from a survey which was not publicly available.
33. His initial report did not use survey data. He explained in cross-examination that he was under the impression that the court would prefer chart data because it is easier to read. Although I do not regard that as a good reason for excluding survey data, I am satisfied that the exclusion of this material from his first report did not reveal any partiality or lack of expertise. He confirmed in cross-examination that the survey data was broadly consistent with the conclusions in his first report.
34. Using chart data and tidal data and making the necessary adjustments, he was able to plot the LAT line of Stubborn Sand and (where relevant) of each Relevant Sandbank on each of the charts going back to 1829. By examining the coastal contour line of LAT on each chart chronologically and comparing the LAT line derivable from each

chart with the LAT line derivable from the previous chart, he said that it was possible to discriminate between accretions which resulted in the joinder of Relevant Sandbanks to Stubborn Sand and accretions which did not have that consequence.

35. The method involved the following steps:

- i) Plotting on each chart the LAT line of Stubborn Sand derivable from the chart;
- ii) Superimposing the LAT line of the Area at the date of the previous chart; and
- iii) Plotting on each chart the LAT line of any Relevant Sandbank which had become attached to Stubborn Sand since the date of the previous chart.

36. The consequence of superimposing these lines on each chart is that the LAT line of Stubborn Sand at the date of the previous chart crosses the LAT line of the Relevant Sandbank at two points. This determines the width of the bridge between the Relevant Sandbank and Stubborn Sand. Where possible the boundary line across the bridge would be determined by evidence of the greatest depth; where this was not possible, it would follow the line of LAT of Stubborn Sand at the date of the previous chart. This would then become a fixed boundary across the bridge and would be carried forward to all future charts.

37. Dr Taylor's second report highlighted the three principal areas of difference between his boundary line and Mr Maloney's. These corresponded to Mr Maloney's third, fourth and fifth stretches. In each case he superimposed his proposed boundary and Mr Maloney's on historic charts going back to 1829 in order to show that Mr Maloney's boundary cut across Relevant Sandbanks but that his own did not.

38. He was cross-examined as to his reason for reverting to the previous LAT line of Stubborn Sand in cases where the line of joinder could not otherwise be established. He explained that the general trend was for channels separating sandbanks in this part of The Wash to become silted up and for the sandbanks to drift in a south-easterly direction. The siltation tended to occur on the side of the channel closest to the Relevant Sandbank. This meant that the deepest part of any channel between a Relevant Sandbank and Stubborn Sand tended to be on the landward side of the channel. For this reason, it was usually appropriate to draw the boundary line along the side of the channel that was closest to Stubborn Sand. He illustrated this by showing the line of enclosed pools between Sunk Sand and Stubborn Sand on the 2016 chart, where both experts agreed that the boundary line ran beyond the Stubborn Sand side of the pools. I accept this evidence, having regard to Dr Taylor's expertise in relation to tides.

39. He was asked about the area of joinder between Outer Ferrier Sand, South Sunk Sand and Stubborn Sand (Mr Maloney's fourth stretch). He looked at the enlargement of the rows of figures on the 1970 fair sheet, which he had not considered when writing his report. He said that this evidence was consistent with his conclusion, because the deepest soundings were on the landward side. He said that Mr Maloney was wrong to assume that South Sunk Sand had formed a bridge with Stubborn Sand at the "pinch" point. In his opinion South Sunk Sand joined with Outer Ferrier before they both joined Stubborn Sand, and they joined Stubborn Sand at a point further south than the point identified by Mr Maloney.

Discussion

40. Although it is impossible to plot the fixed parts of the boundary with total precision, the level of accuracy is likely to be higher, the more information that is available. In an ideal world the court would have been assisted by each expert using both charts and surveys. Nevertheless, if each expert has made appropriate adjustments, I would expect the differences between a boundary based on charts and a boundary based on surveys to be relatively small. Analysis of the results reached by each expert in the present case bears this out. The major differences were not caused by the use of one category of data instead of another, but by the assumptions which the experts were asked to make and by the way in which they interpreted the data.
41. I have already explained why I have rejected Mr Maloney's evidence in relation to the attachment of Ferrier Inner Middle Sand.
42. Dr Taylor's evidence is that, where there was historically a channel between a Relevant Sandbank and Stubborn Sand, siltation has tended to occur on the side of the channel that is closest to Stubborn Sand. Mr Davey submitted that it would be unfair to the Claimant to assume that all accretions in the area where a Relevant Sandbank met Stubborn Sand had been accretions to the Relevant Sandbank and not to Stubborn Sand, but Dr Taylor said that he was merely reflecting what happened in practice.
43. I accept Dr Taylor's evidence, having regard to the fact that he is a tidal expert, unlike Mr Maloney. It is corroborated by a number of matters, including:
- i) Dr Taylor's superimposition of his and Mr Maloney's boundary lines on historic charts (paragraph 37 above);
 - ii) The channel which formerly separated Sunk Sand from Stubborn Sand (paragraph 38 above);
 - iii) An enlargement of the 1917 survey, which shows that the channel between Ferrier Inner Middle Sand and Stubborn Sand was at its deepest on the Stubborn Sand side (paragraph 39 above); and
 - iv) The fact the line of LAT along Stubborn Sand north of the Relevant Sandbanks (i.e. beyond the Hunstanton lighthouse) has not fluctuated much since 1873, indicating that there has not been much accretion to Stubborn Sand.

Disposition

44. I therefore determine that the boundary is as follows, running from south to north:
- i) As agreed between the parties, it follows the line of Wolferton Creek as it was in 1872.

- ii) From the end of Wolferton Creek as it was in 1872 to the most northerly bridge which currently exists between Sunk Sand and Stubborn Sand (opposite Old Hunstanton) the boundary line is fixed along the line drawn by Dr Taylor (subject to the correction of the line between Outer Ferrier Sand and Stubborn Sand: paragraph 29 above).
 - iii) Moving northwards from that point, the boundary is the line of LAT from time to time.
45. When I circulated my judgment in draft, I asked that the experts agree a boundary line on a chart to be attached to the Order, distinguishing between those parts of the boundary which are fixed and those which follow the fluctuating line of LAT, and that the Order should also give the relevant OS coordinates. This has been done, and the chart will be attached to the Order. I will hear the parties as to the form of the Order.

