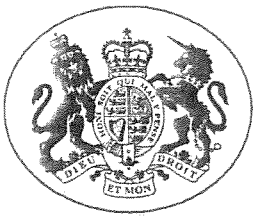


[2018] UKFTT 329 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2016/0816

BETWEEN

(1) PAUL LYNDON BRYANT
(2) DEBRA HELEN BRYANT

Applicants

and

(1) STEPHEN NEIL CHAMPION
(2) JANICE CHAMPION

Respondent

Property address: land on the east side of Chaworth Close
Title number: SY832663

Before: Judge Cadwallader

ORDER

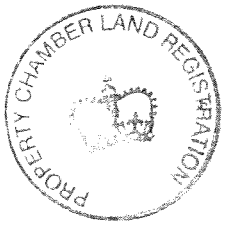
IT IS ORDERED that:

1. The Chief Land Registrar shall cancel the application of the Applicants for registration based upon adverse possession of the title to the property specified above.

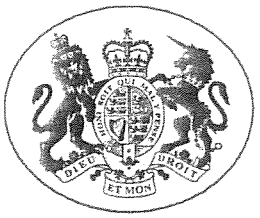
2. The parties shall if so advised within 28 days of the date of this decision submit and exchange written submissions as costs, together with fully vouched Schedules of Costs (limited to costs and expenses incurred since the date of reference to the Tribunal) verified by a statement of truth signed by them.

By order of the Tribunal

Neil Cadwallader



9th May 2018



[2018] UKFTT 0329 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

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(1) STEPHEN NEIL CHAMPION
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Title number: SY832663

Before: Judge Cadwallader

DECISION

Keywords: *adverse possession – reasonable belief*

Authorities -

Allen v Matthews [2007] EWCA Civ 216
J & A Pye (Oxford) Ltd v. Graham [2003] 1 AC 419
Powell v McFarlane (1977) 38 P&CR 452
Zarb v Parry [2011] EWCA Civ 1306

The application

1. The Respondents are and since 19th February 1997 have been the registered proprietors of the adjacent freehold land at 8 Chaworth Close under Title No. SY667083 ("No.8"). The Applicants are and since 3rd March 2003 have been the registered proprietors of the freehold land at 7 Chaworth Close, Ottershaw, Chertsey KT16 0LS under title No. SY666464 ("No. 7"). On 24th December 2015 the Applicants made an application to be registered as persons in adverse possession under Sch. 6 para. 1 Land Registration Act 2002 in respect of part of No. 8. The Respondents objected to the application and on 29th September 2016 the matter was referred to this Tribunal for determination. It had a drawn out procedural history and was listed for hearing on 20th and 21st February in Alfred Place, with a site visit the day before. I conducted the site visit with Second Applicant and the First Respondent separately at the request of the First Respondent. In the event the hearing only occupied the first day of the two days listed.

The layout

2. The two properties in question are attractive detached dwellings on substantial plots forming part of a development at Chaworth Close which had been built by Runnymede Homes Limited in 1996. Looking at them from the Close, No. 7 is on the left of No. 8. The land to left is substantially higher overall than that on the right (the witness statement of the Second Applicant said it was lower but this is wrong), and there is an angled retaining wall supporting No.7 and protecting No. 8 which runs between the houses; as the difference between the levels reduces towards the front of the properties, this runs into a reducingly steep bank which is in the form of a rockery containing stones (the Second Applicant explains the references in her evidence to

'bollards' as being to these stones, though they are nothing but ordinary randomly placed rocks) and planting, and two pine trees. The pine trees are roughly in line with the front section of the retaining wall. The rockery area and pine tree were put in by the Respondents in 1998 or 1999, as the Applicant did not dispute. On the flat surface on the left of that bank nearest the house of No. 8 there are some shrubs or bushes, but otherwise the area is laid to lawn. On the right of the bank and adjacent to it there is a narrow strip of grass which by the road curves round the front of the rockery area and joins the lawn area already mentioned. There is no fence or other hard boundary feature in or beside the bank or at the front of the properties (and in fact the transfers contain covenants that none should be erected). The roadway forming Chaworth Close consists of brick setts in a herringbone pattern bounded by slightly raised brick setts abutting the lawn area along the front of the properties. In front of the house at No.7 there is a clearly defined widening of the roadway, inset into the lawn in front of No.7. Near the angle marking the start of that (which I shall call Point A), a groundwater drain grid has been set in to the roadway.

3. Although the boundaries are not clearly marked on the ground, a reasonable person looking only at the present visible physical layout might assume that the boundary between No. 7 and No. 8 lay along the top of the bank, in line with the trees, or with the front of the trees on the side facing No. 7, or perhaps a little back towards No.8. In fact, the boundary shown on the Land Registry plans seems to run roughly from the end of the retaining wall towards (but not reaching) a point on the roadway a little on the right hand side of Point A. I emphasise that the Land Registry plans only show general boundaries and that I have not had the benefit of a report by an expert surveyor, and so I am not making any findings as to the true location of the paper title

boundary, but in general terms it seems that this means that a triangular area of the lawn in front of No. 7, which might therefore have been thought to belong to No. 7, in fact belongs to No. 8. That is the basis upon which the parties approached the matter.

The extent of the application

4. On that footing, one would have expected the Applicants' application to have been to be registered as proprietors by adverse possession of that triangular area. In fact the application originally related to a slightly different triangular area, represented on the left by a straight line continuing the line of the front section of the retaining wall to the roadway at Point A, and on the right by a line parallel to the rear section of the retaining wall to the roadway (thus apparently including some of the land to which the Applicants had paper title, and at least a substantial part of the bank). This area was later reduced by the production of an amended application plan excluding land marked pink and yellow, and understood by the Second Applicant to represent respectively the area including the bank, the shrubs and pine trees (pink), and land not owned by either party but registered to Runnymede Homes Limited (a strip along the edge of the roadway) (yellow). She confirmed in her evidence (as well as at the site visit) that she did not make any claim to the trees or the land upon which they stood, which includes the bank. I approach the matter on the basis that this is the extent of her claim, and accordingly that it relates to so much of the lawn in front of her house as is registered to the Respondents.

The parties

5. The application was made by and in the name of the Applicants, through solicitors, although the evidence was that they had separated before it was made, and the First

Applicant had left No. 7 in 2014. They had been represented, by solicitors, until July or August 2017, but not thereafter. Although the Second Applicant told me that he had taken no part in the proceedings for some time, she also said that he had been aware of and approved them. He had never applied to be removed as an applicant or joined as a respondent, and he did not attend the hearing (although the Second Applicant had expressed some concern that he might). The issue was considered by other Judges of the Tribunal and consistently with that, I have proceeded on the basis that the application is made and pursued by them both, through the Second Applicant.

6. No. 7 is occupied as her home by the Second Applicant with one of her sons, Jimmy (she has another son, Luke). I understand that Jimmy has Asperger's and autism diagnoses. The Second Applicant also has health issues, including suffering from lupus, which I am told has both physical and mental effects on her. I have the impression she is also under some stress as the result of financial difficulties consequent on the break-up of her marriage. I asked her how best to ensure that she was able to take a full part in the proceedings given those difficulties but, beyond ensuring she had help identifying documents, and knew what the timetable was likely to be so she could manage her medication, she required no special assistance.

7. No. 8 is occupied by the Respondents, a married couple. They represented themselves throughout. They agreed that the First Respondent should speak for them both, but I allowed the Second Respondent to address me as appropriate (though she had some difficulty in restraining herself, and I had some difficulty in restraining her, from making inappropriate comments and interruptions both during submissions and the evidence of the Second Applicant).

Evidence and submissions

6. I heard submissions and evidence from the Second Applicant and the Respondents. My impression was that the Second Applicant was not always a completely reliable witness (an impression confirmed by various admitted mistakes in her witness statement and an email of 1st March 2018 sent to the Tribunal after the hearing in which she said she had been feeling bad about 'a little bit of devilment' in having lied about the extent of her solicitor's fees and thought she had better 'fess up' and apologise. The Respondents struck me as generally attempting to assist the Tribunal with their evidence, telling the truth as they saw it. I had also a witness statement from Andrew Beaumont on behalf of the Respondents. So far as it did not contain inadmissible opinion evidence, it was not of great assistance, and the Respondents decided on that basis not to seek to adduce his oral evidence by telephone (he had been called abroad at short notice).

Legal framework

7. In order for their application to succeed, the burden of proof lies upon Applicants to show on the balance of probabilities that

(1) they been in adverse possession of the disputed land for the period of ten years ending on the date of the application (Sch. 6 para.1 Land Registration Act 2002)

(2) (since the Respondent had required the application to be dealt with under para. 5 of that Schedule, and the first two conditions for which it provides are inapplicable) that

(a) the land to which the application relates is adjacent to land belonging to the Applicants,

(b) the exact line of the boundary between the two has not been determined under rules under section 60 of the 2002 Act,

(c) for at least ten years of the period of adverse possession ending on the date of the application, the Applicants (or any predecessor in title) reasonably believed that the land to which the application relates belonged to them, and

(d) the estate to which the application relates was registered more than one year prior to the date of the application (Sch 6 para. 5 of the 2002 Act).

8. The parties agreed that the land to which the application relates is adjacent to land belonging to the Applicants, the exact line of the boundary between the two has not been determined under rules under section 60 of the 2002 Act, and that the estate to which the application relates was registered more than one year prior to the date of the application. The issues were therefore whether

(1) the Applicants had been in adverse possession of the disputed land for the period of ten years ending on the date of the application (that is from at least 24th December 2005 to 24th December 2015)

(2) for at least ten years of the period of adverse possession ending on the date of the application, the Applicants (or any predecessor in title) reasonably believed that the land to which the application relates belonged to them

For these purposes I take it that the possession of either of the Applicants is the possession of both of them. However, if the Applicants were not unanimous during the relevant period in their belief that the disputed land belonged to them I would regard that as fatal to their application.

I remind myself also of the provisions of para. 11 of Schedule 6 of the 2002 Act.

Adverse possession

9. I was referred to the decision of the House of Lords in J & A Pye (Oxford) Ltd v. Graham [2003] 1 AC 419 (and to Powell v McFarlane (1977) 38 P&CR 452) on the question of adverse possession. What is required is a sufficient degree of occupation or physical control coupled with an intention to possess. A person claiming title by adverse possession has to show absence of the paper owner's consent, a single and exclusive possession, and such acts as demonstrate that in the circumstances, in particular the nature of the land and the way in which it was commonly used, he had dealt with it as an occupying owner might normally be expected to do, and that no other person had done so. The requisite intention is, not to own or acquire ownership, but to possess and to do so on one's own behalf and in one's own name to exclude the world at large, including the paper title owner, so far as was reasonably possible.

Factual possession

10. The land in question is open plan, with no relevant boundary feature at the points in dispute. It would be natural for the Applicants to mow and maintain the whole of the

lawn, including the disputed area, and to trim branches overlying it. It is true that the only access between the disputed area and the rest of the Respondents' land is by way of the roadway, or the small strip of grass passing around the front of the rockery, but the disputed land is open along its entire frontage. There is no question of its having been enclosed by either party.

11. The Second Applicant's evidence was that she and her sons and Tim, a gardener friend of theirs (from whom I note there was no evidence), cut the lawn 3 or 4 times a week (as she was trying to prepare it for a competition or award of some kind), and weeded and feed it, and raked moss out of it; and pruned back branches over it. I accept that evidence. I also accept that the Respondents have never used or maintained it as part of their garden. Although it seems to me they must be right in saying that they had been parking cars on the grass opposite No. 7 for many years, and not just since the dispute blew up (since conditions did not change, and they will have needed to throughout), it is plain from the evidence, the photographs and the site visit that what they parked on was not the disputed land, but the yellow strip still in the ownership of Runnymede Homes Ltd. I accept too that the Second Applicant objected when she was aware that this occurred, and sought to prevent it.

12. The Respondents relied on a few highly redacted emails between the parties in September 2009, in which the Second Applicant asked the Respondents they wanted Manuel the gardener to 'do' (i.e. trim) the Applicants' side of the laurels. I cannot draw any useful inference from these emails.

13. Given the nature of disputed land, I consider that this is just sufficient physical control to be capable of amounting to adverse possession; and to have lasted throughout the period of the Applicants' ownership and occupation from March 2003 to the commencement of the dispute in about November 2015, a period of over 10 years. It makes no difference whether the First Applicant was or was not in occupation of No. 7 or possession of the disputed land: any possession by the Second Applicant will have been on his behalf as well, as co-owner of No. 7. I accept that there was a period of about 16 months when the Applicants lived in Dubai, but No. 7 was tenanted and I infer that the tenants continued possession on behalf of the Applicants. I accept the evidence that they never mentioned having been excluded from the disputed land.

14. The Respondents' evidence was that they gave oral consent for the Applicants to cut the grass on the disputed land when they first moved in, in 2003 or 2004, during a conversation in the garden, when the Respondents had pointed out the true boundary location and the Second Applicant asked if they minded if she cut the grass herself; but that they otherwise treated it is as their own. The Second Applicant denied this account. I did not find this evidence of the Respondents credible. It came across as slightly pat and 'too good to be true'; and I think it implausible.

15. After the dispute blew up in November 2015, possession became contentious; but the Respondents did not positively re-take possession or interrupt the factual possession of the Applicants, as they needed to do in order to stop time running in their favour: Zarb v Parry [2011] EWCA Civ 1306.

16. I am satisfied by way of inference from their behaviour that the Applicants did intend to possess the disputed land as owner and to exclude the world at large as best they could given the nature of the site.

17. In several planning applications the Applicants relied on plans showing the true boundary of their own property, and not the one for which they now contend. These are likely to have come to the attention of the Respondents, as neighbours. The Respondents rely on them as acknowledgments, starting time running afresh in their favour. If the person in possession of the land in question acknowledges the title of the person to whom the right of action has accrued the right shall be treated as having accrued on and not before the date of the acknowledgment: s. 29 (2)(a) Limitation Act 1980. To be effective for the purpose, an acknowledgment must be in writing and signed by the person making it; may be made by the agent of the person by whom it is required to be made under that section; and must be made to the person, or to an agent of the person, whose title or claim is being acknowledged: s.30 of that Act. For a document to constitute an acknowledgment of title all that is required is that, as between himself and the owner of the paper title, the person in possession acknowledges that the paper title owner has better title to the land. Whether or not such a particular writing amounts to an acknowledgment depends on the true construction of the document in all the surrounding circumstances: Allen v Matthews [2007] EWCA Civ 216 at [75]; [2007] 2 P. & C.R. 441, 454, per Lawrence Collins L.J. However, I do not see these documents as being capable of amounting to acknowledgments. They do not say anything about the Respondents' land or title,

even by implication. Nor were they made to them, in the sense of being directed by the Applicants to them.

18. Accordingly, I am satisfied that the Applicants had been in adverse possession of the disputed land for the period of ten years ending on the date of the application.

19. Accordingly I do not need to consider the question whether the Applicants' predecessors had been in adverse possession from 1996, in relation to which there was scant evidence.

Reasonable belief

20. In order to succeed, the Applicants also need to show that for at least 10 years of the period of adverse possession ending on the date of the application, the Applicants (or any predecessor in title) reasonably believed that the land to which the application relates belonged to them. In Zarb v Parry [2011] EWCA Civ 1306 at [17] Arden LJ stated that

> "... the necessary effect of the way that paragraph 5(4) is expressed is to make the unreasonable belief of the adverse possessor in the last ten years of his possession prior to the application for registration a potentially disqualifying factor even though his belief started out as reasonable but became unreasonable as a result of circumstances after the completion by him and/or his predecessor in title of a ten-year period of possession. The consequence of that is that the paper title owner will have a last chance to recover the land if

the adverse possessor did not have a reasonable belief during the last ten years. The moral is that, as soon as the adverse possessor learns facts which might make his belief in his own ownership unreasonable, he should take steps to secure registration as proprietor."

21. In the present case, I consider that the Applicants did not reasonably believe that the land to which the application relates belonged to them. The Land Registry plans, albeit showing only general boundaries, are clear on their face. The Applicants are likely to have seen them on purchase. The planning applications already mentioned recognise the true line of the boundary and at least some of them were actually initialled by the Second Applicant. That is unlikely to have been because she did not realise where they showed the boundary as being on the ground, and although that was the burden of her evidence, I do not accept it, because the plans are clear on their face. The physical appearance of the location cannot trump that. I find that the Second Applicant knew very well that the true boundary was as shown on those plans. If I were wrong, and she believed otherwise, then I would hold that her belief was unreasonable, given the clarity of the plans, and the matters mentioned below.

22. Moreover, the Second Applicant wrote to Runnymede Homes Ltd querying the legal boundary on 28th May 2012; although Mark Knight of that company wrote back on 6th June 2012 indicating that their digital mapping seemed to indicate the original boundaries were in line with what she hoped, he also said to check the title deeds. She accepted in evidence that she had done so, but insisted that she had not understood that they were different. I do not accept that evidence either: it was obvious.

23. By 12th November 2015 the Second Applicant was querying the title with the Land Registry following the commencement of the dispute. However, the application was not made until 24th December 2015. This is probably to be regarded as a minimal delay. But on the basis of the mattes mentioned in the two preceding paragraphs, I have concluded that the Applicants did not reasonably believe that the land to which the application relates belonged to them for at least 10 years of the period of adverse possession ending on the date of the application.

Conclusion

24. Accordingly, this application must be dismissed.

By order of the Tribunal

Neil Cadwallader

PROPERTY CHAMBER LAND REGISTRATION

9th May 2018