[2017] UKFTT 0058 (PC)

REF/2015/0528

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

David Welford, Diane Caroline Welford and Adriane Diana Welford

APPLICANT(S)

and

David John Graham and Elizabeth Jane Graham

RESPONDENT(S)

Property Address: Land and Buildings lying to the west of Cliff Terrace, Marske-by-the-Sea
Title Number: CE192088

Sitting at: Darlington County Court
On: Thursday 5 May 2016

Applicant Representation: Punch Robson
Respondent Representation: Messrs Macks Solicitors

DECISION

KEYWORDS – PRESCRIPTION – LOST MODERN GRANT - RIGHT OF WAY – ABSENCE OF PERMISSION

Cases referred to:
Tehidy Minerals Lrd v Norman [1971] 2 QB 528

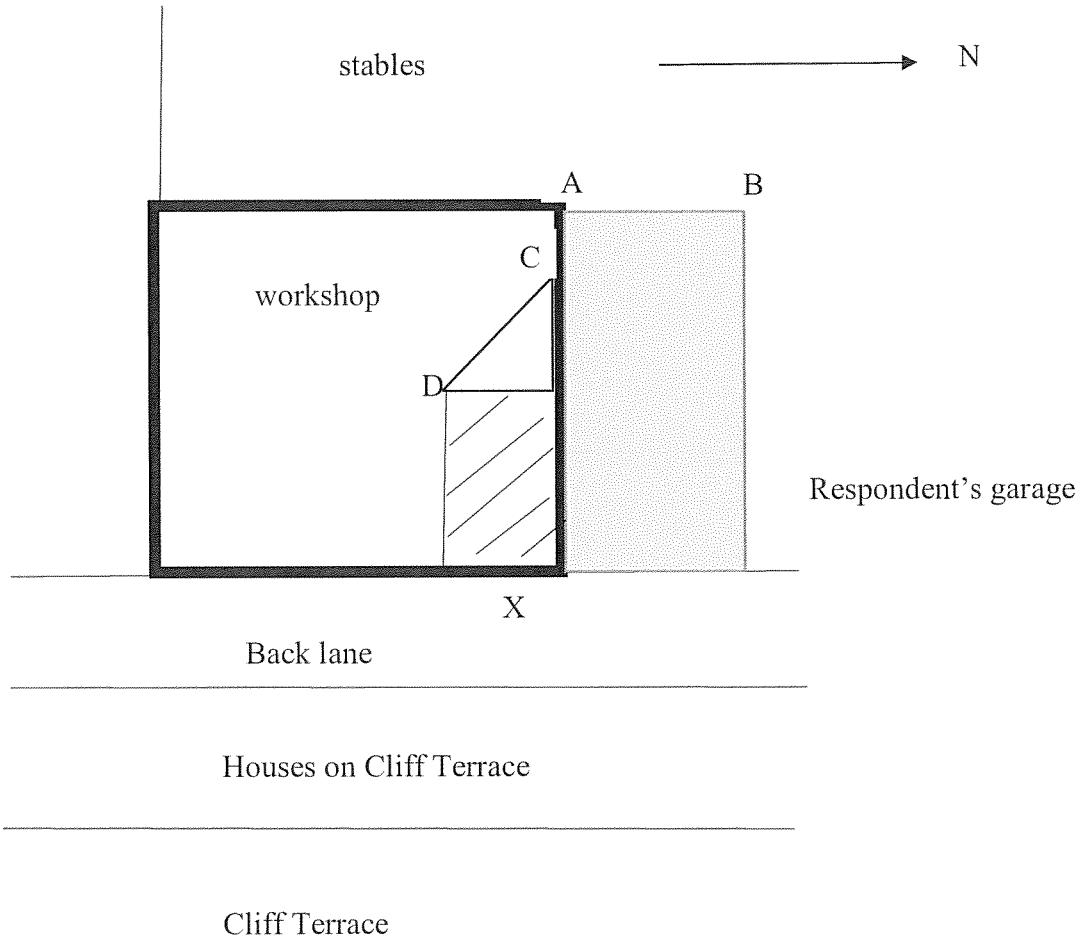
Introduction

1. The Applicants are the registered proprietors of a building on West Cliff Terrace, Marske-by-the-sea, registered at HM Land Registry under title number CE192088. It used to be a joinery workshop, and for brevity I shall refer to it as "the workshop". The Applicants have applied for the registration of the benefit of an easement appurtenant to the workshop, and for that easement to be noted as a burden on the adjacent land registered under title number CE214143. The easement they claim is a right of way with or without vehicles for access to and egress from the rear of the workshop, acquired by the previous owners by prescription before 2002.
2. The Respondents, Mr and Mrs Graham, objected to the application for the registration of an easement, and in due course the application was referred to the First-tier Tribunal. I conducted a hearing on 5 May 2016 at Darlington Magistrates' Court, following a site visit on 4 May attended by the parties and their representatives.
3. At the hearing the Applicants were represented by Mr Henry Stevens of counsel and the Respondents by Mr Stephen Fletcher of counsel; I am grateful to both for their very helpful arguments.
4. I have directed the Chief Land Registrar to cancel the Applicants' application, and I now give my reasons for that direction. I begin by describing the land and setting out the background in terms of its ownership and occupation. I then explain the relevant law, discuss the evidence, and explain my conclusions.

Background

The layout of the land

5. Below is a sketch plan showing the workshop edged with a bold black line; it is a building, but the hatched area within the boundary is part of the adjacent yard, and is hatched yellow on the ground. The shaded area on the plan is the land over which the easement is claimed; I refer to it as "the yard". Between points A and B is a wall, built in 2012; between points C and D are the white doors to which I refer below. The blank triangle in front of the doors is a concreted area, raised a little higher than the yard and the hatched area but over which it is possible to drive. The workshop has wooden doors on its east side at point x, wide enough for a vehicle.



6. Marked on the plan is the former stable yard and buildings ("the stables") to the west of the workshop. The yard was formerly owned together with the stables.
7. To the east of the workshop is a road which does not seem to have a name; I refer to it as the "the back lane" because it is a thoroughfare running along the back of the houses on Cliff Terrace to the east. The workshop has an express right of way of way, with or without vehicles, along the back lane. So does the yard, for reasons to be explained below.

The ownership and occupation of the workshop

8. The workshop was conveyed in 1935 by Richard Cowie to Herbert Jarvis, together with a right of way along the back lane. It was used as a joinery workshop from then onwards. From a date during the 1970s Mr David Meeson, who was married to Herbert Jarvis' grand-daughter, carried on a joinery business there. Mr and Mrs Meeson became the registered proprietors of the workshop in 2006 when it was assented to them following the death of Mr Jarvis. The Applicants bought the workshop from Mr and Mrs Meeson in June 2012.

The ownership of the yard

9. Until 2012 the yard formed part of the stables, and the whole property was conveyed by Robert Cowie to Barry and Eileen Marshall in 1978, together with a right of way along the back lane.
10. Mr and Mrs Marshall sold the stables (including the yard) to Reginald and Anne Lyell in August 1988; they sold it in 2003 to Nerbrek Ltd.
11. In 2012 the yard was transferred to the Respondents by Nerbrek Ltd for £1 in settlement of a dispute about the construction of the wall between points A and B. One of the terms of that settlement was that the wall would block access between the stables and the yard; Nerbrek Ltd relinquished the right of way along the back lane so far as the stables was concerned, leaving the right expressly appurtenant to the yard.
12. The Respondents live at 16 Cliff Terrace and their garage door opens into the yard. Their property has an express right of way across the yard. The advantage to them of the 2012 transfer was that it left them with ownership of the yard and the appurtenant right of way along the back lane. At that stage no-one had suggested that the workshop might have a right of way across the yard.

The law

13. An easement, such as the right of way claimed here, can be acquired by long use, known to lawyers as prescription. The law is complex because there are three different ways by which prescription can be proved.
14. Of those three methods only one is relevant here. Common law prescription is an ancient doctrine and cannot be used here because the use claimed is too recent. Nor can the Applicants use the Prescription Act 1832, because the yard was no longer being used for access to the workshop at the time of their application, and under the Prescription Act 1832 the long use claimed has to continue right up to the point when action is taken to claim an easement.

15. Accordingly the Applicants put their claim under the doctrine of "lost modern grant". This is also an ancient doctrine; the idea behind it is that when the use of a claimed easement has continued for a long period, there must have been an express grant at some point in the past. That grant is a legal fiction; therefore a claim made under the doctrine of lost modern grant does not have to demonstrate that there was or might have been a grant: *Tehidy Minerals Lrd v Norman* [1971] 2 QB 528, at 522A and following.. So the Applicants have to show that the owners of the workshop, or the occupants on their behalf, used the yard for pedestrian and vehicular access to the workshop through the white doors for a period of 20 years, and that they did so openly, without force and without permission.
16. The Applicants say that the twenty years' use was completed by the end of 2001. If the period of use was not completed by the time the Land Registration Act 2002 came into force they would run into difficulties because of the technical requirements of that Act. Accordingly I do not have to make any findings of fact about the use of the yard by the owners of the workshop after 2002. Mrs Meeson gave evidence that her husband worked full-time in the joinery business until he retired in 2008, and that he continued to make some use of the yard after that; but nothing from 2002 onwards is relevant to what I have to decide.

The evidence

17. The issue for decision is therefore whether at any time before 2002 the owners of the workshop, or those occupying it on their behalf, have had vehicular access across the yard to the white doors for 20 years, openly, without force and without permission. I say vehicular access, because the owners of the workshop own the hatched strip alongside the building and accordingly pedestrian access is not a problem. The question is whether they can demonstrate prescriptive use with vehicles for the requisite period. If they have, then an easement has been acquired by prescription, but there remains an issue as to the extent of the easement acquired.
18. For the applicants I heard evidence from Mrs Hazel Meeson, Mr Barry Marshall and Mr Pawson. The applicants themselves gave no evidence; although they have produced witness statements, it is their case that the prescriptive use giving rise to the easement they claim was completed by around 2001, and so they have no evidence to contribute to the issue I have to decide.

Mrs Meeson

19. Mrs Meeson said in a statutory declaration dated 12 August 2014 that the yard has been used by the owners of the workshop and their tenants and licensees ever since 1935. She made a witness statement on 30 April 2016 in which she conceded that she is not old enough to remember the 1930s. But she said that she and her husband had occupied the workshop from the mid 1970s, and that her knowledge of the land goes back some time before then. At least since the mid 1970s, therefore, she was able to say that vehicular access was being exercised through the white doors, and that materials and finished goods were taken in and out of the workshop by vehicle using those doors. She also said that her husband used to park his vehicle partly inside and partly outside the building, between the white doors and under the canopy above them. She said that the doors on the eastern side of the property were not used.
20. Mrs Meeson gave evidence at the hearing. My impression was that she spoke candidly and with a clear memory of events and I accept that she gave evidence honestly according to her recollection, albeit of events that took place many years ago. She confirmed that she was familiar with the workshop as a child, living round the corner on Cliff Terrace. She remembers (because of the age of her son at the time) that she and her husband took over the joinery business 1973 or 1974. She was involved in the business as a book-keeper.
21. She said that Mr Meeson used to cross the yard in his vehicle to access the white doors, whenever he visited the workshop. This was sometimes several times a day, sometimes not for a day or two, but at any rate frequent. He would reverse pull into the white doors and park mainly in and partly outside. Sometimes he would pull right in and leave the doors open.
22. Mrs Meeson was asked if her husband had permission to use the yard, and she said no, he did not. Asked if it was possible that he made arrangements with the owner of the yard to have that access, she said no, he just did it,
23. Mrs Meeson said that it never occurred to her to mention access across the yard to her solicitors when the workshop was sold.
24. She agreed said that when she and her husband applied for planning permission to convert the workshop to a house, the plans (of which copies were in the hearing bundle, dated 2011) made no reference to a right of way across the yard. She said that there had never been any problem with the right of way and that she did not feel it was necessary to say anything about it on the plans; she presumed there was a right of way.

25. I do not believe that Mrs Meeson thought at that date that there was a private easement across the yard. She may well have presumed that the yard was a public thoroughfare; had she or her husband believed there was a private right of way then it is implausible to suppose that they would not have mentioned it either in the planning application or when selling to the Applicants. I do not suggest that Mrs Meeson is not being honest about this. The distinction between a private easement and a public thoroughfare is unknown to many people. I accept that she thought that there was no problem about vehicular access to the white doors, but I do not believe that she thought there was a private easement acquired by prescription. She and her husband no doubt believed that there was a right of access that did not need to be mentioned because it was a public thoroughfare.

Mr Barry Marshall

26. Mr Marshall owned the stables (including the yard) from 1978 to 1988, and he held tenancies of parts of the stables before then from when he was about 19, in about 1964; he used the stables for his automotive business. He made a statutory declaration, dated 18 September 2014, with a plan annexed, and – looking at the text of the declaration alongside the plan - he appeared to be referring to the back lane rather than to the yard. He said that the road had been used for access to the workshop "at all times over the course of the past twenty years". That is unlikely to have been something he could recall, because he sold the stables in 1988.
27. Later he made a witness statement dated 21 April 2016, confirming that his knowledge of the relevant land began from the 1950s and 1960s – when his friend Ron Whitehead occupied the workshop – until the early 1990s. I accept that he signed the earlier declaration without reading it properly but without any intention to mislead.
28. Mr Marshall explained in his witness statement that he recalls Ron Whitehead, Mr Jarvis' tenant, using the yard from the 1960s to access the white doors, collecting and delivering big pieces of joinery through the white doors, parking under the canopy (just as Mrs Meeson described her husband doing). He recalled that Mr Whitehead died in 1971, and he said that there was no significant break in occupation before Mr Meeson took over the workshop.
29. Mr Marshall bought the stables in 1978, so that for the next 10 years he and Mr Meeson operated their businesses side by side. The use of the yard continued. He gave no permission for that use because he thought that Mr Meeson had every right to use it because "loads of people used it" and he thought it was a thoroughfare.

30. Mr Marshall gave evidence at the hearing, confirming the contents of his witness statement. He also spoke of Mr Meeson using his – Mr Marshall's – own yard; that is, the stables yard beyond the line A-B. The wall did not exist at that stage, of course, and people used to drive through. Mr Marshall was aware that the stables yard was his yard; he did not give permission to Mr Meeson to park there but "let him get on with it", so long as he did not cause an obstruction. So in the stables yard there was some active tolerance of Mr Meeson's use, whereas in the yard, the subject of this application, Mr Marshall did not know that he had any right to object.

31. I have no doubt about the truth of all that Mr Marshall said.

Mr John Pawson

32. Mr Pawson is 64 years old and has spent his working life as a joiner, builder and property developer in Marske. He made a statutory declaration on 19 June 2015 to the effect that from the 1980s onwards he frequently visited the workshop to see Mr Meeson, delivering building materials, driving over the yard and up to the white doors; and that Mr Meeson gained vehicular access to the workshop in that way too. He reported seeing Mr Meeson's vehicles "on occasions" parked half in and half out of the doorway.

33. Mr Pawson gave evidence at the hearing. He said that he last saw Mr Meeson at the workshop in 2005 or 2006. He specifically recalled an instance, perhaps more than one instance, when he himself parked in the workshop to pick up wood shavings in 1982 or 1983 because he had acquired a machine to compress shavings, so he use to drive round collecting them.

34. Mr Pawson said that there was never any discussion about the basis of the use of the yard, because he presumed it was a road.

35. I have no reason to doubt the truth of Mr Pawson's evidence.

Evidence for the Respondents

36. The Respondents are not able to give any relevant evidence themselves because they bought their house in 2010 and the yard in 2012. The contents of Mr Graham's witness statement, dated 28 April 2016, relate to his dealings with the Applicants and are not material to what I have to decide.

37. Mr Graham gave evidence at the hearing, relating to the conduct of the litigation by the Macks, solicitors, a form of which he is a solicitor director, but that evidence did not shed any light on the issue of prescriptive use.

38. I heard evidence, however, from Mr Hope and Mr Strong.

39. Mr Nicholas Strong has lived in a first-floor flat directly to the east of the workshop and yard since 2001. He has a clear view of both from his kitchen window, and he keeps his wheelie binds in the back lane. . He says that he never saw anyone, or any vehicle, cross the yard to access the workshop; anyone visiting the workshop would cross the hatched area on foot.
40. Mr Strong is a solicitor, and for thirty years until 2012 he was running his own practice in Marske. He was candid about the fact that he worked long hours and would be at home outside office hours, and at weekends and holidays. However, in view of the times of day and of the week when Mr Strong was at home, and of the date when he bought his flat, his evidence is of no assistance; Mr Meeson could have made constant use of the yard before 2001 without Mr Strong ever seeing him do so.
41. Mr Nicholas Hunt is a police inspector; he has lived at 8a Cliff Terrace, to the south of the workshop for 13 years, so since 2003. He made a statutory declaration on 17 July 2015 and said that in his 13 years at 8a Cliff terrace he had never seen anyone gaining vehicular or other access to the workshop via the yard. He also said that prior to 2012 he rarely saw anyone at the workshop.
42. Mr Hunt also made a witness statement dated 27 April 2001, and said that he bought his house from his father in 2001. At the hearing he added that he had lived at number 8a since 1988, when it was his parents' home, until he bought a house nearby. So I accept that his knowledge goes back further than his ownership of number 8a, but it is not clear how much he recalls in the crucial period from 1988 to 2001.
43. Mr Hunt reported a conversation with Mr Meeson in 2011 or 2012, when Mr Meeson explained that the yellow hatched area was his but that he did not have a right of way across the yard. Mrs Meeson in her witness statement said that she had spoken to Mr Meeson who denied that that conversation took place. However, it seems to me more likely that Mr Hunt reported the conversation correctly. Of course, the fact that Mr Meeson did not think he had a right of way does not mean that he did not have one.
44. Mr Hunt in his witness statement also reported a conversation with the applicants, which is not relevant to my decision.
45. Mr Hunt gave evidence at the hearing. He said that he can see the workshop from his windows and from his walk to and from his car in the morning, and a very small area of the yard, but he could not see the white doors or the main part of the yard unless he actually walked round there. He did so, he says, from time to time to sort out some of the local wheelie bins.

46. Mr Hope also said that Mr Meeson used to park his car outside number 9 where his in-laws lived. That point was not in his witness statement, and it was given towards the end of the hearing when there was no opportunity for it to be put to Mrs Meeson or the other witnesses for the applicants, and so I treat it with caution. But I am not aware of any reason why Mr Hope would not be telling the truth about this.
47. I accept that Mr Hunt was not aware of the yard being used to access the workshop. But he is a police officer, sometimes working shifts, and he cannot have had comprehensive knowledge of what was happening on the ground. Mr Hope's evidence does not lead me to doubt that Mr Meeson used to drive across the yard, quite frequently, as the Applicants' witnesses have said. But it is consistent with Mr Marshall's evidence that Mr Meeson used the white doors for access for loading and unloading and would then drive off to park elsewhere.

Conclusion about prescriptive use

48. I accept the evidence given for the Applicants that Mr Meeson drove across the yard to the white doors for many years, certainly from 1978 onwards, and for at least twenty years before 2002. But to give rise to a prescriptive easement, use has to be made openly, without force, and without permission. The use was clearly made openly and without force, but I have to consider whether it was used without permission.
49. Mr Marshall recalls Mr Ron Whitehead using the yard for vehicular access before 1978. He can tell us nothing about whether or not that was done with permission; he was not aware that permission was given, but there is no reason why he would have been aware. Accordingly I cannot make any finding to the effect that use was made of the yard by the owners or occupiers of the workshop without permission before Mr and Mrs Marshall bought the stables in 1978. 1978 therefore becomes a starting point from which a period of prescriptive use can run.
50. Mr Marshall says, and I accept, that he did not give permission during the period of his ownership from 1978 to 1988; indeed, he said at the hearing that he did not even know he owned the yard. He was aware that he owned the stable yard beyond the line A-B and he regarded the yard, the subject of this application, as a thoroughfare that lots of people used.
51. So prescriptive use is established during the period 1978 – 1988.
52. However, from 1988 onwards there is an absence of evidence. Mrs Meeson is clear that her husband continued to use the yard regularly. But she can contribute nothing to whether the owners of the yard, Mr and Mrs Lyell, gave permission. There is no

evidence that they did and no evidence of any value that they did not, because I can see no reason why a conversation between Mr Meeson and Mr or Mrs Lyell about his access across the yard would have been reported to Mrs Meeson. It might have been, but it might well not have been. It is impossible to prove a negative, but there must be something to tip the balance of probabilities and to show me that it was more likely than not that Mr Meeson did not have permission to use the yard during the Lyells' ownership, and there is simply no evidence either way. True, the yard had been regarded by Mr Marshall as a thoroughfare. But the new owners were probably aware that the yard was theirs. According to Mr Marshall they successfully applied for planning permission to re-develop the stables, so they may well have looked at the current use made of the yard and checked that there was no right of way across it. Certainly, as Mr Stevens in his skeleton argument points out, they must have been aware of his using the yard for access. According to Mr Hope, Mr Meeson maintained that he had no right of way; that may have been because he was unaware of the rules of prescription, but equally it may have been because he was well aware that he had permission rather than a right. There is no evidence either way.

53. Accordingly the Applicants' application fails because they have not proved that the requirements for prescriptive use were met for a period of twenty years before the end of 2001.

Two further issues

The extent of prescriptive use

54. If I had found that an easement had been acquired then I would have had to decide the extent of that easement. I record my conclusions about that on the basis of the evidence I heard.

55. It is beyond dispute that Mr Meeson used the access across the yard solely for the purposes of his joinery business. It appears that there may be plans to convert the workshop into a residential property, and it is important that I make clear that even had this application succeeded there would have been no question of the Applicants' having an easement for all purposes. The use acquired by prescription would have been limited to loading and unloading material for the purposes of a single business conducted at the workshop.

56. I say that because that is what Mr Meeson did, and because Mr Marshall was very clear that when Mr Meeson parked between the white doors he did so to load and

unload. When pressed on this point Mr Marshall said that Mr Meeson would unload and then take his vehicle round the corner. He might leave it half in and half out of the white doors but that, Mr Marshall said, was not for long and was only done when he needed to go and get something. Similarly Mr Pawson parked there when he went to use machinery and therefore was loading and unloading materials. There is no evidence that Mr Meeson drove across the yard in order to keep a vehicle inside the workshop with the doors closed. There is some indication from Mrs Meeson that he would park his vehicle between the open doors during the day, but there is also evidence from Mr Hope that Mr Meeson parked round the corner outside number 9. Accordingly the evidence points to use predominantly in order to get materials in and out of the workshop.

Abandonment

57. If the Applicants had been able to show that an easement had arisen by prescription by the end of 2001, there might then have been a question as to whether it had subsequently been abandoned. It is notoriously difficult to prove that an easement has been abandoned because it has to be shown that the person holding the easement not only failed to make use of it but also that he or she actually intended to abandon it. The Respondents did not pursue any argument about abandonment at the hearing, and rightly. Such an argument would have had no prospect of success in the light of Mrs Meeson's evidence that Mr Meeson continued to drive across the yard until he retired and indeed beyond.

Costs

58. In this tribunal costs usually follow the event, and it is open to the Respondents to apply for their costs incurred since the date of the reference to this Tribunal. At the hearing I expressed some concerns about the way in which the litigation had been conducted, and any application for costs will be considered in the light of those concerns. Any application is to be made within 28 days of the date of this order, sent to the tribunal, and copied to the other party. If the other party objects to paying those costs or to the amount claimed they are to make submissions with 14 days of receiving the application. The party applying for costs will then have 14 days in which to reply, after which I will make an order.

BY ORDER OF THE TRIBUNAL

Elizabeth Cooke

Dated this Friday 20 May 2016