[2018] UKFTT 0720 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REC/2017/0007

BETWEEN

Helen Westle

Applicant

and

Dr Suzanne Matthews

Respondent

Property Address: land on the north east side of 1 Stable Cottages, Threlkeld, Keswick CA12 4TX
Title Number: CU255526

Judge Colin Green

ORDER

It is ordered that the Applicant's application for rectification is dismissed.

Colin Green

PROPERTY CHAMBER LAND REGISTRATION

Dated this 15th day of October 2018

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Judge Colin Green

At: Workington Magistrates Court
On: 4 October, 2018

Applicants Representation:	**In person and with Alistair Westle**
Respondent Representation:	**Martin Brown of Atkinson Richardson, instructed by Taylor & Emmet**

DECISION

Introduction

1. This is an application under section 108(2) of the Land Registration Act 2002 for rectification of a Transfer dated 5 July 2010 ("The Transfer") made between William Ian Hartland ("Mr. Hartland") and George Francis Cammack and Patricia Ann

Cammack ("Mr. and Mrs. Cammack"). The land transferred is identified on the first plan attached to the Transfer ("the Transfer Plan") edged in red and is part of a parking area ("the Parking Area") which lies set back from a lane and opposite to 1 and 2 Stable Cottages ("No. 1" and "No. 2" respectively). Plans used for the hearing marked the frontage of the Parking Area as point "A" at the northern end and point "B" at the southern end. Abutting the Parking Area at the southern end is a shed-like structure ("the Shed") the frontage of which is marked B – C. Such letters do not appear on the Transfer Plan and I will deal with how the Parking Area came into existence below.

2. The part of the Parking Area transferred by the Transfer was to be used for the parking of vehicles by the owners and occupiers of No. 1, of which at that time Claire Cammack ("Miss Cammack"), Mr. Cammack's daughter, was registered as proprietor under Title No. CU81590. The land the subject of the Transfer was part of Title CU141892 and a new title was opened in respect of it (CU255526 – "the Respondent's Parking Title") and it would appear that Mr. and Mrs. Cammack were registered as proprietors. Shortly thereafter, they transferred the Respondent's Parking Title, and Miss Cammack transferred No. 1, to Suzanne Matthews ("Mrs. Matthews"), the Respondent, who was registered as proprietor of both titles on 24 August 2010.

3. At this time, No. 2 was owned an occupied by Patrick Roger Holmes and Annabel Jane Holmes ("Mr. and Mrs. Holmes"). By a Transfer dated 20 September 2012 ("the 2012 Transfer"), Mr. Hartland transferred two parcels of land to them, outlined in red on the attached plan. One parcel is a triangular piece of land not material to this dispute. The other, also hatched in black, was the remainder of the Parking Land not included in the filed plan to the Respondent's Parking Title, together with the Shed. The land the subject of the 2012 Transfer was registered under title CU268161 on 1 October 2012 ("the Applicant's Parking Title"). That title, together with No. 2 and possibly other land were transferred to Helen Westle, the Applicant, and Alistair Westle ("Mr. and Mrs. Westle") on 1 September 2015, though due to delays by reason of the dispute mentioned below they were not registered as proprietors until May 2016.

4. In 2015 a dispute arose between Mrs. Matthews and her husband and Mr. and Mrs. Westle concerning the internal division of the Parking Area between No. 1 and No. 2. As a result, in April 2016 Mrs. Matthews applied to the Land Registry for alteration of

the filed plans to the Applicant's Parking Title and the Respondent's Parking Title, pursuant to Schedule 4 to the 2002 Act. Included with her application was a letter to Mr. Hartland from Mrs. Matthews' solicitors dated 21 October 2015, which enclosed a copy of the Transfer Plan and contained the following paragraph:

> *"There has now been some confusion as to the division of the parking area between 1 and 2 Stable Cottages. In the fist instance we would be grateful if you would confirm if the dimensions plan [the Transfer Plan] reflected your intentions at the time of the sale of the parking area. If the plan did not reflect your intention we would be grateful if you could assist us in establishing the origin of the plan and if within your knowledge, why this was annexed to the deeds for 1 Stable Cottages."*

By an undated letter, Mr Hartland replied in the following terms:

> *"In answer to your enquiry concerning parking spaces. The plan you have sent was drawn by me. The measurements may not be absolutely accurate as I only strode it out and put down the distance in imperial measure; the metre was added by someone else. The positive way to determine the parking space between No 1 and No 2 is that it coincides exactly with the division of the two properties & I have drawn a red line on the plan to show this, and I hope this will clarify the matter."*

The attached copy of the Transfer Plan has a red line drawn from the division between No. 1 and No. 2, across the lane and through the Parking Area, dividing it to coincide with the boundary between the properties. The section opposite No. 1 is shown as 11 yards in length (9.8 metres) – which is the area outlined in red – and the section opposite No. 2, which extends to include the Shed (point C as defined above) is shown as 12 yards in length (10.8 metres). There are other markings on the plan, including an area to the south of the Parking Area which it would seem from the evidence of Mr. Holmes was purchased by Norman Davies from Mr. Hartland for the purpose of access to his property at the end of the lane, and the plan does bear the signature "N. T. Davies" which suggests that in some form it was also used in respect of that quite separate transaction, earlier than the Transfer.

5. It is clear in comparing the Transfer Plan with the filed plans to the Applicant and Respondent's Parking Titles that there was a discrepancy in the dividing line within the Parking Area. According to the Transfer Plan, it is as described above which produces and unequal division between points A and B; but the filed plans showed it as an equal division between those points. Mr. and Mrs. Westle's objection to the application was

that an equal division is what had been agreed and the dividing line shown on the Transfer Plan was in error as it did not reflect that. The view taken by the Land Registry was that its function was to accurately map the land identified in the Transfer Plan, the first conveyance out of common ownership, and that this would take priority over the plan to the 2012 Transfer – Mr. Hartland cannot have sold the same land twice, identified coloured yellow on a plan provided by the Land Registry, so the first transaction must prevail. It was considered that there was no merit in Mr. and Mrs. Westle's objection and the filed plans were amended accordingly. The yellow land was removed from the Applicant's Parking Title and added to the Respondent's Parking Title. The Land Registry's letter to Mr and Mrs Westle's solicitors of 25 July 2016 included the following:

> *"If it is suggested Mr Hartland's intention was not to transfer the yellow land to Mr and Mrs Cammack and there is an error in the plan appended to the transfer, it may be possible for your clients to apply direct to the Land Registration Division of the Property Chamber first tier tribunal under section 108 Land Registration Act 2002 for an order rectifying the transfer. Land Registry would not be involved in such an application."*

6. On 19 April 2017, Mrs. Westle (but not Mr. Westle) applied to the Tribunal for an order under s. 108(2) rectifying the Transfer, to which Mrs. Matthews is the Respondent. I had the benefit of a site view the afternoon before the hearing and at the hearing Mrs. Westle was represented by herself and her husband. Mrs. Matthews was represented by Martin Brown, a solicitor instructed by her solicitors for the purpose of the hearing. I am grateful to them all for the assistance they provided.

Evidence

7. The principal testimony that I heard was from Mr. Holmes and Miss Cammack. In summary, their combined evidence was as follows. Mr. Holmes and his wife purchased No. 2 in 1998. Parking for No. 2 was restricted to the verge adjoining the stone wall that ran along the edge of the lane, which was inadequate and caused difficulties in turning and for passing vehicles. Therefore, in 2006, he approached Mr. Hartland, the freehold owner of the land opposite No. 1 and No. 2, and suggested that a parking space be opened out, to which Mr. Hartland was amenable. Mr. Holmes spoke with Miss Cammack, then the tenant of No. 1 (she purchased in 2007) and she agreed to such a proposal so that the Parking Area could be used by both No. 1 and No. 2. She left the

negotiations to Mr. Holmes and Mr. Hartland, and a figure was agreed of £500.00 each. (Ray Wild, who owned a property further up the lane was also involved concerning a parking space for his property, but that is not material to the issues in this matter.)

8. Mr. Hartland arranged for a trench to be dug 4 metres back from the stone wall and Mr. Holmes had a wall builder move the wall back from the roadside to the trench, creating the Parking Area as it now stands. The cost of moving the wall was borne equally by Mr. Holmes and Miss Cammack. It was agreed between them that the Parking Area would be divided equally between the properties, that is: at the mid-point between A and B and that is how their respective properties made use of the Parking Area thereafter.

9. Mr. Holmes proceeded with his purchase from Mr. Hartland and may even have executed a Transfer, but matters did not continue to completion at that time. During his evidence he produced a letter from his solicitors dated 8 June 2007, which stated:

> *"I very much regret the delay in supplying you with documentation relating to your acquisition of land for parking. You probably know Mr. Hartland is disposing of a number of parking spaces. However the Land Registry inform me that the land allocated for your space is within the land leased to Lakeland Mines & Quarries Museum Ltd and so the transfer of the land to you will be by the museum company for a term of 99 years (less ten days) from 12th June 1990.*
>
> *Please can you confirm that you wish to proceed with the transaction on this basis."*

Mr. Holmes was not prepared to proceed based on a leasehold title and the transaction was left in abeyance. He understood that subsequently, Mr. Hartland arranged for a surrender and regrant with the Museum so that the Parking Area was no longer subject to a lease. There was no urgency on his part, or that of Miss Cammack, to complete their respective purchases in respect of the Parking Area however, as they were both already making use of it.

10. In 2010, Miss Cammack decided to sell No. 1, and therefore wished to conclude the acquisition of No/. 1's part of the Parking Area with Mr. Hartland so it could be sold with the property. She could not afford the £500.00 required to complete, and therefore asked her father and stepmother, Mr. and Mrs. Cammack, to purchase such land on her

behalf, and asked Mr. Hartland to arrange with his solicitors for the sale. Her solicitors, Gaynham King + Mellor of Penrith, also acted for Mr. and Mrs. Cammack, and they have certified that the copy of the Transfer which appears in the bundle is a true copy of the original. That copy is not signed by Mr. and Mrs. Cammack, but I infer that there must be a copy signed by them, as there is a space for their signatures, the Transfer contains restrictive covenants such as to use the land transferred only as a car parking space, and the Land Registry would not have registered such covenants against the title unless the Transfer had been signed by them. Eventually, Mr. Holmes purchased the part of the Parking Area identified on the plan to the 2012 Transfer, together with the Shed and a triangular parcel, for which he paid an additional £500.00, making a total purchase price of £1,000.00.

11. Although much of the oral evidence given by Mr. Holmes and Miss Cammack was not contained in their statements, I am minded to accept their accounts of what took place. It is credible and there is no evidence which contradicts it.

12. In respect of communications between the relevant persons, Miss Cammack only really spoke with Mr. Hartland twice concerning the Parking Area: at the time the trench set back from the lane was dug, and to ask him to complete the transaction with Mr. and Mrs. Cammack. There was no evidence the internal division was mentioned. The initial negotiations were dealt with by Mr. Holmes, but it is also unclear from his evidence if he ever discussed the internal division of the Parking Area with Mr. Hartland. There will have been solicitors' correspondence in 2006/7 concerning his proposed purchase by Mr. Holmes and in 2010 concerning the purchase by Mr. and Mrs. Cammack, but I have not seen any of that correspondence other than the letter of 8 June 2007 (paragraph 9 above). Miss Cammack cannot remember having seen the Transfer Plan at any point.

13. There is a statutory declaration made by Mr. Cammack on 7 September 2016, but he was not well enough to attend the hearing and provide oral testimony. Attached to his statement is a copy of the filed plan to the Respondent's Parking Title (before alteration by the Land Registry) with the land within the title edged red and to which the A – B – C markings mentioned above have been added. In paragraph 4 of his declaration Mr. Cammack states:

> *"The land which I purchased from Mr Hartland on 5 July 2010 is shown edged in red on the plan. At the time of our discussions with Mr. Hartland, it was agreed that the land to be transferred in respect of both parking areas was to extend along the boundary between the points marked A and B on the plan. The division between the two areas to be transferred to the Holmes and ourselves respectively was at a mid way point along that boundary. The agreement was for each party to pay Mr Hartland the sum of £500.00 for the parking area."*

14. I have reservations concerning that paragraph. There is no evidence that Miss Cammack ever identified the internal boundary to her father or stepmother or of any communication between Mr. Hartland and Mr. and Mrs. Cammack other than through their solicitors. Nor is there evidence of any meeting between them, which seems unlikely given that Mr. Hartland lived in Cumbria and they lived in Surrey. The purchase was not for Mr. and Mrs. Cammack's benefit but on behalf of Miss Cammack and there is nothing to suggest they had any involvement beyond solicitors' correspondence and attending to the legalities. In addition, as was clear from the evidence of Mr. Holmes and Miss Cammack, the agreement with Mr. Hartland concerning the Parking Area was made in 2006, not 2010 as suggested by Mr. Carrack, and he had no involvement in those discussions. The plan to which Mr. Carrack refers was not in existence in July 2010 at the date of the Transfer, and he makes no mention of the Transfer Plan which was attached to the Transfer, and the discrepancy between that plan and the plan attached to his statement.

15. I also heard testimony from the parties, but since their involvement post-dates the date of the Transfer they were not able to provide evidence that assists.

Rectification

16. Section 108(2)(a) of the 2002 Act provides that the Tribunal

> *"may, on application, make any order which the High Court could make for the rectification or setting aside of a document which—*
>
> *(a) effects a qualifying disposition of a registered estate or charge"*

The rectification sought by Mrs. Westle was the replacement of the Transfer Plan with the original filed plan to the Respondent's Parking Title. The skeleton argument of neither party addressed the law relating to rectification and therefore, at the site view, I provided them with copies of two decisions of this Tribunal which contain useful

summaries of such law: *Coady and Gibson v. Comerford* [2013/0024], a decision of Judge Rhys of 21 January 2016, and *Palo Alto Limited v. Almor Estates Limited* [2015/0430], a decision of Judge Cooke of 28 September 2016, subsequently upheld on appeal by the Upper Tribunal.

17. The relevant passages are as follows. In *Coady*, Judge Rhys states at paragraph 9 of his decision:

> *"...although the usual civil standard of proof applies, because the purpose of the claim is to contradict the terms of a written instrument, prepared by solicitors, the court will require "convincing proof" or "strong, irrefragable evidence" of the mistake. He also cites the cautionary words of Lord Walker in Pitt v Holt [2013] UKSC 26, to the effect that rectification is "a closely guarded remedy, strictly limited to some clearly established disparity between the words of a legal document, and the intentions of the party to it...."*

In paragraph 44 of *Palo Alto Limited* Judge Cooke summarised as follows:

> *"Rectification for common or mutual mistake is available where the parties, objectively at least, reached an agreement and then, unbeknown to either, the document they execute does not reflect that agreement – for example, both parties might be mistaken about the meaning of a particular word. Mr Jackson referred me to the judgment of Etherton LJ, as he then was, in Daventry DC v Daventry Housing Ltd [2011] EWCA Civ 1153, at pp 1355-6, where a number of situations are discussed. For all types of common or mutual mistake, where the parties make the same mistake or different mistakes, there must be a prior agreement (although there need not be a contract)."*

And at paragraph 47, in respect of unilateral mistake:

> *"The courts have been very restricted in their approach to unilateral mistake as a ground for rectification, where one party knows what the contract means and the other party does not. To rectify a contract in these circumstances is to impose upon one party a term to which it definitely did not agree. In the second edition of Rectification (2012) HH Judge Hodge QC sets out the three exceptions where the court will be prepared to do this. It will do so where the contract is unilateral, which is not the case here, or where there is fraud, which is not alleged here. The third exception is where one party knew of the other's mistake. The leading case is Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd [1980] 1 WLR 505, where Buckley LJ said:*

"I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies "some measure" of sharp practice, so be it; but for my part I think that the doctrine is one which depends more upon the equity of the position."

He went on to say:

For this doctrine ... to apply I think it must be shown:

(1) first, that one party (A) erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain;

(2) secondly, that the other party (B) was aware of the omission or the inclusion and that it was due to a mistake on the part of (A);

(3) thirdly, that (B) has omitted to draw the mistake to the notice of (A).

(4) And I think there must be a fourth element involved, namely that the mistake must be one calculated to benefit (B).

If these requirements are satisfied, the court may regard it as inequitable to allow (B) to resist rectification to give effect to (A)'s intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.""

18. So far as common or mutual mistake is concerned, the burden is on Mrs. Westle to establish that at the time of the Transfer, the common intention of the parties – Mr Hartland and Mr. and Mrs. Cammack – was that the land to be transferred was not that outlined in red on the Transfer Plan but the land outlined in red on the filed plan to the Respondent's Parking Title in its original form, that is, an equal division of the Parking Area. There are a number of difficulties with this.

18.1. There is no evidence that there was any other plan in existence at the time of the Transfer other than the plan which had been prepared by Mr. Hartland, which shows the division within the Parking Area as in alignment with the division between the two proprieties, even without additional marking. It is not known when exactly that version of his plan was prepared (it might even go back as far as 2006) but it is the only plan to which anyone could refer at that time.

18.2. I heard no oral evidence or cross-examination of either of the parties to the Transfer. Clearly, there are a number of important questions that arise, none of which could be addressed to them. Although it does not follow that I must disregard their evidence, it does mean that I am likely to place less weight on it.

18.3. I have mentioned in paragraphs 12 and 14 above the apparent lack of communication with Mr. and Mrs. Cammack concerning the precise boundaries of the land they were acquiring on behalf of Miss Cammack, and my doubts concerning paragraph 4 of Mr. Cammack's statutory declaration. The evidence falls short of the "convincing proof" and "strong, irrefragable evidence" required. Indeed, it suggests that what Mr. and Mrs. Cammack intended to purchase was simply the land identified on the plan to the Transfer. In addition, although the only evidence from Mr. Hartland is his undated letter (paragraph 4 above) I must have regard to what it says, and that his belief was that the internal division lay in line with the boundary between the properties. There is no apparent reason why he would draw up a plan other than in accordance with what he genuinely believed.

18.4. Therefore, although I accept that the agreement between Mr. Holmes and Miss Cammack was that the Parking Area was to be divided equally, I am unable to conclude that this was the common intention of the parties to the Transfer.

19. Even if it was Mr. and Mrs. Cammack's intention that some different area of land from that shown on the Transfer Plan was to be purchased, or if their beliefs can be regarded as the same as Miss Cammack's, on whose behalf they were purchasing, the issue remains that this was not the belief of Mr. Hartland. Such circumstances would place the matter within the possible ambit of a unilateral mistake and subject to the four conditions set out in paragraph 17 above as the basis for an order for rectification. I do not consider that conditions (2) and (4) can be satisfied however, as there is no evidence that Mr. Hartland was aware of any mistake by Mr. and Mrs. Cammack or that somehow, he was seeking to benefit from it or otherwise acting in a dishonest fashion. So far as Mr. Harland was concerned, the internal division of the Parking Area between the respective properties made no difference to him. He had agreed to dispose of the area that had been marked out and used for parking for some years and how precisely

this was split between Miss Cammack and Mr. Holmes did not affect his position or the price to be paid, agreed at £500.00 each.

Conclusion

20. Accordingly, I will order that Mrs. Westle's application for rectification be dismissed.

Costs

21. At present, I can see no reason why I should not order that the Applicant pay the Respondent's costs of the application, as the Respondent has been the successful party. I direct that by 4.00 pm on 29 October, the Respondent's solicitors should send to the Tribunal and the Applicant details of their legal fees relating to these proceedings together with copies of supporting invoices. The Applicant will then have the opportunity to provide written submissions in response, presenting any reasons on which she relies as to why she should not pay the Respondent's costs, and any issues with the details provided by the Respondent's solicitors. Such submissions should be sent to the Tribunal and Respondent's solicitors by 4.00 pm on 12 November. Should the Respondent's solicitors wish to serve a short reply, they may do so by 4.00 pm on 26 November. I will then deal with a final determination on the issue of costs and the amount to be paid should I remain of the view that the Applicant should make payment.

Dated this 15th day of October 2018

Colin Green