CA on appeal from Kingston Upon Hull CC (HHJ Dowse) before Tuckey LJ; Arden LJ; Lawrence Collins LJ. 15th February 2007.

Lord Justice Tuckey:

1. This is a dispute between neighbours about the ownership of a wall standing between their houses in the small market town of Beverley in East Yorkshire. Resolution of this dispute is of no great practical value to either party but it took five days to try in the county court and is now before the court of appeal. The costs of this exercise are out of all proportion to what is at stake: we were told that to date they total over £260,000 excluding VAT.

2. The case was tried by His Honour Judge Dowse who found that the wall belonged to the defendants, Mr & Mrs Wilson, either because they had paper title to it or because title had been acquired by adverse possession. The claimant, Mr Palfrey, was ordered to pay the defendants' costs of the proceedings and on an indemnity basis from 24 February 2004 because at that time he had unreasonably refused the defendants' offer that the wall should be declared a party wall. Permission to appeal from the judge's decision and his order for costs was refused by Jacob LJ on paper, but when the application was renewed orally by Mr Cameron, who has appeared throughout for the claimant, Jacob and Maurice Kay LJJ were persuaded to grant permission, although apparently they gave no reasons for doing so. The appeal on costs was referred to the court hearing the substantive appeal without permission being granted.

3. We heard the appeal on 2 February 2007. At the beginning of the hearing we asked to hear the argument about adverse possession first. The appeal was against the judge's order, not the judgment; if he was right about adverse possession his order would be upheld whether or not he was right about the more complicated question of paper title.

4. Mr Hartley for the defendants welcomed this course and had half suggested it in his skeleton argument. Mr Cameron did not object. At the end of the argument, which took the best part of the day estimated for the hearing of the whole appeal, we said that we did not wish to hear argument on the paper title point and would hand down our reserved judgment in due course. We then invited Mr Cameron to address us on the costs appeal. As he had foreshadowed in his skeleton argument Mr Cameron submitted that we should not and could not determine that appeal without first deciding the merits of the paper title point. He said that a substantial part of the costs had been incurred on this point and if the judge was wrong about it the claimant was entitled to have an order for issue costs in his favour irrespective of the outcome of his appeal on the adverse possession point. It was not appropriate, Mr Cameron submitted, that this should be regarded as one of vicissitudes of litigation. Costs often have a greater financial significance for the parties than the decision on the substance of the dispute and this was such a case. To deny the claimant his right to be heard on the paper title point would be a breach of his rights under article 6, and article 1 of the first protocol, of the ECHR.

5. We did not accept these bold submissions, made even bolder by the fact that they were made in this case upon which everyone concerned has already spent a disproportionate amount of time and money. Judicial time is also something which has to be taken into account. Almost every day of the week divisions of this court take a course such as we have in the interest of saving expense and dealing with cases proportionately and expeditiously. This is a condign case for such treatment. If an appellant has to succeed on two grounds in order to upset the order under appeal he takes the risk that this court will uphold the decision on one of those grounds and decline to consider the other. That is what the CPR permits and encourages. Any ECHR challenge is in effect to the rules themselves. The claimant's rights to do not compel us to embark on a further hearing of at least one day to determine a point which we have decided is academic to the outcome of his appeal. As we have said, his appeal is against the order made by the judge which says nothing about title but simply declares the line of the boundary and that the wall is "the property of the defendants".

6. I proceed therefore to consider adverse possession on the assumption, but without deciding, that the claimant did have paper title to the wall. As we were only considering adverse possession it is not necessary to set out the conveyancing history or background to the dispute in any great detail but the relevant background is as follows.

7. The claimant's house, "Stables", is built on the site of what had been the stables and other outbuildings of the Dog and Duck public house in Dog and Duck Lane. The land on which his house is built was conveyed to the claimant in 1985 by the brewery, Courage, which then owned it. Its eastern boundary is defined by the line of what had been the back wall of a stable block. This wall had been included in a conveyance of the pub and its outbuildings dated 17 August 1896. The claimant's case was that this wall was the disputed wall so was included in the conveyance to him.

8. The defendants' property, Tymperon House, lies to the east of the wall and has frontages to Dog and Duck Lane and Walkergate. It was their case that the disputed wall was built on their land as a high garden wall to mark its western boundary. Their house was built in about 1731. They had acquired the property in 1998 following the death of the previous owner, Mr Heelas, who had owned and occupied it since 1954.

9. The disputed wall is about 22 yards long and 9 inches wide and is built of brick. It now stands about 10 foot 6 inches high. After building his house close to the wall in the early 1990s the claimant built a conservatory behind his house along the length of but not attached to the rest of the wall. On the defendants' side the wall is supported by eight piers which are undoubtedly built on their land. At various times outbuildings of various kinds have been built against the wall and its height has been increased. The dispute was precipitated by the fact that

in May 2002 the defendants started to build a new store and garage against the wall which involved raising its height above the claimant's conservatory by several courses of brickwork to which he objected.

10. So with that brief overview of the history and geography I can turn to the primary facts found by the judge or shown by the documents which we have seen upon which the dispute about adverse possession turns. Chronologically they are as follows.

(1) Throughout the time of his ownership Mr Heelas had done all that needed to be done to maintain the wall.

(2) In 1964 a substantial part of the wall collapsed as a result of damage by a bonfire and severe weather. Mr Heelas, who was a builder, put up a temporary fence and then rebuilt the wall. There was no evidence that Courage had objected to the collapse or the temporary fence or taken any interest in the rebuilding. Mr Cameron submitted that the Judge found that the rebuilding had not been completed until 1976 and that this was a fundamental misconception of the evidence on his part. Although he could have expressed himself more clearly, I do not think the judge could possibly have meant this. All he was saying was that the repair had taken place during this period. The evidence from Mr Heelas' son was that the rebuilding had taken place during 1964.

(3) At some time before 1976 Mr Heelas had inserted a damp proof course into the wall to protect a building (which appears to have been a store room) fixed to the wall. Mr Cameron submits that there was no evidence to support this finding. I do not agree. A relatively recent damp proof course was found on the defendants' side of the wall and it was open to the Judge to infer that it had been inserted by Mr Heelas.

(4) On 19 October 1979 Mr Heelas applied for planning permission for work which included extending the height of the wall over about half of its length from 7 foot 6 inches to 10 foot 6 inches and attaching the roof of a substantial new car port to this part of the wall. He certified that no-one else owned any part of the land to which his application related. Planning permission was granted and the work was carried out by 1981.

(5) In pre-contract enquiries between Courage and the claimant in March 1985 Courage was asked to whom the boundary walls belonged, to which it replied "there is no information" and if it maintained or regarded as its responsibility any of the boundary walls, to which it replied "not to the vendor's knowledge".

(6) When the claimant applied for planning permission to build his house in June 1985 Mr Heelas wrote to the chief planning officer saying:

> Although I have no objection to the building of a dwelling as proposed, I am very concerned that excavation so close to my boundary wall will cause substantial damage to that wall. You will appreciate the wall in question is very old, and will have the minimum of foundations.

(7) In 1985 the claimant asked Mr Heelas for permission to key in part of his new house to the wall. Mr Heelas refused and the claimant did not do so.

(8) Again, in about 1990 the claimant asked for permission to key his new conservatory into the wall, but Mr Heelas refused and the claimant did not do so.

(9) The claimant denied that he had asked for permission on the two occasions referred to above, but the judge rejected his evidence about this and his assertion that he believed that he was the owner of the wall.

(10) The claimant had repointed his side of the wall adjacent to the side of his new house in 1986 and attached a wire mesh to the wall once the house was finished to stop debris falling down the gap. He had repointed the rest of his side of the wall in about 1990 and although his conservatory was free standing he had inserted some sort of infill between the wall and his conservatory once it had been built. There was no evidence that these things had been done to the knowledge or with the consent of Mr Heelas.

(11) Mr Heelas had done everything which could be expected of him to assert exclusivity and ownership.

11. The judge was referred to *Prudential Assurance Limited v Waterloo Real Estate Inc.* [1999] 2 EGLR 85 and the five conditions necessary to establish a claim to adverse possession which were approved in that case. He was satisfied that the defendants had established possession of the wall from 1976 at the latest or, if he was wrong about that, from 1979 when Mr Heelas signed the certificate as part of his application for planning permission, or 1981 when the work was completed. Secondly, the judge found that Mr Heelas' possession was exclusive because he had dealt with the wall as an occupying owner might be expected to have dealt with it and no-one else had done so. Thirdly, if he was not in fact the owner of the wall, Mr Heelas had dispossessed the paper owner. Fourthly, Mr Heelas had intended to possess the wall: the way he dealt with it demonstrated an intention to possess and he had made it clear to all the world. It followed that the possession was adverse in the statutory sense (Limitation Act 1980: sections 15(1), 17 and Schedule 1 paras. 1 and 8 (1)).

12. I have already dealt with Mr Cameron's challenges to the judge's findings of primary fact. He does not quarrel with the Judge's approach based upon the *Prudential Assurance* case, but submits that the primary facts to which I have referred did not meet the conditions required. They can be summarised as (1) having possession (2) which must be exclusive (3) and dispossessed the paper owner (4) with the intention to possess (5) adversely in the statutory sense.

13. Mr Cameron submits that rebuilding the wall in 1964 could not amount to possession. All Mr Heelas was doing was repairing the wall which his bonfire had damaged. Even if it did amount to possession, it was not of the whole

wall and there was no evidence that it was exclusive. Courage's lack of response to what had happened did not justify any inference that it had been dispossessed. Mr Heelas' certificate of ownership in 1979 was equivocal as to intention and did not make anything plain to the world. There was in truth no basis whatsoever for finding that any of the five conditions were met before the works which were carried out in 1981.

14. As to the 1981 works Mr Cameron again submits that none of what happened amounted to the taking of possession. The works only related to a limited length of the wall and as a matter of law the raising of a wall is not an act of possession. What happened was equivocal because it could relate to the assertion of an enlarged easement of support from the wall for the buildings which were attached to it. Moreover any possession of the wall after 1981 was not exclusive because of what the claimant did to it. The claimant's state of mind deduced from his requests for permission to key into the wall was not relevant unless exclusive possession and dispossession had been established which they had not.

15. Persistently and skilfully though these arguments were put, I do not accept them. The judge's task was to consider the whole of the evidence and evaluate it with a view to deciding whether the defendants had satisfied the five *Prudential* conditions. A holistic approach was required. He was not required to fine-slice each and every event and assess its individual merit. At the end of the day the findings he had to make were the findings of fact based upon his evaluation of the primary facts to which I have referred. In a case of this kind, where a judge has heard evidence and argument over five days and visited the site, this court should be and is extremely reluctant to disturb such findings. Put shortly I would dismiss the appeal simply upon the basis that there was clearly evidence to justify the judge's conclusions and there are no grounds for us to substitute conclusions of our own.

16. I will however deal with some of Mr Cameron's detailed arguments in deference to them. I think the context in which the relevant events occurred is important. Mr Heelas (and his son) obviously believed the wall belonged to them. There was every indication that Courage did so too. When the claimant came on the scene, so did he, as the judge's findings make clear. Throughout the period of his ownership and occupation Mr Heelas had done all that was needed to maintain the whole of the wall. No-one else to his knowledge had. Looked at in this context the repairing of the wall in 1964, the insertion of a damp proof course, the application for planning permission in 1979 and the work carried out in 1981 are all of a piece and can be seen as unequivocal acts of possession dispossessing the paper owner. It was open to the judge to infer dispossession from Courage's lack of interest in and knowledge of the wall.

17. It seems to me that on all the evidence the judge would have been justified in concluding that there had been adverse possession since 1964 in which case title had been acquired before the claimant came on the scene. Taking the judge's later date or dates I do not think that what the claimant did casts any doubt upon whether Mr Heelas' possession was exclusive. What he did was trivial, unknown to Mr Heelas and against the background of his failed attempts to obtain permission to key into the wall and his not believing that he owned it.

18. Taken in isolation one can see the force in the submission that merely repairing someone else's wall which one has damaged cannot amount to possession or dispossession. Taken in context however it obviously can.

19. In support of his submission that raising the height of someone else's wall was not capable of being an act of possession Mr Cameron relied on a decision of Chitty J in *Waddington v Naylor* (1889) 60 LT 480. That was a case in which the plaintiff's claim for trespass was based on his assertion that he owned part of a wall which he had built on top of a wall which admittedly belonged to the defendant. The judge dismissed the claim because he held as a matter of law that a person who builds on another's wall in such circumstances makes a gift of what he has done, irrespective of whether he has the latter's permission. That may be so, but I do not think it follows that one must ignore such an act for the purpose of considering whether it is an act of possession over not just part but the whole of a wall. It self-evidently is if it is not done with the permission of the true owner. It will not of itself confer ownership upon the builder, but it must be capable of supporting a claim that he has asserted rights of possession over the wall.

20. Of course a particular act may be just as referable to the exercise of an easement as to an act of possession. If Mr Heelas had merely attached a bigger or better shed onto the existing wall that might have been an equivocal act in this case. But raising the wall by 3 feet was not such an act. It was an unequivocal act of ownership over the wall.

21. For these reasons I would dismiss the substantive appeal and confirm the judge's order.

The Costs Appeal

22. Mr Cameron challenges the whole of the judge's order. The relevant events for considering this part of the appeal are as follows.

23. The proceedings started in November 2003. After various unsuccessful attempts to settle, on 24 February 2004 the defendants, through their solicitors, made a Part 36 offer that they would agree to the wall being declared a party wall (the consequences of which were spelt out) and that each party should bear its own costs. The claimant's solicitors rejected this offer on 19 March 2004 and made a counter-offer requiring the defendants to modify the works which they had already carried out by reducing the height of the wall and to accept that the claimant had title to it. Understandably this counter offer was rejected. The trial was fixed to start on 15 December 2004. On 11 October 2004 the claimant repeated his earlier counter-offer with the added requirement that the defendants should pay his costs from the time it had first been made. As an alternative he offered mediation as a last attempt to achieve a settlement. These offers were rejected on 2 November on the

grounds that the claimant had already rejected reasonable offers, the proximity of the trial and the likely costs of formal mediation.

24. In a supplementary judgment the judge recited the correspondence to which I have referred and said: *The claimant had opportunities to settle this case on sensible and (in the light of the judgment favourable) terms. He chose to fight it out and in the event has not succeeded. I believe both sides in this contest have been dogged, but looking back the offers made by the defendants were constructive and they cannot be criticised for not acceding to mediation at such a late stage in the proceedings.*

He went on to reject Mr Cameron's submission that a party wall agreement might have created problems of its own and then decided that it was appropriate to order indemnity costs from the time when the offer of such an agreement had been made.

25. As I have already said the claimant's principal argument was that the costs order was wrong because the judge came to the wrong conclusion on title. For reasons I have already given we have not found it necessary to hear the appeal on that question. But the claimant would always have known that even if he won on title he could lose on adverse possession and the question as to whether to make an order for issue costs in those circumstances would be in the discretion of the judge. In exercising this discretion the judge would have been able to take into account the offer made by the defendants that they would agree to the wall being declared a party wall. He rightly took the view that this was a sensible offer. It would still have been a sensible offer if he had found in favour of the claimant on the question of title and so I think it is extremely unlikely that he would have made any different order in that event.

26. Mr Cameron submitted that the judge had failed to give proper weight to the fact that the defendants had rejected an offer of mediation at a time when it was still possible before trial. But this point and other points made in his skeleton argument do not come anywhere near to providing this court with any ground for interfering with the judge's exercise of discretion. A trial judge has a very wide discretion as to costs and there is no arguable basis for saying that the judge exercised it incorrectly in this case. The appellant cannot show that the judge erred in principle in his conclusion that the offer made by the defendants was in all the circumstances of this case a sensible offer.

27. For these reasons I would refuse the claimant's application for permission to appeal the judge's order for costs.

Lady Justice Arden: I agree.

Lord Justice Collins: I also agree.

Neil CAMERON (instructed by MESSRS GOSSCHALKS) for the Appellant
Timothy HARTLEY (instructed by MESSRS HAMERS) for the Respondents