



13 April 2016

PRESS SUMMARY

Lynn Shellfish Ltd and others (Appellants) v Loose and another (Respondents) [2016] UKSC 14
On appeal from: [2014] EWCA Civ 846

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEAL

The Le Strange family (“the Estate”) is the owner of a substantial amount of land adjoining the east side of the foreshore (“the Foreshore”) on the east side of the Wash, on the west coast of Norfolk (“the Wash”), as well as holding an exclusive right to take cockles and mussels from the Foreshore (“the Right”). In 1970, the Estate granted a lease of the Right to Mr John Loose, who is still holding over under that lease.

The appellants operate fishing boats out of King’s Lynn in Norfolk. During the summer of 2007, 13 of the appellants’ boats fished for cockles in locations claimed by the respondents to be within the area of the exclusive fishery vested in the Estate (“the Area”). Mr Loose and the Estate (“the respondents”) subsequently brought a claim in the Chancery Division of the High Court, alleging that the appellants had infringed the Right.

The parties accepted that the Estate is the owner by prescription of the Right, but were in dispute as to two issues relating to the extent of the Area. The first issue was which of the low water measurements should determine the location of the western, seaward, boundary of the Area. Four different types of low water measurement were contended for: (i) mean low tide; (ii) mean spring low tide; (iii) mean neap low tide; and (iv) the lowest astronomical tide, the most extreme neap low water, which occurs every 18.6 years. At first instance, the High Court held that the mean spring low water represented the location of the western, seaward boundary of the Area; whereas the Court of Appeal concluded that it was the lowest astronomical tide mark.

The second issue between the parties was whether the Right extended to sandbanks which, having been previously separated from the Foreshore, became attached to it as a result of the gradual silting up of channels separating the banks and the Foreshore. The appellants contended that the respondents must establish that the Right extended to the relevant sandbanks before they became part of the foreshore; whereas the respondents contended that either the Right applied to the Foreshore as it was constituted from time to time, or, by the doctrine of accretion, the sandbanks were treated in law as added to the Area when it became attached to the Foreshore. The High Court and the Court of Appeal accepted both the respondents’ arguments on this issue.

JUDGMENT

The Supreme Court unanimously (i) dismisses the appeal regarding the seaward boundary, finding that the boundary is determined by the lowest astronomical tide, and (ii) allows the appeal in relation to the second issue, holding that the Estate’s right to fish does not extend to the sandbanks which attach to the Foreshore as and when they become so attached. Lord Neuberger and Lord Carnwath give a joint judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

There are two important principles which apply to both issues. The first principle is that unless it is taken away from them, the public have the right to gather fish and shellfish from the foreshore and since Magna Carta it has not been possible for the Crown, the owner of the foreshore, to grant a private fishery (which

ousts the public right) [32-35]. The second principle is that, in order to establish that he has obtained a fishery (as with any right) by prescription, a person must establish that he has physically enjoyed the fishery “as of right” for the requisite period, so the extent of the right must be determined by the extent of the actual or probable use in the past, not by inquiring into the mind of the notional grantor [44-47].

The first issue: the seaward boundary

Resolving the first issue involves answering two questions. The first is whether the western boundary is fixed or whether it fluctuates with the relevant low mark, because, over time, the low water marks, marking the edge of the sea at low water had moved further seaward [57]. The Court concludes that it is a fluctuating boundary. The evidence clearly establishes that during the substantial period during which the prescriptive Right to take shellfish from the Foreshore was exercised, the only way in which the shellfish were gathered was by individuals walking from the land when the tide was out [58]. In those circumstances, it was very likely that the putative Right would have been exercised over an area which was defined or limited by a shifting low tide mark [58]. It is not as if the existence of such a fluctuating right would have detrimentally affected any other interests of any significant value [60].

The second question is which of the suggested low water marks is the appropriate boundary [57]. The Court concludes that the most satisfactory low water mark is the lowest astronomical tide, as this means that all parts of the Foreshore which are at any time uncovered by the sea are included in the Area, whereas any other selection involves some of those parts being excluded from the Area [64].

The second issue: the previously separated sandbanks

As to the respondents’ first argument, the evidence does not establish that the Estate’s prescriptive Right extends to sandbanks which were not previously joined to the Foreshore as and when they become so attached [70].

There are two distinctions between the change in the Foreshore and the fluctuation of the low tide mark boundary. First, (while the silting up of channels which leads to the attachment is gradual), the actual attachment of sandbanks to the Foreshore itself will happen at one moment, whereas the shifting of the low tide mark will normally be gradual [71].

Second, and of particular significance, the public will have had the right to take fish, including shellfish, from such a sandbank. Unlike the position in relation to the fluctuating low tide mark, and notwithstanding the respondents’ contention to the contrary, it is by no means plain or obvious that, once a sandbank became attached to the Foreshore, the Estate would have exercised an exclusive Right to take shellfish from that former sandbank [72-73]. In fact, it appears unlikely that local fisherman would have been prepared to accept the Estate maintaining its exclusive Right to fish over former sandbanks which became attached to the Foreshore [73]. The fact that it is common ground between the parties that one of the sandbanks, Stubborn Sand, falls within the Area, is not inconsistent with the Court’s conclusion [74].

As to the Respondents’ second argument, based on accretion, the doctrine of accretion is concerned with gradual and imperceptible changes in a boundary; in the present case, however, there is a specific moment in time when the whole of a sandbank becomes attached to the Foreshore [78]. There is a difference in kind between the gradual extension of one recognised bank and the joining up of two formerly distinct banks. There is no room for the doctrine of accretion in relation to the sandbanks which became connected to the foreshore in the present case [80].

Conclusion

The Court would only be able to define the precise extent of the Area if the parties were able to agree it following receipt of the Court’s judgment. In the absence of agreement, the Court considers that the best course of action would be to remit the proceedings to the Chancery Division to enable the precise extent of the Area to be identified [83].

References in square brackets are to paragraphs in the judgment

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>