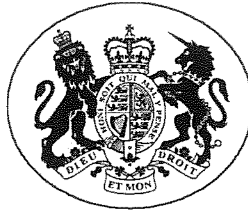


[2017] UKFTT 0637 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2016/0219

BETWEEN

DOROTHY ANN SOUAISSI

Applicant

and

PAUL TINGLE
JACQUELINE TINGLE
ALAN FITCHIE
CLAIRE FITCHIE

Respondents

Property address: Land at 27 Cross Halls, Penwortham, PR1 0YD
Title number: LAN167551

Before: Judge Hargreaves

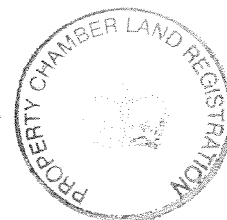
ORDER

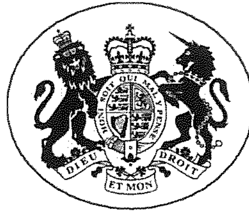
The Chief Land Registrar is directed to give effect to the Applicant's application dated 23rd July 2013 in form ADV1 dated 11th August 2015.

DATED 20th JULY 2017

Sara Hargreaves

BY ORDER OF THE TRIBUNAL





[2017] UKFTT 0637 (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 2016/0219

BETWEEN

DOROTHY ANN SOUAISSI

Applicant

and

PAUL TINGLE
JACQUELINE TINGLE
ALAN FITCHIE
CLAIRE FITCHIE

Respondents

Property address: Land at 27 Cross Halls, Penwortham, PR1 0YD
Title number: LAN167551

Before: Judge Hargreaves
Sitting at Alexandra House Employment Tribunal, Manchester
4th July 2017

Applicant representation: Diarmuid Flood instructed by Solicitors Direct Ltd
Respondent representation: in person at the hearing (Paul Tingle), The Ellen Partnership

---

DECISION

Keywords – claim for adverse possession of a small strip of land adjacent to Applicant's property in Form ADV1 – clear evidence of possession for many years – original agreement consensual – Schedule 6 LRA 2002 – third condition relied upon – alternative conditions –

s40 LPA 1925 – boundary agreement – estoppel – Tribunal Rule 40 – Schedule 1 paragraph 2 LRA 2002 – Limitation Act 1980

Cases cited

Neilson v Poole (1969) 20 P&CR 909

Joyce v Rigolli [2004] EWCA Civ 79

Cooper v Gick REF/2007/0103 Deputy Adjudicator Stevens-Hoare

Pawson v Vaines and Nichols REF/2015/339/340 Judge Owen Rhys

Adverse Possession (2nd ed) Jourdan and Radley-Gardner

The Law of Real Property (8th ed) Megarry & Wade

1. For the following reasons I have directed the Chief Land Registrar to give effect to the Applicant's application dated 23rd July 2013 in form ADV1 dated 11th August 2015. In the circumstances, if I had not been able to, for reasons explained below, I would have directed him to make other changes to the registers pursuant to Tribunal Rule 40, in order to give the Applicant the relief to which she is clearly entitled. Tribunal Rule 40 provides that a direction to the Chief Land Registrar *"may include – (a) a condition that a specified entry be made on the register of any title affected ..."*. This is a procedural device which is available to ensure that the outcome justified by the facts as proved by the Applicant could be achieved despite the fact that what was referred to the Tribunal was an ADV1 application which has raised a point on whether the Applicant's undoubted possession was in fact adverse (though I note the presence of an AP1 application in the trial bundle which was not referred). In the event, she has succeeded.

2. All references are to the trial bundle unless otherwise made clear.

3. The ADV is at 1/1. The Applicant relies on *paragraph 5(4) Schedule 6, LRA 2002*, ie the third condition, the only seriously debatable point raised by the Respondents (assuming adverse possession) being whether she can show that *"for at least ten years of the period of adverse possession ending on the date of the application, the applicant (and any predecessor in title) reasonably believed that the land to which the application relates, belonged to him"*. The Respondents returned Form NAP

requiring the Applicant to establish those grounds and denying the fact of adverse possession for the relevant period.

4. I attended a site visit on 3rd July in the presence of the Applicant, Paul Tingle, and, later, two representatives from the Applicant's solicitors. I was able to inspect thoroughly the disputed side passage of the Applicant's house, and had the opportunity of inspecting the other side of the fence on the Respondents' side, though Mr Tingle would be the first to admit that a very close inspection is not possible due to fairly impenetrable undergrowth. Relations between the two sides are not particularly harmonious, and in the light of the Applicant's extremely strong case on the facts and merits it is a shame that the parties were unable to settle due (it appears) to a dispute about costs and ill will generated by other incidents, as the Respondents' written statements stress. A site view only served to strengthen the Applicant's case overall on the facts and merits: it is easy to see how the lay out and current physical boundary were created: see generally the photographs in the bundle (I had the advantage of seeing originals) at tab 2 and attached to the expert report of Peter Gilkes at tab 4. Paragraphs 8-11 of that report neatly encapsulate the dispute, the background facts, and the relevant measurements, and there is little point given that his findings are agreed to all intents and purposes by the parties, in repeating any of its content.

5. The Applicant bought 27 Cross Halls and was registered as proprietor in February 1987: see tab 2/19-21. As the current disputed path was already in existence before she moved in (and is clear on the Reeds Rains estate agents' particulars at tab2/25), it is a shame that there was (apparently) a failure to notice that there was a slight kink in the physical boundary to allow for a path to the side of the extension at 27, rather than a straight line, which is what the Respondents contend for and which appears on the file plan (in the court file) and may or may not be reflected in the file plan of the Respondents' property at 125 Broad Oak Lane. That straight line would run inches away from the flank wall of the extension and that is the root of the current dispute. The Respondents' continued opposition makes no sense in the light of the planning documents produced by the Applicant (see below).

6. After she made her ADV1 application, the Applicant tracked down her predecessor Mr Bamford who prepared a statutory declaration: tab 2/4. He did not give oral evidence but since his account is (mostly) supported by the planning documents, that does not diminish the weight of his evidence. He explains that after he purchased no. 27 in 1982 he wanted to build a side extension. As the local planning authority required a side passage (for access for dustbins etc, see in particular tab 2/44), he negotiated to buy a strip of land from Jess, his neighbour at 125 Broad Oak Lane. As to that he simply says *"Jess sold me the land for £100 and we used solicitors on Winckley Square in Preston to do the sale/purchase."* That suggests there was something in writing and costs were incurred, but there is no sign of it now except as evidenced by the planning documents and plans and by the fact that permission was granted for the extension which was built. Jess was the Respondents' (elderly predecessor), now deceased. Unfortunately the said solicitors appear to have done nothing to alter the boundaries on the file plans in consequence of the transfer but that may be because, no doubt, while 27 Cross Halls was already registered, 125 Broad Oak Lane was not registered until purchased by the Respondents on 29th April 2005. Prior to that it was unregistered land. But it is absolutely clear to me on the basis of the documents produced by the Applicant at tab 2/50-59 that Mr Bamford obtained planning permission on the basis that he acquired the 1.2m strip and built the extension accordingly.

7. When the Applicant purchased no.27 in 1986-7, she saw a house with a side extension and a path to the side of that – as it is now, though she has resurfaced the path and removed the conifers which were planted as the new boundary feature, and replaced those with a fence. When the Respondents bought no. 125 they saw (as Jess had seen for 20 years or more) a line of conifers where the fence is now and could not have been under any illusions about where their rear boundary was in physical terms (ie in the same place as it is now) even though they now suggest that they raised an issue over the removal of the conifers with the Applicant in 2005 (which she does not recall: either way, the immediate dispute was over the conifers so far as I can tell, rather than the location of the replacement fence). Immediately behind the conifers was a low mesh fence so the conifers were apparently on the Applicant's land and not accessible from the rear of 125 Broad Oak Lane. Given the rules as to general boundaries it is hard to tell by looking at

tab 4/14 whether their rear boundary is "incorrect" or a straight "general boundary" reflecting what they purchased, but there must be an overlap so far as HMLR is concerned otherwise the Applicant would not need the relief she now seeks and the disputed strip would not be identified as LAN167551.

8. It is absolutely clear to me that on the basis of the deal between Mr Bamford and Jess, he relied on the agreement as to the acquisition of the strip and the subsequent change in their mutual boundary to go ahead with the building of the extension and that he acted to his financial detriment in the expectation that the land was his because Jess had agreed and been paid for it. There is no evidence that Jess objected at any stage, so she too acted in accordance with the arrangement for which she received £100. She would not then have been able to insist that Mr Bamford stuck to the original boundary, and neither can the Respondents. At all material times since the building of the extension over 30 years ago, it is indisputable that the strip has been physically part of no.27 and there has been no access to it from Broad Oak Lane. There was either an agreement to agree a new boundary (*Neilson v Poole; Joyce v Rigolli*) or an agreement to transfer land or possibly, a conveyance was executed which is still languishing in a drawer somewhere. Prior to 1989, part performance as demonstrated on the facts would have made the agreement specifically enforceable even if there was nothing in writing (which appears unlikely on Mr Bamford's account): *s40 LPA 1925*, which was still in force. On various grounds, Mr Bamford and the Applicant would have been entitled to formalise the situation with Jess if that was required. What actually happened on the known facts before me was that Jess retained the legal title to the disputed strip though Mr Bamford was entitled to it beneficially.

9. In reaching these conclusions on the facts I take into account the Applicant's written and oral evidence, with that of her ex-husband Mr Souaissi and close friend and neighbour Donna Alexander, who supported the Applicant's version of events in a compelling and confident manner. Having heard their evidence, I accept their accounts without hesitation. To be fair to him, Mr Tingle (who did not realise he was heading for a judicial hearing as opposed to a more conversational form of dispute resolution) did not have much ammunition to challenge any of

them and the Respondents' written evidence did not assist their case, because it was largely based on irrelevant or inaccurate facts. So far as he contradicted the Applicant, his evidence was based on a misconception of (i) the length of time during which the strip has existed and (ii) the fact that the fence in my judgment replaced the conifers on the same line to all intents and purposes, so there was no "land grab" in 2005.

10. The Respondents' case boils down to this: when the Applicant decided that the conifers she inherited on her purchase from Mr Bamford had reached an excessive and unattractive state so that she wanted to (and did) remove the conifers and replace them with the fence which is now in position, she "land grabbed" the disputed strip. On the facts as I have found them to be, that is fanciful: the strip was long incorporated into no. 27 roughly 20 years before the fence was replaced in 2005 and I accept the Applicant's evidence that the fence was replaced on the line of the conifers. Whether or not the path ended up slightly wider than the 1.2m agreed between Jess and Mr Bamford is wholly irrelevant and does not justify the Respondents' claims of trespass – which is their alternative and secondary point. On the balance of probabilities, the fence is on the line of the conifers. The principles as to general boundaries apply. A matter of 10-12cm is irrelevant to this application.

11. The Respondents seek to make much of an alleged dispute in order to challenge "reasonable belief", relevant to the "third condition". The only evidence of this hangs on one letter dated 7th November 2014 from the Respondents' solicitors (see eg tab 4/2 – but it should be read with the Applicant's solicitors' analytically correct response of February 2015 at tab 4/3). As the Applicant says, this letter was written when she was trying to sell her house and the first time she knew about a potential dispute involving the conifers was years after they were removed, in 2014. The allegation that in replacing the surface of her driveway and disputed path the Applicant attempted to conceal evidence as to the true boundary is simply unsustainable on the basis of her evidence. Whilst it is absolutely the case (it transpires) that there have been other regrettable disputes between the parties involving a different tree on the Respondents' land, it is certainly not the case that there is any evidence of an ongoing dispute as to the relevant strip – and on the

basis that the Respondents acquired 125 Broad Oak Lane in 2005 about 20 years after their predecessor Jess would be estopped from denying the agreement she made with Mr Bamford, it is hard to see how there could be a relevant neighbour dispute anyway. In conclusion it is evident that the Applicant *"reasonably believed that the land to which the application relates belonged to her"*.

12. On the findings I make as to the facts, which is that the Applicant's version of events is made out, the next question is: what is the legal analysis? The starting point is that on the facts of the agreement between Mr Bamford and Jess, Mr Bamford's entry onto the disputed land was arguably consensual, not adverse. At all material times Mr Bamford and the Applicant undoubtedly had the intention to possess, but it was on the face of it not "adverse" to the true owner's rights, because Jess had sold the land and Mr Bamford and the Applicant had a defence to any claim for possession if Jess challenged them. The consequence is, on that basis, that the ADV1 application which was referred to the Tribunal would have to be cancelled because there would be no ten year period of adverse possession prior to the date of the ADV1 form as required by *Schedule 6 LRA 2002*.

13. However, the question whether possession is adverse or time runs in favour of an Applicant such as in this case is discussed at length in chapter 28 of Jourdan and Radley-Gardner's *Adverse Possession* where they consider authorities (amongst others) relating to cases where there has been an agreement to convey land which has not been finalised by a conveyance or a registered transfer where money has been paid. At paragraph 28-41 the authors state (after a lengthy analysis of the authorities): *"The only basis for reconciling the above decisions is to treat the possession of a person entitled to the land in equity as adverse if, but only if, he is absolutely entitled, so that the person holding the legal title holds it on bare trust for the person in possession"*. On the facts as I have found them to be, Jess would have been bare trustee of the disputed land for Mr Bamford who was absolutely entitled to it. It follows that he would be in adverse possession of the land and applying the standard adverse possession tests (factual possession and an intention to possess), there is no question about that as far as this case is concerned. See also *Megarry & Wade* citing Jourdan with approval at 35-040.

14. It would then follow, that if Mr Bamford was in adverse possession from 1982 or 1983 (he obtained planning permission on 13th October 1982), Jess' title to the dispute strip would have been extinguished under the *Limitation Act 1980* by 12 years' adverse possession well before 2005 when the Respondents bought no. 125, (and before 2003 when the *LRA 2002* came into effect), by 1994 or 1996 – but years before the Respondents acquired no.125 in 2005, as the extension was built when the Applicant saw the property in 1986 (making a 12 year period 1998 at the latest).

15. In her ST1 dated 29th June 2015 (in the court file) the Applicant states: *"I believe the boundary was moved from its original location to the present location in 1982 to accommodate an extension (see planning application)"* so the basis of her case has been essentially the same throughout. Moreover, when the Respondents were first registered with title to 125 Broad Oak Lane they would be registered subject to the Applicant's interests as discussed above as a *"person in actual occupation"* of the disputed land: see *s11 and Schedule 1, para 2 LRA.* The grounds on which the Respondents have objected to the application have been based not on technical legal grounds but on matters of fact which I have rejected as misconceived and unfounded, preferring the Applicant's evidence on all counts.

16. If my analysis is correct, title to the disputed strip was barred under the provisions of the *Limitation Act 1980* several years before the Respondents bought no.125. If so, an AP1 application based on the transitional provisions of the *LRA 2002* rather than an *ADV1* application could have been made and I cannot see that the Respondents would have had any defence to such an application to alter the register on the grounds of mistake in relation to the disputed strip. However, it is well settled that such a finding would have entitled me to find the Applicant successful under the second condition (*Schedule 6 paragraph 5(3)*) in so far as she *"is for some other reason entitled to be registered as the proprietor of the estate"*: see *Cooper v Gick; Pawson v Vaines and Nichols.*

17. As it is, the Applicant could make out any of the three conditions in *Schedule 6* if she needed to. However, even if she or Mr Bamford had not been in adverse possession so as to satisfy the requirements of *Schedule 6* (if I am wrong about the

application of the bare trustee analysis as set out in paragraphs 12 and 13 above) I would conclude that her rights under a boundary agreement or estoppel principles would entitle the Applicant to an order pursuant to Tribunal Rule 40(3) requiring the Chief Land Registrar to note her as proprietor of LAN167551 in any event, it plain being that the correct outcome of the facts is that the Applicant is entitled to be registered as proprietor of the disputed strip for a number of reasons, including the one she relied on (assuming adverse possession), ie reasonable belief that the disputed strip was hers.

18. In the circumstances the Applicant is successful. The usual rule is that the unsuccessful party pays costs. Although the Applicant has filed a schedule of costs it is inaccurate (eg court fees of £190 are claimed and there are no fees in this Tribunal) and a revised schedule must be submitted to the Tribunal and served on the Respondents by 5pm 4th August 2017, correcting this, other mistakes if any, and removing all claims relating to costs incurred prior to the date of reference to the Tribunal ie 6th April 2016 (the attendance claims seem on the high side). The Respondents are entitled to make submissions in reply by 5pm 11th August, and costs will be decided after that, if they cannot be agreed.

DATED 20th JULY 2017

Sara Hargreaves

BY ORDER OF THE TRIBUNAL