



**PROPERTY CHAMBER
FIRST -TIER TRIBUNAL
LAND REGISTRATION DIVISION**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO: 2014/0869

BETWEEN

MARTIN PAUL GRIFFITHS and HELEN FRANCES GRIFFITHS

Applicant

and

NATHAN LLEWELLYN

Respondent

**Property address: 10 Commercial Road, Abercarn, Carephilly, NP11 5AH
Title number: WA455871**

Before: Judge Wear

DECISION

Right of Way – Section 62 Law of Property Act 1925 – whether reputed or enjoyed with the properly conveyed – whether binding on the registered proprietor

Cases referred to:

Bolton v Bolton (1879) 11Ch.D 968

Loveluck-Edwards v Ideal Developments [2012] EWHC 716

Godwin v Schweppes Limited [1902] 1Ch 926

Background:

1. The issue in this case is whether number 10 Commercial Road, Abercarn enjoys a right of way on foot over the concrete path at the rear of number 11, Commercial Road, Abercarn. The applicants are Mr and Mrs Griffiths and they applied to the Land Registry to enter the right as appurtenant to their freehold title (title no. WA455871) and as a burden against the

Respondent's freehold title (title no. CYM546914) on 15 July 2014. The Respondent objected and the dispute was referred to the Tribunal in October 2014.

2. Numbers 10 and 11 Commercial Road are the last two in a row of terraced houses, all facing west. At the back of each a concrete path runs in a north-south direction from number 10 across the rear of number 11. It then turns at a right angle and proceeds along the flank wall of number 11 and thence into the highway. Number 11 is the last house in the row. There is no access from any house to the north of Number 10 onto the concrete path. To the east of the path the land rises steeply and forms a garden or amenity area for each property. For brevity, I will call this the concrete path.
3. Initially, the Applicants put their case on the basis of prescription from which a grant of the right claimed should be presumed. The case first came on for hearing on 10th July 2015. A preliminary point was taken against the Applicants that such a right could not have been acquired by prescription because the servient land was at all material times let.
4. Having asked for and received submissions on this point, the Tribunal gave a decision on the 13th October rejecting the Applicants' case based on prescription. Reference should be made to that decision for further background to this case.
5. The Applicants also put their case on the basis of Section 62 Law of Property Act 1925. A further hearing took place on the 16th October and the Tribunal now rules on this aspect of the reference.

The Applicants' Case:

6. Section 62 reads as follows:

62.— General words implied in conveyances.

(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

.....

(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

(6) This section applies to conveyances made after the thirty-first day of December, eighteen hundred and eighty-one.

7. In their skeleton argument the Applicants' case is that there was an easement or quasi-easement reputed to appertain to number 10 Commercial Road at the time of the Conveyance to the Applicants. (Mr Hughes for the Applicants did not specify whether they relied on sub section (1) or sub section (2) of Section 62 but the material parts of both sub sections are identical).
8. At the hearing Mr Hughes submitted that Section 62 operated on the Conveyance dated 15th October 1988 made between (1) R H Tenison (2) M Emery and P Gibbons. This was the conveyance by the common owner of numbers 10 and 11 Commercial Road to the Applicants predecessors in title.
9. The testimony supporting the Applicants' case consist of a witness statement made by the first Applicant and the witness statements of Jane Carol Hancock, Elizabeth Coral Gibbs and George Stephen Gibbs.
10. The first Applicant gave evidence and was cross examined. From this it emerged that the Applicants first viewed number 10 Commercial Road in August 1988. They had no knowledge of the property prior to this and there was no one in occupation when they viewed. There was a second viewing sometime later when they spoke to Mrs P Gibbons, one of the joint sellers. They never met Margaret Emery, the other joint seller. The first Applicant told me that Margaret Emery was the mother of Mrs P Gibbons. The use of the concrete path was not discussed but they viewed the garden and saw the opening from the yard behind the dwelling of number 10 onto the concrete path. There was no gate and Mr Griffiths assumed there was a right of way.
11. The first Applicant could cast no light on the freehold title to number 10 prior to the Applicants registration as proprietor on 5 January 1989.
12. The first Applicant said that the sale to the Applicants completed on the 15th October 1988. This was the same day as the conveyance of the freehold to Margaret Emery and Phyllis Gibbons.
13. The first Applicant also said that since then the concrete path had been used by the Applicants in connection with the deposit of refuse in the road at the front of number 10 for its weekly collection. The Applicants have two children, one born in 1991 and the other in 1995. It was the habit of the family to keep their bicycles in the yard at number 10 and use the concrete path as a means of taking them onto the public highway. It was also the custom of friends of the children while they were growing up to use the concrete path to visit the family.

14. Access over the concrete path was also needed in order to turn off and on the stop-cock for the water supply to number 10 and the other houses. The Applicants also used the concrete path for the daily exercise of their dogs.
15. The first Applicant gave his evidence honestly and carefully. He was a reliable witness.
16. None of the other witnesses for the Applicants were available for cross-examination. Their statements could not therefore be challenged by Miss Williams for the Respondent. She indicated that she would have done so had it been possible.
17. The witness statement of J C Hancock reads:
 1. "I have lived on this road all my life (66 years) and I have always known that number 10 and 11 have been free to come and go around the back of the house. Until recently it has never been cut off.
 2. I would say that ever since I can remember it has been like that and it came as a complete shock to me to see the gate being constructed to stop that access from occurring".
18. It contains a Statement of Truth and is dated 29th December 2014. The reference to the gate is to the metal gate which the Respondent installed in April 2014 after he had bought number 11.
19. The statement is helpful to the Applicants but its credibility is untested. If the witness was born in 1948 her earliest memory must be sometime after that but there is no indication of when. The statement is in brief terms. It casts no light on the frequency or nature of the rights which were exercised. I can attach no evidential weight to this statement. It is little more than a comment on the physical layout of the buildings at Commercial Road.
20. The statements of E C Gibbs and G S Gibbs are both in identical terms. They both contain the statement of truth and are both dated 7 April 2014. They read:
 1. "I have known [the Applicants] since they came to live at Commercial Road, Abercarn 25 years ago.
 2. I can confirm they have always used the side entrance to number 10 passing the back of the building at number 11 Commercial Road, Abercarn."
21. Not only is the credibility of those statements untested but they also do not address the question of what rights were exercised at the time of the Conveyance viz 15th October 1988. The statements are of little or no use in determining the issues in this case.
22. Mr Hughes invited the Tribunal to draw the inference from the failure of the Respondents to file evidence on the question of the exercise of rights that there was none. I accept that an absence of evidence may make the Applicants' task a little easier but that absence cannot be treated as support for their case.
23. It is convenient at this point to deal with an issue arising under the words in Section 62(1) and (2). The Applicants say that the right they claim is "reputed to appertain to the land at the time of the Conveyance of number 10". The word "appertain" is apt to refer to easements already in existence and not to something which might become an easement: *Bolton v Bolton* (1879) 11Ch.D 968 (where Fry J explained the significance of the phrase "with all ways thereunto appertaining"). In this sense the words do not help the Applicants. They argue

that Section 62 created a legal right which was not previously there. Such a right is more properly described as “at the time of conveyance.....enjoyed with or....appurtenant to” number 10. However, it would be wrong to dismiss the Applicants’ case on the technical ground that they had relied on the wrong words in the section. I will therefore apply the test of enjoyment rather than reputation in this case.

24. In order to satisfy section 62(5), Mr Hughes drew attention to entry number 1 in the Charges Register of title no. CYM546914. It refers to a Transfer of number 11 dated the 6th April 2001 made between (1) R H Tenison (2) J W H Tenison. He submitted that this was sufficient evidence of title to the servient tenement to mean that the conveying party in October 1988 was a competent grantor of the rights for which the Applicants contend.

25. Mr Hughes acknowledged the need for diversity of occupation between the dominant and servient tenements if section 62 is to operate. He submitted that the address of the parties in the Conveyance dated 15 October 1988 showed that the mother occupied number 10 and the daughter number 11. The Respondent did not seriously dispute that there was diversity of occupation, however.

Case for the Respondent:

26. The Respondent takes issue with the Applicants’ case under Section 62 in three respects:-

- a. The conveyance to the Applicants is not in evidence.
- b. There was no competent grantor for the purposes of Section 62.
- c. There is no evidence of reputation regarding the rights claimed.

27. The Respondent himself made a witness statement and was cross-examined. Although he completed his purchase of number 11 on the 28th March 2014 he has continued to live locally at 9 Rhyswg Road with his mother while work is being carried out.

28. The Respondent instructed solicitors to act in his purchase and they raised enquiries with the sellers. One of these was whether number 11 was crossed by rights of way. The reply given by Messrs Granville-West Chivers & Morgan by letter dated 24 January 2014 was that none of the neighbouring properties enjoyed access over the rear garden of number 11. This was followed later by a Statutory Declaration made by the sellers in respect of their title to a part of the concrete path. There was no paper title to the concrete path where it ran along the southern wall of number 11 but it was the intention of the parties that freehold title to this parcel (coloured yellow) should be conveyed to the Respondent. In the course of the declaration the sellers’ state “....during our parents’ ownership the adjoining property owner used the land coloured yellow to gain access to the rear of their premises but this was with the consent and permission of our parents”.

29. The Respondent emphasised that he wanted to do everything by the book. He accepted that there might be occasional use of the concrete path but not habitual use. He accepted that the concrete path was apparent. The Respondent denied that, living close by, meant that he had knowledge of number 11 and the traffic over the concrete path.

30. The Respondent was a creditable witness whose evidence I accept. He was not able, however, to speak to the position which obtained on or before 15th October 1988.

31. In her closing speech Miss Williams pointed out that the Transfer to the Applicants was not in evidence. The significance of this is diminished by the fact that the Applicants rely on the operation of Section 62 on the October 1988 Conveyance. Miss Williams also questioned the evidence of enjoyment as required by Section 62 at the time of the 1988 Conveyance and drew attention to the burden of proof faced by the Applicants, in which connection she referred the Tribunal to *Loveluck-Edwards v Ideal Developments* [2012] EWHC 716.

Issues in the Case:

32. The issues arising in this case are:

- a. Have the Applicants discharged the burden of proof on the question of enjoyment within Section 62?
- b. Have the Applicants shown that there was a sufficient estate at the time of the October 1988 Conveyance to satisfy Section 62(5)?
- c. If the Applicants have a right based on Section 62 is it binding on the Respondent?

Findings of Fact:

33. The Tribunal makes the following findings of fact:

- a. The freehold title to number 10 Commercial Road was until the 15th October 1988 vested in R H Tenison.
- b. On that date he conveyed it to Phyllis Gibbon and Margaret Emery. The latter was the sitting tenant holding under a Lease of number 10 dated 14th July 1978 for a term of 50 years from 31st October 1984. I base this on the schedule to the October 1988 Conveyance at page E7a of the bundle.
- c. R H Tenison was also the freehold proprietor of number 11 Commercial Road until 6th April 2001 when he transferred it to J W H Tenison. In order to satisfy Section 62(5), in my judgement, it is not necessary to deduce title as would happen under an open contract for the sale of a parcel of land. There simply has to be evidence of a sufficient estate in the conveying party to support the grant. See further Gale on Easements 19th Edition at paragraph 3.155. The reference in the register of CYM546914 to the 2001 Transfer coupled with the reference to the renewal of the Lease of number 11 on 20 June 1974 by R H Tenison in the Transfer dated 15th November 2011 (further explained at paragraph 10 of my earlier decision in this matter) are, in my judgement, evidence of an estate sufficient to support the operation of Section 62.
- d. Margaret Emery was the mother of Mrs P Gibbon who was married to Gerald Stanley Gibbon. The Gibbons both lived at number 11 until the 9th February 1984. I accept the first Applicant's evidence on this point and the evidence in the Statutory Declaration at page D22 of the bundle.
- e. On the 9th February 1984 Mr Gibbon died and Phyllis Gibbon lived on at number 11 until 2011. This finding is based on the Statutory Declaration (*ibid*).
- f. It follows that number 10 and 11 were from at least 9th October 1984 occupied by mother and daughter respectively. At some point the mother ceased to live at

number 10 because by the time the first Applicant viewed the property in August 1988 it was empty. On the 15th October 1988 number 10 was owned by the mother and daughter and number 11 was owned and occupied by the daughter. On that day (but presumably after the conveyance to mother and daughter), the sale to the Applicants completed. From then on they were in occupation.

- g. In my judgement there is diversity of occupation sufficient to mean that the right claimed could be regarded as enjoyed or appurtenant within Section 62.
- h. There is nothing in the October 1988 Conveyance which amounts to a contrary intention within Section 62(4).
- i. The evidence of the rights enjoyed with or appurtenant to number 10 is more difficult. I have already decided that the only witness statement of any value is that of the first Applicant. To this must be added the oral testimony of the first Applicant at the hearing. I bear in mind also attention is to be directed to "the time of conveyance" under section 62.
- j. In the usual residential sale with vacant possession the property will nearly always be empty at the time of the conveyance. Evidence of rights enjoyed (or appurtenant) must be derived from what is on the ground or has happened in the recent past and/or in the replies to enquiries. As to this the Tribunal has the first Applicant's observation that the rear yard was open onto the concrete path. The Tribunal also has evidence of the executors of P Gibbon in their Statutory Declaration of the 5th March 2014 made in connection with the sale of number 11. It is worth repeating it.

"We understand that during our parents' ownership the adjoining property owner used the land coloured yellow to gain access to the rear of their premises but this was with the consent and permission of our parents".

- k. The land coloured yellow is of course not the entirety of the concrete path but from the site inspection it was plain that:
 - i. The adjoining property must be number 10 and
 - ii. it is physically impossible to reach number 10 than over the concrete path.
- l. The evidence is barely sufficient but I conclude, when viewed as a whole, there is enough material from which it could be said on the balance of probabilities that on the 15th October 1988 a right of way on foot was enjoyed with number 10 over the concrete path.
- m. It is true that the makers of the declaration have not been cross examined. On the other hand they have personal knowledge of the land from 1957-2011. In the context of a sale where title is through adverse possession, it would have been an easy step for them simply to state that no one had any access to the concrete path. It is significant that they did not.
- n. Additionally and unlike the position in the *Loveluck-Edwards* case, the Tribunal is not in this case being asked to speculate about facts existing in the distant past. The Tribunal has heard oral testimony of the position at the time of the October 1988 Conveyance.

Decision:

34. It follows that the Applicants have made out their case that Section 62 operated to create the right they claim on the execution of the October 1988 Conveyance. On a subsequent transfer by Mesdames Emery and Gibbon of their interest to the Applicants the right will pass without mention: *Godwin v Schweppes Limited* [1902] 1Ch 926. By Section 11(3) of Land Registration Act 2002 the right vested in the Applicants upon their registration. It is therefore necessary to decide whether the Respondent is bound by the right so created.
35. The Respondent was registered as proprietor of number 11 on the 30th April 2014. He was not, however, the first registered proprietor. Title to number 11 was first registered on the 8th July 2002. In these circumstances when the Respondent registered his Transfer Section 29 Land Registry Act 2002 applied. That section reads:

29 Effect of registered dispositions: estates

(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected—

(a) in any case, if the interest—

(i) is a registered charge or the subject of a notice in the register,

(ii) falls within any of the paragraphs of Schedule 3, or

(iii) appears from the register to be excepted from the effect of registration, and

(b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.

(3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.

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36. There is no notice in the register and the right under Section 62 is not a registered charge. This means that paragraph 3 of Schedule 3 becomes relevant. That paragraph has to be read with paragraph 9 of Schedule 12 (*ibid*). The effect is that if the interest was an overriding interest under Section 70 Land Registration Act 1925 then it remains such, notwithstanding the provisions of the new paragraph 3. Schedule 3 came into force on the 13th October 2003

so the only way in which the Applicants' interest took effect against the servient registered title under the earlier legislation was by virtue of Section 70(1)(a).

37. This is enough to mean the Respondent is bound by the interest under Section 62. This result is unsatisfactory in the sense that the Respondent took all the proper steps and, as far as can be judged, followed all the proper procedures in his purchase. He nevertheless finds himself subject to an incumbrance that he could not have expected. The only consolation is that it is far from clear that the result would have been the same had paragraph 3 of Schedule 3 applied in unrestricted terms.
38. There will be an order directing the registrar to give effect to the Applicants' application dated the 15th July 2014. If either side wishes to make a submission about costs I would ask that it is received by the Tribunal no later than the 4th December 2015.

Michael Wear

Dated this 24th November 2015