

JUDGMENT OF JAMES WOOD  
SITTING AS A JUDGE OF THE SUPREME COURT -  
IN THE CASE OF TEAL INLET LTD.  
AND  
TRUSTEES AND MEMBERS OF THE FALKLAND ISLANDS  
ANGLING CLUB

v

EXECUTORS OF THE ESTATE OF  
ADRIAN HENRY FREDERICK NEWMAN

This matter comes before the court as a consolidated action lead by cause SC/CIV/6/90 and commenced by the petition of Teal Inlet Ltd. being the First Petitioner in the petition of the 21st January 1991 in cause SC/CIV/1/91, and that of the Trustees and Members of the Falkland Islands Angling Club who are the Petitioners in the cause SC/CIV/6/90 dated the 28th May 1990, and the Second and joint Petitioners with Teal Inlet Ltd. in the cause 1 of 91.

In both actions the Respondent was named as Adrian Frederick Henry Newman, but following the death of Mr Newman and the subsequent order made by me on the 10th September 1992, the executrix of his estate, Pamela Rosemary Cheek Summers, was substituted in that capacity as respondent.

For brevity, I propose to adopt the descriptions which have arisen in the course of the proceedings, namely that of "Teal Inlet", "the Angling Club", and "Mr Newman".

As to the petition of the 28th May 1990, the matters relevant to that action apparently have become superceded by

other unrelated events, and all parties ask me to order that the prayers of that petition, and of the Answer dated the 20th September 1990 be dismissed with no order as to costs. I so order.

Also by the above mentioned order made on the 10th September 1992, leave was given to the Petitioners to amend the petition of the 21st of January 1991, and it is convenient to refer to that amended pleading simply as "the petition".

Teal Inlet is a limited company which was on the 22nd September 1986 declared by the Supreme Court under a petition presented under section 11 of the Land Ordinance 1949, to be the freehold owner of some 86,655 acres of land known as Teal Inlet Farm. Through that land flows a river known as the Arroyo Malo, and from the point at which it becomes tidal, the Malo Creek. The land which was the subject of that declaration includes all land and waters relevant to this present action.

The Angling Club was formerly known as the Falkland Islands Angling and Shooting Club, and there seems little doubt that since at least 1966, the club members have fished the waters of the Malo passing through Teal Inlet's property. At this stage I say no more about the basis on which such fishing took place.

In 1986, Teal Inlet invited tenders for the sale of part of its land and Mr Newman purchased the freehold of some 33,000

acres of land to the south of the Malo by way of a conveyance to him by Teal Inlet executed on the 26th September 1986 and registered with the Registrar General on the 10th of October 1986. For convenience I will refer to the property purchased by Mr Newman as "Riverview", as that was the name by which it was to become known.

It would appear that at some time, and it is not clear to me when that was, Mr Newman was also a member of the Angling Club, though not at the time of the execution of the conveyance, or of the lease referred to below.

By a lease executed and registered on the 21st of September 1986, Teal Inlet granted certain rights in respect of fishing on the Malo to the Angling Club.

Thus Teal Inlet was the lessor under the lease and the vendor under the conveyance. The Angling Club was the lessee under that lease. Mr Newman was the purchaser under the conveyance.

In essence, it is the effect of these two deeds, the lease and the conveyance, which forms the subject of this present case.

Before proceeding to deal with the matters in detail, I will dispose of one further point.

Though there is no reference to it in any pleadings, or in

other papers which were produced to the court prior to the hearing of this action, it is now evident that Mr Newman purchased Riverview with the aid of a mortgage granted by the Falkland Islands Development Corporation dated contemporaneously with the conveyance and, like that deed, registered on the 10th October 1986. It is clear that the Development Corporation ought to have been joined as party to this action, as their interest stood to be affected if certain of the prayers in the petition were to be granted. I am told however that following Mr Newman's death, the loan secured by the mortgage was repaid, and though no reconveyance or other discharge has been registered with the Registrar General, I am satisfied that the respondent is entitled to call for such, and that accordingly the Development Corporation's interest in the land is now no more than nominal. In these circumstances I see no reason to take any point regarding the non joinder of the Development Corporation. This view would appear to be supported by all parties to the action.

I now turn to the prayers of the petition. These are as follows:-

1. A declaration that upon the true construction of the Lease and the Conveyance the First Petitioner is entitled to convey all the land and fishing rights comprised within and referred to in the Lease to the Second Petitioners; and
2. In addition, a direction to the Registrar General

requiring her, subject to such conditions as the Court may see fit, to register any conveyance of the said land and fishing rights made by the First Petitioner to the Second Petitioners

3. Further and in the alternative, a declaration that upon the true construction of the Lease and the Conveyance the First Petitioner is entitled to convey the River to the Second Petitioners; and

4. In addition, a direction to the Registrar General requiring her, subject to such conditions as the Court may see fit, to register any conveyance of the River made by the First Petitioner to the Second Petitioner

5. Further and in the alternative, a declaration that the First Petitioner is entitled, subject to the rights of the Second Petitioners pursuant to the terms of the Lease, to exclusive fishing rights in the River insofar as the same is non-tidal

6. In the alternative, rectification of the Conveyance

7. That the Respondent do pay the costs of this suit

Whereas those of the Respondent in the Answer are

1. A declaration that on the true construction of the conveyance the Respondent's property stands to the centre of

the river-bed;

2. That he may be granted a just proportion of the rental paid by the Second Petitioners to the First Petitioner;

3. A declaration that on the true construction of the lease there is no estate contract binding upon the Respondent;

4. Further or in the alternative a declaration that specific performance is not an available remedy;

5. Costs.

In essence therefore, the issues are

1. What is the extent of the land conveyed in the conveyance
2. Is any part of that land subject to the terms of the lease
3. If so what are the terms of the lease insofar as they affect the conveyed land.

I now turn to the evidence. I have heard the testimony of Stuart Booth, the Company Secretary of Teal Inlet; Marjorie McPhee, clerk in the Post office; Sharon Halford, former Registrar General; and Stuart Wallace a trustee and officer of the Angling Club. These witnesses were called by the Petitioners. I have also admitted into evidence the affidavit sworn on the 29th January 1991 by John David Barton, the major shareholder in Teal Inlet. Again this affidavit was filed on behalf of the petitioners.

No witnesses were called by the Respondent, nor affidavits filed on its behalf.

The court did not have the benefit of hearing from Mrs McIlroy, the former Crown Solicitor who prepared the conveyance; I further assume that it had been intended that Mr Newman would have given oral evidence before the court, resulting in there being no affidavit prepared by him prior to his untimely death.

Having considered the evidence, I find the following facts to have proved to the necessary standard.

Since at least 1966, members of the Angling Club have had the benefit of the fishing rights at the Arroyo Malo, the exercise of which has involved passing over parts of Riverview adjacent to the river, including its tidal portion known as Malo Creek. Such rights included the erection of huts on the south bank for use by club members. Such benefits have arisen by way of an agreement or series of agreements between the Angling Club and the landowners.

At sometime in 1983 or 1984, and certainly by the time of the board meeting of Teal Inlet on the 13th March 1984, Teal Inlet had considered the sale of the Riverview land.

As a result of what Mr Booth described as an "amicable business relationship", Teal Inlet gave consideration to protecting the Angling Club's fishing rights after the sale

of Riverview.

Negotiations took place between Mr Barton for Teal Inlet, and among others, Mr Wallace for the Angling Club.

It is clear that the negotiations focused around fishing rights and access over land rather than land ownership. As Mr Wallace put it in his letter of the 21st March 1985 to Mr Barton "We are not very keen on becoming landowners, even on a minute scale". I attach significance to this remark as indicative of the intention of the club.

I do not believe that other than the fishing rights themselves, it was the intention of Teal Inlet to grant the Angling Club anything other than access rights in respect of the river banks and the right to site a hut on the South bank. In this context, the letter of the 20th July 1985 from Teal Inlet to the Angling Club, and the reply of the club dated the 13th September 1985 are significant.

On the 31st of July 1985 Teal Inlet caused an advertisement to be broadcast over the radio on three occasions, inviting tenders for the purchase of land "south of the Malo River" additionally the advertisement included the sentence "the offer does not include fishing rights in the Malo River".

Whilst there is no evidence to this effect, it seems unlikely that Mr Newman was not aware both of the proposed sale and of the reservation of the fishing rights prior to



the publication of the advertisement, but I make no finding as to this.

At some time in 1985 or 1986 ( precisely when, Mrs Halford was not clear) Mr Barton on behalf of Teal Inlet asked her in her then capacity of Registrar General to prepare a conveyance of Riverview. Regrettably it appears the letter of instruction cannot be found. In her evidence Mrs Halford indicated two matters of considerable significance, and I accept her evidence entirely as to these two points:-

First, that the northern boundary of Riverview was intended to be the river bank, or to put it another way, the southern edge of the river itself. As she put it in a somewhat forthright manner "If I had meant the middle of the river I would have said the middle of the river".

Second, the conveyance was intended to be subject to the terms of a lease to be prepared by Mrs McIlroy and which was to be executed prior to the execution of the conveyance.

As to whether the conveyance was to give effect to these intentions, I shall deal with below.

Before leaving Mrs Halford's evidence, I should add that she is not a lawyer, and I believe that the possible existence of any presumption as to the ownership of part of the river itself was beyond her contemplation. Having said that, I am satisfied that by including the words "and including" in the

phrase " south of and including the south bank of the Arroyo Malo River" Mrs Halford intended expressly to exclude any part of the river itself.

I am satisfied that Mr Newman read the conveyance at some stage prior to its execution, though of course his signature does not appear on it.

At some stage between September 1985 and February 1986, Mrs McIlroy was requested by the Angling Club to draw up a lease to which it was intended that the conveyance would be subject.

There are two drafts of that lease in existence, and I am satisfied that the earlier draft passed between the Angling Club and the Crown Solicitor, but not between the Angling Club and Teal Inlet. The difference between the two drafts, save for the insertion of the proposed duration, is the addition of a new clause at what was to become paragraph 4 of the second schedule to the final lease. I set it out in full:-

"The lessees shall have the right to the first option to purchase that part of the river which is the subject of the lease".

Mr Wallace said in evidence, as I recall, that the handwritten addition of the above originated from Mrs McIlroy, but at his suggestion.

I am satisfied that the draft lease, in its second and final form, was in the possession of Mr Barton in May 1986 at the latest. It would be a reasonable assumption that Teal Inlet and Mr Newman would at some time discuss the contents of the lease, and that Mrs Halford and Mrs McIlroy would discuss both the lease and the conveyance with one another. Regrettably there is no firm evidence one way or the other on either of these matters, though Mr Booth says he believes the former would have taken place, and Mr Barton, in his affidavit, says he seems to recall having discussed the lease with Mr Newman. In view of the finding of the court as to the effect of S9 of the Land Ordinance 1949, this point is not crucial.

I do not accept the evidence of Mr Wallace that it was his belief at that time that the conveyance would exclude a strip of land along the south bank of the river. This view is inconsistent with the weight of evidence to the contrary.

I turn to the affidavit of Mr Barton. In paragraph 7 there, reference is made to an intention to "grant a tenancy in respect of 20 yard strips of land abutting onto the north and south banks of the river and the area upon which the huts were located". In paragraph 9 however Mr Barton refers to having considered the draft lease in its final form, and says.

"the draft lease reflected the proposals which had been agreed by the board of the company with the exception that

there had been inserted ..... an option to purchase the River in favour of ... the club".

An examination of that draft of lease shows that it does not reflect the intention as stated in paragraph 7 of the affidavit to grant "a tenancy in respect of 20 yard strips" as the lease refers only to "the right of usage of 20 yards of land boarding the river". Whilst the wording of the minute of the board meeting of the 16th July 1985 is less than entirely clear, I accept Mr Barton's statement that he believed that the draft lease reflected the proposals agreed by the board of Teal Inlet - presumably as represented by the minute of the above meeting.

At paragraph 9, Mr Barton refers to "an option to purchase the river" this is elaborated at paragraph 11 (b). Mr Barton says he believed "the lease would contain an option for the trustees or officers of the club to purchase the land comprised within the lease". I do not accept that, at that time, Mr Barton believed the lease would include anything other than "rights" over the land on the south bank. If he had done so, it seems reasonable to suppose that the option to which he referred would have been expressed in more precise terms, for example, to be subject to the reservation of the grazing rights in favour of Riverview, referred to in paragraph 13 of his affidavit.

Thus it is my conclusion that Teal Inlet intended to convey to Mr Newman the land south of the southern edge of the

river, excluding the bed of the river or the fishing rights, but subject to the rights of access of the Angling Club and of the siting of the huts along the 20 yard strip.

I further conclude that Teal Inlet intended to retain the river including the fishing rights, so as to provide an income from the Angling Club under the terms of the proposed lease. The "option" was intended to relate to the retained land - namely the river itself, and to the ancillary rights of access and siting of the huts, in relation to the southern bank, and to which it was intended the conveyance was to be made subject.

I do not believe that at that time, consideration was given to the significance which such an arrangement might have in relation to the control of access to the public fishing rights in the tidal section, even though something in excess of 80% of the fish taken by the Angling club comes from the tidal waters.

I now turn to the law.

I have been referred to a number of cases, learned text books, Ordinances and Regulations made thereunder, and to a number of Equitable principles. I am most grateful to the advocates for providing the court with copies of the relevant parts of all of the above.

First I consider the extent of the land which was transferred under the terms of the conveyance. I must first consider the application of the principle of ownership *ad medium filum aquae* - namely whether or not the Riverview lands extend to the centre of the river. It is well established law that the ownership of the bank gives rise to a presumption of ownership to the centre of a river, and with it the ownership of the rights of fishing. This is a rebuttable presumption, the onus of establishing such rebuttal being upon those wishing to avoid the application of the presumption. I do not propose to refer to all of those authorities cited to the court, though I have considered them all.

The principles applicable to the presumption are set out clearly in *Micklethwait v Newlay Bridge Co Ltd* reported at 33 Ch.D. 133 - "on the grant of land adjoining a highway or a non navigable river, one half of the soil of the road or of the bed of the river is presumed to pass, unless there is something in the language of the deed, or in the nature of the subject matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption.". Further (Cotton, L. J.) "one may look at the surrounding circumstances, but only to see whether there were known to both parties facts existing at the time of the conveyance which showed that it was the intention of the vendor to do something as regards the half of the road or the half of the bed of the river which rendered it necessary that he should

retain in himself the soil which would otherwise pass to the purchaser of the piece of land abutting on the river or road. It is not sufficient that the circumstances which afterwards occur show that it is very injurious to the grantor that the conveyance should include half of the bed of the river or half of the soil of the road".

I now return to the wording of the conveyance. The land was said to comprise "all those parcels of land situate in East Falkland south of and including the south bank of the Arroyo Malo River...." Why was it drafted thus? Were the words "and including" mere tautology? I think not. I have considered in some detail the evidence before the court, and the intention of the parties as may be inferred from such evidence. I believe that it was the intention of Mrs Halford when drafting the conveyance to use those words not by way of inclusion (which would have been unnecessary) but by way of *exclusion* of the river. It has not been suggested that Mrs Halford acted other than in accordance with instructions given to her by Teal Inlet, and again, considering all of the evidence, I am satisfied that the vendors never intended to convey the soil of the river bed or indeed the fishing rights in the river. As Mr Kilmartin has submitted to me, rights of fishing can be severed from the ownership of the soil of the river bed, becoming an incorporeal hereditament. There is however no suggestion here that such right, which would be no more than a mere Profit, was intended to be conveyed to Mr Newman or indeed was conveyed at all.

I have been referred also to the somewhat unusual case of *Conservators of the Thames v Kent* [1916] Court of Appeal. There it was said (of the lower court) "the learned Judge took the view that the fact that in the same conveyance other soil was conveyed 'including the towpath' excluded the presumption in a case where the tow path was not expressly included, but was stated as a boundary and that in any case the presumption would only extend to half the soil of the towpath. I am unable to take that view". It is my own view that the facts of that case are different from the matter before me in that in the Thames case the land was boarded by two ways, the tow path and the river. Here there is only a river and the words of the conveyance have to be construed in that context.

Before leaving this subject I will deal briefly with Mr Titterington's submission that the wording in the conveyance "South of and including the Arroyo Malo River..." serves to exclude land south of the tidal waters known as the Malo Creek. I say no more than that I reject his interpretation for the reasons which appear below in the following section of this judgement.

I now deal with the question of whether or not Mr Newman took the conveyance of Riverview subject to the terms of the lease. I am satisfied that he did, for the following reasons.



The lease was executed and registered on the 25th of September 1986. The conveyance was executed on the 26th September 1986, the following day, and registered on the 10th of October 1986. The conveyance, at paragraph (1) (ii) recited that the vendor was seized of the property thereby conveyed subject to the lease ...."whereby part of the said property together with other property was demised to the Falkland Island Angling Club for the term of ten years from the 1st September 1986". The conveyance concluded with the words ...."to hold the same unto the purchaser in fee simple subject to the aforementioned licence and lease and the covenants on the part of the vendor and the conditions therein contained so far as they relate to the property hereby conveyed". I take the view that those words would have been sufficient to have the effect of subjecting the conveyance to the terms of the lease, but the matter is taken further by the provisions of sections 9 and 47 of the Land Ordinance 1949. I do not accept Mr Kilmartin's submission that the principle of constructive notice is inapplicable under the laws of the Falkland Islands. I am satisfied that where a lease is duly executed and registered within thirty days thereafter, any conveyance of the reversion which subsequently occurs will be subject to its terms. An intending purchaser who does not make a search under section 47 does so at his own risk.

Next I turn to the terms of the lease. What were these terms to which the conveyance was subject?

Having concluded that the conveyance did not effect a transfer of the soil of the river bed *ad medium filum aquae* and further that there had been no transfer of an incorporeal fishery to Mr Newman, it follows that the only terms of the lease to which the conveyance might be subject could be those affecting a line to the south of the southern edge of the river - in practice, the river bank.

I do not accept Mr Titterington's submission, admittedly in a different context, that the parties ever intended there to be a distinction between "the river" and "the creek" insofar as land was described as bordering the river. Whilst it is settled law that only the non-tidal parts of a river are capable of supporting a private fishery in the absence of any grant by the Crown in respect of the tidal parts, I do not believe that the parties had that in mind when referring to the bank of the river. I believe the word to be capable of conveying the meaning of a watercourse for this purpose. This view must be supported by the terms of the lease which have the effect of referring to the Angling Club's huts being situated on the land bordering the river though strictly they adjoin the tidal waters known as the Malo Creek.

Thus, to what rights did the lease subject the river bank under the terms of the conveyance? Excluding for the moment

consideration of the "option" the effect of the lease is quite clear, and reflects what I have found to be the intention of both Teal Inlet and the Angling Club from the evidence before me. After referring to the right to take fish, the wording of the lease goes on "...together with the right of usage of 20 (twenty) yards of the land bordering the said River including access to 3 (three) river crossings and occupation of the buildings being the property of the tenants". It seems to me that this must grant no more than an easement for the benefit of the river land. That easement is expressed to be the use of the land by implication for the sole purpose of taking fish from the river and the right to the "occupation of the buildings being the property of" the Angling Club. Such rights were expressed to be for a period of ten years from the 1st September 1986. Thus far, it is my view that Mr Newman took the land subject to such rights until the expiration of the lease.

I now turn to the option clause.

The wording of this clause is to say the least unfortunate. Is it an option at all, or merely a right of pre-emption? In my view, it must be the former. The lease was executed on the 25th September 1986, and it was within the contemplation of all of the parties that the conveyance of the Riverview land would be executed the following day. It cannot have been the intention of the parties to create a right of pre-emption which could only last for one day.

I must now consider what the option comprised.

Again, the wording is not helpful - ".....first option to purchase that part of the river which is the subject to this lease." Could this mean simply the soil of the river and the right of fishery arising from it? I think not. It would seem inconceivable that the parties to the lease would contemplate the bringing together of a lease of the fishery and access to it over the south bank land, to go on to agree an option to buy the river, as it were, for all time, whilst limiting access to it from the south to the residue of the term of the lease. I can only conclude that the words "that part of the river which is the subject to this lease" were attempting to delineate the east and west extremities of the effect of the option, and that the particular words "the river" intended to include what the lease had earlier termed "the right of usage" of the 20 yard strip on the southern bank and the right to occupy the Angling Clubs huts.

Having deduced this meaning, I must deal with the submission of Mr Kilmartin that the option would be void for uncertainty. As he rightly says, the clause is not limited as to time, nor indeed as to price. Whilst I find this submission attractive, I considered there is a danger in importing the concept of uncertainty from English law into the cultural and social traditions of the Falkland Islands. In the light of all of the evidence, it is my view that the parties intended that for the term of the lease, namely for

ten years from the 1st September 1986, the Angling Club would have a right of purchase at a sum agreed between the parties as representing a fair market sum. I do not believe the parties contemplated the difficulty which this might well give rise to following the separation of the reversion into the ownership of Teal Inlet and Mr Newman.

I find therefore that as a matter of law the conveyance of the Riverview land was subject to the abovementioned rights in favour of the Angling Club including an option to purchase those rights in the manner I have described above.

I now turn to the prayers of the parties contained in the Petition and Answer. First, the Petition. Where appropriate I refer to the numbering adopted in that document. I grant a declaration that the First Petitioner is entitled to convey to the Second Petitioner the land comprising the soil of the river together with the exclusive fishing rights in the river is so far as the same is none tidal. Thus I grant the prayers numbered 5 and 3. It is inherent in the making of such order that the conveyance of any such land and rights between the First and Second Petitioners is required to be registered with the Registrar General pursuant to the provisions of section 9 of the Land Ordinance. To that extent the prayer numbered 4 would seem to be unnecessary in the light of my decision as to the extent of the Riverview land, though I will hear submissions on this point.

The court has been asked to rectify the conveyance so as to exclude the river bank, but as will be apparent from the findings of the court above, I am not prepared to do so. As I have taken the view that the Respondent is bound by the terms of the lease insofar as it refers to the rights over the southern bank, and further an option to purchase in respect of those rights, it would appear that whilst the Second Petitioner is entitled to call upon the Respondent to convey those rights to it the court clearly cannot give a declaration that the *First Petitioner* is entitled to convey those rights to the second petitioner. In order to avoid the risk of further litigation, it may well be that the parties would invite the court to make the appropriate declaration with regard to this.

In the light of the findings of the court as above, a rectification of the conveyance in the terms sought in the prayer numbered six is inappropriate, and is refused.

It may well be however that for the avoidance of doubt in the future, some rectification of the conveyance is appropriate so as to state clearly the extent of the respective parties' interests which the court has had to deduce in the light of circumstances, some of which may not be apparent to any successor in title to the Respondent. Again I will hear submissions on this as in the absence of consent I do not believe the court has power to make such an order.

It follows from the above that in this context I need not consider the submission by Mr Henderson as to the effect of section 11 of the Land Ordinance 1949 save only that I do not accept that the Equitable principle of rectification is extinguished in favour of the application of section 11 of the Land Ordinance, or, as submitted by Mr Kilmartin, by any delay in this action.

I turn to the Answer. It follows necessarily from the matters referred to above that a declaration that the Respondent's property stands to the centre of the river bed is refused.

I find that the Respondent is entitled to a proportion of the rental paid by the Second Petitioner to the First Petitioner insofar as it relates to what had been termed "rights of usage" in respect of the land on the south bank. I believe the parties to the conveyance and to the lease did not apply their minds to this issue, and that accordingly rectification of the conveyance would not be available to deal with this point.

The declaration in the terms of the prayer numbered three is refused by reason of the matters above.

I invite the parties to address the court on the issue of costs.

 27:1:92

TEAL INLET LTD (1) ANGLING CLUB (2) ESTATE NEWMAN (3)

SC/CIV/6/90

SECOND PETITIONERS LIST OF CASES

1. Peter v Kendall (1827) 6 B + C 703.
2. Lord v Sydney Comns (1859) 12 MOO PCC 473.
3. Micklethwait v Newlay Bridge Co. (1886) 33 CLD 133 CA.
4. Duke of Devonshire v Pattinson (1887) 20 QBD 263 CA.
5. Browne v Marquis of Sligo (1859) 10 1 CL R 1.
6. Hindson Ashby [1896] 2 CL 1.
7. Marshall v Ulleswater Steam Navigation Co (1863) 3 B + S 732 + (1865) B + S 570 Ex Ch.
8. A-G v Emerson [1891] AC 649.
9. Pages 254, 255 and 258 - 268 Vol 18 Halsbury's Laws (4th Ed).
10. Conservators of the Thames v Kent [1918] 2 KB 272
11. s 11 and Form 6 of Land Ordinance
12. Wright v Dean [1948] 2 all ER 415
13. paras 352-373 Chitty on Contracts