PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

REF No 2015/0156
BETWEEN

HAREPATH LLP

Applicant

and

CARE AND SKILL PEST CONTROL LIMITED

Respondent

Property Address: Land and buildings at Elm Grove, Wimbledon SW19 4HL
Title numbers: SY322207 and SGL218336

Before: Judge McAllister
Alfred Place
23 September 2016

Representation: the Applicant was represented by Julia Petrenko of Counsel instructed by Greene and Greene; the Respondent was represented by Pavlos Eleftheriadis of Counsel instructed by Coles Miller

DECISION

Introduction

1. The Applicant ('Harepath') is, and has been since July 2008, the registered owner of a building known as Bell House, Elm Grove, Wimbledon. The Respondent ('Care and Skill') is, and has been since March 2009, the registered owner of a building known as 'Overseas House' Elm Grove. Title to this property has been registered since 1962. Both buildings form part of a small estate of industrial units and factories to the east of Elm Grove. Bell House is currently occupied by Curtis Packaging who use the building for storage. Overseas House is also used for storage of material and equipment used by Care and Skill in their pest control business.

2. The two buildings are separated by a narrow paved pedestrian passageway ('the Passageway') which leads from the estate road to a door to the offices of Bell House. The office area ('the Extension') was constructed in or about 1980 by Harepath's predecessor in title, Coglen Limited. The Extension was constructed on land forming part of Overseas House. The door to the Extension was blocked off in 2007 and it is common ground that the Accessway has not been used to gain access to Bell House since that date.

3. By applications dated 8 January 2015 Harepath applied to register a right of way over the Passageway and for title by adverse possession of the Extension. The application in relation to the right of way was referred by Land Registry to the Tribunal on 28 October 2015. The adverse possession claim was not referred to the Tribunal, presumably because Care and Skill did not object to the application within the prescribed time limits. Counsel for Care and Skill confirmed at the hearing that Care and Skill accepts that title by adverse possession of the Extension had been acquired by Coglen Limited, and that accordingly Harepath is entitled to be registered as owner of the Extension.

4. The sole issue before me, therefore, is whether Harepath can establish that a right of way by prescription has been acquired in its favour over the Passageway. The right is claimed as a *'right of way on foot at all times of the day and night along the passageway .... for the purpose of access to and egress from the Applicant's adjoining building.'* The brief details given in the statement of truth in support of the application are that the Applicant's predecessor in title used the Passageway since around 1980 when the Extension was built.

5. For the reasons set out below I will order the Chief Land Registrar to give effect to the application.

Background and evidence

6. The claim, as I have said, is based on prescription at common law or under the doctrine of lost modern grant. It is however worth noting that by a deed dated 15 June

1964 (whereby what is now Bell House was transferred out of a larger title) the transferee (then British Electric Lamps Limited) was granted a right to enter into '*the transferor's neighbouring land as the same is shown hatched black on the said plan with or without workmen for the purpose of maintaining repairing renewing or replacing the building on the land hereby transferred...*'

7. The land shown hatched black appears to be half the width of the Passageway but to extend further north into what is now the Extension. The words '3' 0'' wide right of way' appears next to this.

8. On behalf of Care and Skill it is argued that any use allegedly made of the Passageway by Harepath's predecessors in title is referable to the express right granted by the 1964 deed to use the Passageway for the purpose of maintenance. This argument, with respect, seems to me to be unsustainable. The evidence is that the Passageway was used as a means of access following the construction of the Extension. It could not have been used as an access way to any part of Bell House before this date. In the same way and for the same reason, however, I attach no weight to the words ' right of way' on the plan: until the Extension was built the accessway led only to a wall (albeit, it seems also, to the rear of Overseas House).

9. Neither Mr Whiteway, a partner in Harepath, nor Mr Izod, the Managing Director of Care and Skill were in a position to give any evidence as to the historic use of the Passageway. I will return to their evidence, in so far as it is relevant, below. I have seen both a statutory declaration and a witness statement made by Albert Henry Cree supporting Harepath's applications. I am told that Mr Cree is very elderly (he is in his late 1980s) and very frail, and unable to travel from Surrey. Mr Eleftheriadis invited me to attach no weight to his evidence. He submitted that this evidence is central to the Applicant's case and that, since his evidence could not be tested, it should be dismissed. I do not agree. I agree with Ms Petrenko that Mr Cree has nothing to gain or lose by making his statements. His evidence is supported in any event by the evidence of Mr Curtis.

10. Mr Cree's evidence is that his company, Cobglen, purchased Bell House in 1977. The building was used as a workshop for the manufacture of pumps and associated

equipment. In or around 1980 the company carried out substantial works of improvement to the building, including creating additional office space in the Extension. From the time the Extension was constructed until very shortly before the sale of Bell House to Harepath in 2008, Cobglen, through its employees and customers, enjoyed full and unrestricted use of the offices in the Extension, and full and unfettered use of the Passageway for the purpose of pedestrian access to the Extension. The door was boarded up prior to the sale when the company ceased trading from Bell House. During the period between 1980 and 2007 the Passageway was kept clean and tidy and regularly used. No consent to this use was sought or given. Mr Cree also stated that the Passageway remained the only access to the Extension throughout Cobglen's ownership of Bell House. It seems to me, however, that Mr Izod may be right in his contention that, given the layout of Bell House, and the very low number of people working there, anyone seeking to gain access to the Extension might also have walked through the main part of the building to get to the Extension.

11. Mr Curtis began working in Crownhall House, Elm Grove (which is immediately opposite Bell House) in 1978 and has worked there since that date. Prior to 2000 the offices of Crownhall House were at the back of the premises, but access was from the front, and Mr Curtis regularly went up and down what he called 'the yard' (ie the estate road). He knew Mr Cree. At first Mr Cree worked with two or three other people, and in later years worked on his own. He kept unusual hours, sometimes working in the evening. The Passageway was a means of access to the offices and was used as such. Mr Curtis stated that he saw Mr Cree use the Passageway and that, on occasion, he went to visit Mr Cree in his office using the Passageway. The door had glass panelling. Mr Curtis sometimes asked Mr Cree to repair parts of the printing and packaging machines. Mr Curtis' company began using Bell House for storage in 2009, but made no use of the Extension because of the poor condition of the roof. More recently Curtis Packaging bought the estate road.

12. Mr Curtis was taken to a number of photographs which show, or appear to show, vegetation at the entrance of the Passageway (since removed) and a fig tree, which is still there to this day. The fig tree, though large, does not in any way impede access along the Accessway. The buddleia bush was growing outside Bell House and was

removed. Nothing, he said, grew in the Passageway itself, which was concreted over. The Passageway was cleared on a regular basis, and more recently a smoking bin was placed at the end of the Passageway near the door for his staff. Mr Curtis accepted that rubbish such as tyres are sometimes left in the Passageway. When this happens, it is cleared.

13. Mr Whiteway, a partner in Harepath, was asked why it was that, in 2008, the company applied to register rights in respect of land to the east of Bell House but took no such steps in relation to the Passageway. He replied that he always believed that there was a right of way along the Passageway, and indeed this was shown as a right of way on the plans submitted in support of the original plans to demolish and rebuild Bell House as an office block. It seems to me that nothing turns on this point: the failure to apply for an easement by prescription before 2015 does not, of itself, support or undermine the arguments now advanced.

14. Mr Izod stated that he had a conversation with the previous owner of Overseas House, Mr Taferell, to the effect that the Passageway was used by Mr Cree as a matter of convenience, on a consensual basis. This important point does not appear in Care and Skill's Statement of Case, nor in Mr Izod's witness statement. I am not prepared to accept the suggestion that use of the Passageway was by consent based solely on this evidence. Mr Izod accepted that the Passageway had been used in the period between 1980 and 2007, but suggested, as mentioned above, that in fact most people would walk through the factory to reach the office. Whether this is the case or not, there is no doubt in my mind that the Passageway was used to gain access to the Extension.

15. Mr Izod gave evidence that the Passageway was all but impassable from 2009 to 2014 (the fig tree branches hung low, and the area was used a general dumping ground) but he also accepted that on occasion he would use the door and even the window on the side of Overseas House giving onto the Passageway to move equipment and material into the building, when cars parked on the road made it difficult to get in through the main doors. The doors and windows of Overseas House are boarded up, as requested by the insurers, but it is still possible to gain access. His evidence on this point was supported by Darren Williams.

16. I have no hesitation in finding, on the basis of the evidence, that (subject to the legal issue discussed below) that a right of way by prescription arose along the Passageway by virtue of the use made by Mr Cree and his employees and visitors in the period between the construction of the Extension (1980 or thereabouts) and the boarding up of the door. This right was a right to use the Passageway on foot. I do not accept Mr Eleftheriadis submission that there is insufficient evidence for me to reach this conclusion. I accept Mr Cree's statements in this regard (and his evidence that the Extension was built in or around 1980), and that of Mr Curtis. And as Ms Petrenko submitted, the overwhelming inference to be drawn from the Passageway and the door leading to the Extension is that the door and the Passageway were used.

17. Mr Eleftheriadis also submitted that the right of way, if established, should be limited to normal working hours. I do not agree. Mr Curtis gave evidence that Mr Cree kept unusual hours, sometimes working in the evening. It is clear that Mr Cree had full and unfettered access. There is no question of Harepath seeking, by the application before me, a radical change in the character or identity of the dominant land, as submitted by Mr Eleftheriadis. This argument may or may not be available to Care and Skill in the future, depending on whatever plans are approved and developed.

Legal Issues

18. At the outset of the hearing, the Respondent's case was that, even if a right of way could be established by prescription, this right had been abandoned or extinguished by cessation. This argument was (in my view rightly) not pursued. It is well established that abandonment is not inferred lightly and mere non use will not suffice (see *Benn v Hardinge* (1993) 66 P&CR 246).

19. The Respondent also submitted that that right of way is not an over-riding interest and is caught by the provisions of sections 29 and Schedule 3 to the Act. The answer to this point is that all easements and profits which were, on 13 October 2003 (the date on which the Act came into force) over-riding under the provisions of the Land Registration Act 1925 continue to over-ride under the 2002 Act: see paragraph 9 of Schedule 12 to the Act. By the conclusion of the hearing, Mr Eleftheriadis accepted this analysis.

20. The issue which remains, therefore, is the following. In order to acquire a right of way over the Passageway, Harepath needs to show 20 years use. The period relied on is between 1980 and 2007. Paper title to the Extension was not extinguished until (at the earliest) 1992. If, therefore, time for the purpose of acquiring a prescriptive right only begins to run in 1992, it is clear that Harepath cannot show 20 years user. So the question is whether Harepath can rely on the period between 1980 and 1992. Mr Eleftheriadis says the answer must be no: any attempt to rely on the period between 1980 and 1992 falls foul of two of the cardinal requirements for the creation of an easement, namely that there must be a dominant and servient tenement, and that these must not be owned and occupied by the same person. In this case, he says, the Extension and the Passageway were in the same ownership until, at the earliest, 1992.

21. It appears that there is no direct authority directly on this point. The view expressed by the authors of *Adverse Possession (2nd Ed),* Stephen Jourdan QC, and Oliver Radley-Gardner is that where a squatter is in possession for 20 years or more, and throughout this period exercises a right over adjacent land belonging to the true owner, or to a third party, he will acquire a prescriptive right in the usual way (see paragraph 23.21). The authority relied on for this proposition is a decision of the Ontario High Court, *Walker v Russell* (1966) 53 DLR (2d) 509.

22. In that case the defendant was the paper owner of an island. The claimants claimed an injunction preventing the defendant from going on to the island, damages for trespass, and damages for the destruction of a cottage used by them. The court held that they had acquired title by adverse possession to a cottage on the island which they had used for holidays and weekends from 1938 to 1960, and to a dock which they had built in 1938 and which they used for docking their boat, and from there gaining access to the cottage. They had not acquired title to the remainder of the island. The court also held that the claimants had acquired a prescriptive right in the form of an easement or a way of necessity between the dock and the cottage. Time ran from the construction of the dock in 1938, and had certainly been acquired by 1962 when the defendants regained possession of the island.

23. It is not clear whether the issue was closely argued, or argued at all. There is no discussion in the judgment of the difficulties which arise, or may arise, from the requirement that there should be separate ownership of the dominant and servient tenements, and no reference to either general principles or authorities. The point is dealt with succinctly as follows: *' I am persuaded, too, that the plaintiff has obtained a prescriptive right in the form of an easement or way of necessity between the dock and the cabin. The dock had been built by 1938; it was repaired in 1953 and a new top was affixed in 1960. By 1962, 20 years had passed, a sufficient period to establish the prescriptive right which I mention. '*

24. Mr Eleftheriadis submits that in truth this was a case about an easement of necessity: the route from the dock to the cottage was the only way to gain access to the cottage. But it seems to me clear from the passage above that the court came to the view that a prescriptive right had been established (possibly as well as a right by necessity).

25. An easement by necessity, in the context of an adverse possession claim, was considered in the case of *Wilkes v Greenway* (1890) 6 TLR 449, in which the Court of Appeal held that, as title acquired under the Limitation Acts does not operate as a statutory conveyance, but simply extinguishes the title of the former owner, there is no disposition by a common owner, and accordingly no right of way by implication can arise. In that case the squatter had acquired title by adverse possession of two gardens, but did not acquire title to the private road which was the only means of access. He had not used the private road for a period of 20 years or more. The issue of prescription was not considered. At first instance Vaughan Williams J found in favour of the squatter saying: *'I see no reason why, where a defined way is absolutely necessary to the enjoyment of the property, the law should not presume that somehow or other by legal means, by grant or otherwise, that right of approach must have been created without which that possession could not have been taken, and that seisin enjoyed which the law recognises'.* The Court of Appeal reversed the decision, holding that there is nothing in the Statute of Limitations to create ways of necessity. Since the squatter's title did not derive from grant, the squatter could not benefit from an implied right, including necessity.

26. It has been held that where a true owner makes use of the disputed land during the limitation period (but the use is not such as to prevent the squatter from acquiring title), the title of the squatter will be subject to the rights acquired by the true owner: see *Williams v Usherwood* (1983) 45 P&CR 235. Cumming-Bruce LJ also gave this example: *'If a squatter obtains a possessory title to one of two semi-detached houses, each of which has enjoyed a right of support of the other, by what duty, if any, is the squatter under an obligation to continue the duty to support of the neighbouring house? The answer lies in the power of the law to imply obligations in the case of necessity. The duty arises as a matter of law, independent of grant.'*

27. It is suggested in *Adverse Possession* (at 23-29) that, as the reasoning in the two cases above is inconsistent, the reasoning of Vaughan Williams J at first instance in *Wilkes* should be preferred. The possessory title of a squatter should be treated as having the benefit of, and be subject to, the rights actually exercised during the limitation period over land belonging to the paper title owner. This approach would make no distinction between rights in the course of being acquired (*Walker v Russell)* and new easements arising by implication in favour of the squatter (or true owner).

28. On the facts of this case the issue is not (nor could it be) whether a right of way has arisen by implication or by necessity, but whether a prescriptive right arose during the period when the squatter was in possession but before he has acquired possessory title. It is therefore not necessary to express a view as to whether reasoning in *Wilkes v Greenway* and *Williams v Usherwood* is indeed inconsistent, and if so, which should be preferred. The issue is whether, in short, is the decision in *Walker v Russell* is correct and should be followed.

29. The answer to this question, in my judgment, lies in the nature of the squatter's possessory title. Possession generates its own title, 'which is good against the world except the person who can show a good title' (*Asher v Whitlock* (1865) LR1 QB1). This is essence of the common law principle of relatively of title. In *Asher v Whitlock* the court held that a person in possession, even wrongfully, had the right to evict a third party who takes possession and, importantly, that the right to possession can be devised by will. In *Leach v Jay* (1878) 9 Ch 42 James LJ cited with approval a passage from a text book: *'If a person wrongfully gets possession of the land of another he*

becomes wrongfully entitled to an estate in fee simple, and to no less estate in that land; thus if a squatter wrongfully encloses a bit of waste land and builds a hut on it and lives there he acquires an estate in fee simple by his own wrong in the land which has enclosed. He is seized, and the owner is disseised. It is true that until by length of time, the Statute of Limitations shall have confirmed his title, he may be turned out by legal process. But as long as he remains he is not a mere tenant at will, nor for years, nor for life, but he has an estate in fee simple. He has seisin of the freehold to him and his heirs. The rightful owner in the meantime has but a right of entry, a right in many respects equivalent to seisin; but he is not actually seised, for if one person is seised, another person cannot be so.'

30. A number of consequences flow from this. A squatter may claim compensation if the land is compulsorily purchased before the perfection of his possessory title (*Perry v Clissold* [1907] AC 73 at 79-80); a person with exclusive possession may sue in nuisance without having to prove title (*Hunter v Canary Wharf Ltd* [1997] AC 655; a squatter may sell (*Rosenberg v Cook* (18810 8QBD 162) and a squatter may ecover possession against any one other than a person with better title.

31. In *Lovett v Fairclough* (1991) 61 P&CR 385, Mummery J explained the difference between a person in possession (who acquires title immediately) and a person claiming a prescriptive right: *[the argument advanced by the defendants] ...'ignores the fundamental difference between limitation and prescription. Although both are concerned with acts of long user by one over property of another, the similarity ends there. The law of limitation is relation to adverse possession of land is an illustration of the doctrine of relativity of title in English law. The squatter in possession of land has title to it even before the limitation period has expired... The squatter's title is good against all those who have no better title to the land. He can sue others for trespass or nuisance, even though before the end of the limitation period the true owner would be entitled to recover possession of the land from him on the strength of a superior paper title. Acquisition of easements and profits by prescription is not based on any doctrine of relative strengths of title... The difference can be illustrated by the fact that in the period of long user during which there is a potentiality of acquiring an easement or profit the person prescribing. unlike the squatter in land,*

has no interest whatsoever protectable by law. There is either an easement or profit or there is not. There is 'no intermediate stage which has any existence'.

32. In my judgment, therefore, it follows from the above that Harepath's predecessors in title acquired a possessory fee simple title to the Extension (the dominant tenement) from the moment this was built. It is this title (albeit inchoate, or' intermediate') which allowed Harepath's predecessor in title to begin to claim a prescriptive right to use the Passageway, and clothed the disputed land with the character of the dominant tenement. In view of the nature of a possessory title, and the privileges and rights this title confers from the moment possession is taken, the requirement of diversity of owners is, it seems to me, satisfied. Whilst the paper owner has a better title until such time as his title is barred, the squatter, as it clear, has a title in his own right. It seems to me entirely consistent with the other rights which have been recognised as enuring in favour of the squatter to allow the clock to be started for the acquisition of a prescriptive right at the same time as a squatter takes possession of, and acquires title to, the disputed land. The difficulty identified in *Wilkes v Greenway* (if the decision is still good law) does not arise.

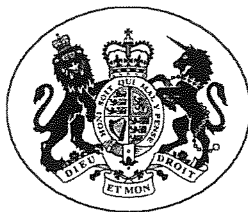
33. The Applicant has not argued, and I do not have to decide, whether, if I am wrong in holding that possessory title satisfies the diversity of ownership test, the right to use the Passageway enured for the benefit of Bell House, not the Extension. Mr Eleftheriadis submits that such use would not be permitted, applying the well known principle in *Harris v Flower* (1904) 74 L.J. Ch 127. As I say, this is not a point I have to decide.

34. For all the reasons given above, I find in favour of the Applicant. This leaves the question of costs. The Applicant is entitled, in principle, to its costs since the date of the reference (26 October 2015). A schedule in Form N260 or the like is to be filed and served by 14 November 2016. The Respondent may respond by 28 November 2016. I will then deal with the matter on paper.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 31st day of October 2016



PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2015/0739

BETWEEN

HAREPATH LLP

Applicant

and

CARE AND SKILL PEST CONTROL LIMITED

Respondent

Property Address: Land and buildings at Elm Grove, Wimbledon, SW19 4HL
Title number: SY322207 and SGL218336

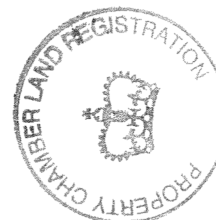
ORDER

The Chief Land Registrar is ordered to give effect to the application dated 8 January 2015

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 31st October 2016



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