[2017] UKFTT 0809 (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 2016/1126

BETWEEN

JOHN ALFRED POLLARD
BEATRICE ANN ROBINA POLLARD

Applicants

and

BELJINDER JOHAL

Respondent

Property address: 99 and 100 Tutbury Road, Burton-on-Trent DE13 0NX
Title number: SF418429 and SF532305

Before: Judge Hargreaves
Hearing: 14th September 2017
South Derby Magistrates

Applicant representation: James Holmes-Milner instructed by DLG Legal Services
Respondent representation: Iqbal Mohammed instructed by R.W. Skinner & Son

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DECISION

Keywords – determined boundary application – DB line agreed subject to Respondent's claim for adverse possession of a very narrow strip running parallel with the agreed legal boundary – claim for adverse possession failed on the facts.

Cases cited

Adverse Possession, 2nd ed, Jourdan QC and Radley-Gardener

Searby v Tottenham Railway Company (1868) LR Eq 409

Hawkes v Howe [2002] EWCA Civ 1136

Norton v London and North Western Railway Co [1879] 13 Ch D 268

1. The Chief Land Registrar is directed to give effect to the Applicants' application in Form DB dated 3rd July 2015 for the following reasons.

2. Page references are to those in the trial bundle. In addition I was handed better copies of photographs and two plans in more user friendly (and correct) scale than those originally in the bundle (or attached to HMLR's case summary) prepared by the Greenhatch group. "Greenhatch 1" is the plan prepared on 8th October 2014 and the distinguishing feature is marked as the "projected line from concrete retaining wall". The compliant DB plan is "Greenhatch 2" dated 1st September 2015: the exact line of the boundary to be determined is the whole of the boundary between the Applicants' bungalow at 100 Tutbury Road and the Respondent's house at 99 Tutbury Road, near Burton-on-Trent. The DB line is marked along (in part) "projected line from concrete retaining wall". There is no dispute as to the DB between E-D; the factual dispute concerns that part of the boundary which runs parallel to the existing hedge which is visible in both plans. It is clear that the centre line of the existing hedge is well within the DB line on the Applicants' side of the boundary on both Greenhatch plans.

3. I had the advantage of having a site visit on the afternoon before the hearing. It was attended by the Applicants and Mr Holmes-Milner, and the Respondent and her father, Deep Singh Kang. As is frequently the case, relations between the two edge towards the bad tempered. The DB application was made part-way through a project started to by the Applicants to erect a fence on the line of what they say is the boundary, roughly between D-F on Greenhatch 2, which would, when complete, enclose the hedge within their garden. That project was part-completed in 2014 and should now be capable of completion, though that matter is out of my hands. There have been related county court proceedings which will now be resolved (I hope) pursuant to this decision.

4. Looking at the properties from the road (eg p74) the notable feature is that the Applicants' bungalow is on land about 1m higher than no.99 and was built on a concrete plinth. The line D-F is a continuation of a straight line to the rear taken along the outside edge of that plinth. There is a small gap to the side of the Applicants' bungalow between it and the Respondent's house, and there is no dispute that the relevant physical features have been in place for many years on that part of the boundary. If you stand in the gap and look straight down the Applicants' garden, as I did, the centre line of the hedge is roughly in line with the centre line of the gap between the bungalow and the fence. In other words, and this is obviously not definitive but makes sense of the history discussed below, the hedge does appear to the eye to have been planted within the Applicants' boundary and garden. See in particular the bottom photograph at p92. The hedge is long established (see eg p93), but another feature is that it never has extended to the rear fence, so there was a gap, and there was in the corner gap a hawthorn tree, and a pear tree, now removed (see an early photograph at p75). Although the differential in plot height seems to diminish towards the rear of the back gardens, the garden at no.100 is higher. That means there has been some form of earth retaining feature along most of the boundary. Photographs of the disputed area in February 2014 and later that year when Mr Pollard starting erecting the fence (from the rear working towards point D on Greenhatch 2) are at p77-80 and from 2016 onwards at p81-92. As Mr Pollard's evidence indicates, parts of this retaining feature have been removed since he started to erect the new fence in early 2014 (see below).

5. The site visit being undertaken after disputed activity along the boundary, one of the most interesting features is now hard to discern for that reason. However, a better version of the picture at the bottom of p87 shows a higher level of soil/undergrowth under what would be the canopy of the hedge (cut back on the Respondent's side to the roots in that photograph). The hedge was clearly planted on land higher than that in the Respondent's garden. Some photographs show steel pins inserted to support the concrete/brick retaining wall. The best photograph of the hedge as it might have looked if well established and well maintained was one produced by the Respondent at the hearing, taken from estate agent's particulars,

showing the Respondent's rear garden, with the hedge set back beyond the line of a low retaining wall. Mr Pollard says the retaining wall/line of bricks is the line of D-F, though little remains of it now due to the new fencing works. The Respondent says, with reference to that photograph, that the part of the boundary between the brick line and the roots of the hedge, belongs to her by way of adverse possession, and that she has clearly maintained her garden up to the roots of the existing hedge. She relied heavily on this photograph, which emerged at the hearing.

6. By the time the reference came to be heard, the sole issue between the parties is whether the Respondent can make good her adverse possession claim. There seemed to me to have been an earlier issue as to whether there was a boundary agreement in relation to Greenhatch 1, but as that was not in issue by the time the hearing commenced, I therefore turn to the facts so far as they concern the Respondent's adverse possession claim.

7. Before I do that, I point out that the parties have corresponded at length about their respective cases, but given the fact that both had counsel at the hearing, and the parties gave evidence, I do not intend to rehearse their previous arguments.

8. Both sets of file plans show straight boundary lines. The Applicants bought their bungalow in March 2010[1] (first registered in 2007), and the Respondent hers in September 2004 (first registered 1999). See p6-11. The Respondent has no evidence of anything done or not by her predecessor, but it transpired that she bought no.99 from the family or the estate of "the late Mr Woods" to whom reference is made in an important letter dated 1st October 1979 and to which I refer in more detail below.

9. Mr Barnes lived at no.100 and Mr Woods lived at no.99 until some time in or before 1979 when he died. Then the Respondent's predecessors put no.99 on the market. Mr Barnes, evidently a cautious and well-organised man, wrote a letter to Barnes & Co, the estate agents. He enclosed a plan. See p62-63. He wrote the

[1] Conveyances at p49 onwards, but not too helpful except to suggest that the boundary was a straight line as Greenhatch

letter *"to avoid any future misunderstandings on the subject [of the boundary], the possibility of which seems to me to be inherent in the situation as it exists. You have doubtless observed that there is running alongside the outer wall of my property adjacent to no.99 a concreted strip of land 33 inches wide which is not fenced off from no.99*[2] *but acts as a retaining wall to my property. This strip of land is clearly part of my property ... Mr Woods was fully aware of this. The two gardens are separated by a privet hedge, and it might be assumed that this hedge belongs to no.99 since my deeds and probably your clients' deeds show the original fence belonging to the two properties as belonging to no.99. The hedge does, however, belong to me, having been planted on my land inside the previous chain-link fence."*

10. To reinforce his point, Mr Barnes enclosed a plan indicating where the current hedge had been planted by himself and Mr Woods. So the original chain link fence was removed, and the hedge was planted to replace it (possibly to create more privacy than that provided by a chain link fence, but the motive is irrelevant). That was agreed by the Respondent (paragraphs 4-5 of her statement of case p24).

11. So the situation is that the hedge was planted in no.100's garden at least 25 years before the Respondent acquired no.99 or 38 years ago. That would, in principle, enable her to rely on any acts of adverse possession for a 12 year period prior to October 2003 when the 2002 Land Registration Act came into effect or rather 2007 when no. 100 was first registered or even up to 2014 (subject to LRA technicalities such as later issuing an ADV1 or AP1) but she could not speak of any credible evidence of anything done by her predecessor which excludes reliance on the period prior to 2004. Though the 1979 letter is not determinative, it does arguably suggest some knowledge or recognition by the Woods family as to the circumstances surrounding the planting of the hedge, and would therefore arguably justify some evidence that they had taken deliberate steps to possess the disputed strip prior to 2004[3]. In view of my findings on the facts, any technical issues about which adverse possession regime might apply to the Respondent's

[2] It clearly is now

[3] There was a suggestion in some correspondence that the Respondent was confused at one point about who planted the hedge: see eg p106, this was not maintained at the hearing

case are not required to be decided, including a point raised by Mr Holmes-Milner on the application of *s11(4)(b) LRA 2002*. In her statement of case, a 38 year period is relied on because it is pleaded that since the hedge was planted, the owners of no.100 were dispossessed of the land on the other side of the roots. See also the Respondent's first skeleton argument at p191.

12. The Respondent and her father gave evidence first. The Respondent's witness statement is at p239. The chronology of her account at p240 is not very clear (neither is Mr Kang's at p244). What actually happened is set out in Mr Pollard's statement at p200 and the chronology prepared by Mr Holmes-Milner. Her evidence as to adverse possession has therefore to be considered against the factual background that (i) in about May 2013 the Applicants erected 3 fencing panels starting from the rear (ii) the fence project was paused but not due to any neighbour dispute (iii) the fencing started again in about February 2014 insofar as posts were installed for the remaining panels and (iii) in June 2014 further works to complete the fencing were halted by the Applicants after Mr Kang raised issues about the location of the boundary (iv) Mr Kang cut back the hedge on the Respondent's side to the roots in September 2016 after (v) Greenhatch was called in to survey the boundary line in October 2014 and litigation continued with police involvement about fence panels which Mr Kang had removed, about which I need not say more. At the time of my site visit, the first set of fence panels was still in position. Mr Pollard issued the DB application in 2015, so the dispute has now been simmering for over 4 years with an incomplete fence between the properties.

13. Mr Mohammed laid great stress in his submissions on the fact that the hedge appeared to be at the top of a bank which looked to be part of the Respondent's garden. But Mr Mohammed had not attended a site visit and this line of argument does not take into account the boundary as a whole ie from E-F[4]. Taking it as a whole, the hedge is clearly "set back" from the "obvious" straight line from point E. Another point on which he relied, that the hedge enclosed the Respondent's garden, also overlooks the gap at the far end. I can only surmise that the careful Mr Barnes left a gap so he could walk round and trim the hedge, but unfortunately we

[4] For example, at paragraph 15 of his skeleton argument he contends that there is no dispute as to factual possession because the hedge runs all the way to the rear of the garden: it never has done

have no evidence as to any hedge trimming activities prior to 2004, and in later years at least that gap might have been blocked by the hawthorn tree, making that mere speculation. So although Mr Mohammed relies on more than mere hedge trimming, his arguments as to exclusive possession are somewhat undermined by the facts as a whole. In particular, the Respondent's own evidence does not support her claim to establish adverse possession.

14. In evidence in chief Mrs Johal referred to the "new" estate agent's photograph and confirmed that it was taken in 2010 when agents had been instructed to sell no.99. She maintained that the hedge overhung her garden until Mr Kang and her husband cut it back, from 2004, and suggested that the 2010 photograph which indicates maintenance of a border with shrubs and flowers planted up to the roots of the hedge above the line of bricks, was how the rear garden commonly appeared. But in cross examination that case really collapsed: she accepted that the border as such was invisible in 2004 when she acquired the house, and her evidence overall was vague to say the least, given the burden of proof on her to prove her case. She herself never gardened. Her husband, who apparently did, was not called to give evidence. Works on the "flowerbed" ceased after a sale fell through in 2010 and prior to that, from 2004-2010 they had not touched the hedge. By 2014 (see eg p77) the hedge was clearly unkempt and had grown out again. The effect of her evidence in cross examination was that the rear garden had been tidied up in 2010 for the purposes of selling the property, revealing the "flowerbed", but that was basically a one-off event. She admitted that the recent heavy cut back in 2016 was in the form of maintenance "as we should have done [it]" (a telling remark in itself) but denied that by then it was relevant to the dispute, as on the balance of probabilities after years of inactivity, I find it was. She accepted most of the suggestions put to her by Mr Holmes-Milner, and in particular the strong fact in favour of the Applicants that she made no objection to the fencing works carried out in May 2013 and early 2014 until her father intervened later in 2014. Her evidence on that by way of explanation ie that basically she could not remember any conversations between herself and Mr Pollard (whose evidence in brief is that she agreed to the fencing works or at the very least was well aware of his plans in 2013 as they involved removing an old shed from her garden as well, by consent) was not really credible. She recalled a

conversation about the shed removal, but not the fence: that again is not credible, particularly since she accepted that she was on good terms with Mr Pollard and his contractors to start with. The rear garden of no.99 is not so big that she could have failed to notice the first three fence panels: she noticed them, as did her father, but he raised no objection for over a year. Such an attitude is wholly inconsistent, without explanation, with a case of adverse possession ("this property is mine and you are taking it away" is the usual expected response) and it weakens the already very thin evidential basis of her claim.

15. Even if, as Mr Mohammed suggested in re-examination, Mr Pollard started to build the new fence without warning (which I reject), that does not justify a failure to respond. She accepted that she noticed the new fence panels. It is pretty clear that the dispute escalated when her father became involved the following year. She herself has been wholly indifferent to the issue for years on my interpretation of the her evidence: even if she had factual possession of the land under the extensive hedge canopy (which I doubt save for one short period in about 2010 when the hedge was trimmed back for the purpose of improving the look of the rear garden), nothing in her evidence suggests she had any intention to possess. At best her evidence (in re-examination) was that there was always a flower bed, but it was "overgrown". She said she did not notice much, being busy at work and caring for a young family.

16. Mr Kang's oral evidence by contrast was exaggerated in my judgment. His written evidence (p243) contains little by way of useful detail except to claim the hedge is a boundary feature which he trimmed every 2-3 months. He maintained that he was the gardener who cared for the flowers ("all sorts of flowers") in the flower bed every time he cut the grass. But not only was the "flower bed" notable by its absence in the Respondent's witness statements, the 2010 photograph only being revealed after the site visit, that line of evidence was also severely weakened by the answers Mr Kang gave to Mr Holmes-Milner in cross examination. He was unnecessarily contradictory, unhelpful and belligerent eg in his assertion to Mr Holmes-Milner that the Applicants lacked further photographic evidence to prove the assertion that the rear garden was tidied up to reveal the "flowerbed" only once in 2010. Given that no.99 had been a family home to the Respondent for well over

10 years, it was surprising that the Respondent produced no other photographs to support her case. In response to questions about how often he cut the hedge, (the allegation being that it was only in 2010 and 2016) he said "How often do you cut a hedge?"

17. His written evidence that he trimmed the hedge every 2-3 months (at most) does not support a claim to adverse possession of a strip of "flowerbed" up to the roots. Again, Mr Kang is faced with having to explain his failure to object to the first fencing works carried out by the Applicants. I reject his evidence that he objected from the first in 2013: that is not only inconsistent with the detailed and careful evidence of Mr Pollard, but also his own daughter's evidence. Whilst he is clearly capable of overriding her and interfering forcefully (which I consider is why she "did not remember" various conversations with Mr Pollard), she told the truth on this point. Mr Kang's evidence got so much more confused and complicated in his account of his conversations with Mr Pollard that eventually he was forced to resort to alleging he was bad at dates and never took photographs. On that basis I can find with confidence that he knew about the fence works in 2013 but made no objections until over a year later in 2014, and that, in my judgment, undermines the adverse possession argument, as does his failure to recall the state of the back garden at no.99 in 2004. Further, no solicitors were instructed until April 2016 (p102).

18. My conclusions on the Respondent's evidence are that the hedge was trimmed by or on behalf of the Respondent irregularly. To cut it properly on the Respondent's side would require a ladder (at least in recent years) and several hours' labour not to mention decent tools. Such obvious details were wholly missing from the Respondent's evidence. Except in 2010 the "flowerbed" was not revealed. It was not treated as a feature of the Respondent's garden and the whole issue of the disputed strip was not an issue until 2014. Although Mr Mohammed says the case is not just about hedge trimming, it still represents a factual bottom line on which he would need to pin his case for it to succeed.

19. Mr Pollard was cross examined at some length as to his credit and credibility. Most of this was pointless given the burden of proof was on the Respondent. By

contrast to Mr Kang he was a credible witness, though he also exaggerated his evidence about hedge trimming on the Respondent's side which was unnecessary and unhelpful. He recalled the only one occasion he did this when the Respondent's husband had lent him gloves, but notably he was not cross-examined to the effect that when he did so, he trampled all over a flowerbed. That apart I reject the line put by Mr Mohammed that he set out to do something he knew (in erecting the new fence) was "naughty": I do not think he took a chance at all. He worked out where he could put the fence, started to build it within that line by a few inches, and cleared the way in conversation with the Respondent first. He does not strike me as the sort of man who would barge into someone else's garden (the only way of building the fence and keeping the hedge) without clearing his ground first (actually and metaphorically). That is why he instructed a surveyor: he might have been wrong in thinking the boundary was agreed, but at least he has followed through on his case by making the DB application.

20. Asked why he wanted to erect the fence, he replied: to keep the chickens in (indeed the site visit showed gaps in the hedge blocked with random cardboard etc). Asked why he didn't remove the hedge first, he replied for environmental reasons: the hedge is well established and that is not, contrary to Mr Mohammed's further questioning, a ridiculous answer. Even if I am wrong about Mr Pollard's evidence, none of it supports the Respondent's case. In particular I accept Mr Pollard's detailed account of the steps he took in relation to the hedge and the retaining bricks/wall when he started to erect the fence both in 2013 and subsequently (see p198 et seq.)

21. Where there is a conflict as to time or date, I prefer Mr Pollard's evidence, written and oral: he was careful; and produced photographs, many of which are dated. He also retained documentary evidence of many of his purchases which support his account, these are evident in the bundle and do not require to be referred to in detail.

22. Mr Holmes-Milner for the Applicant submitted that the hedge had been planted in accordance with Mr Barnes' letter, on top of a bank on his land, the earth being retained by a line of bricks. I agree. I also accept that on the basis of the evidence I

heard, the hedge was well established with a substantial canopy by 2004. The short answer to the adverse possession claim is that the Respondent cannot rely on any of her own activities since 2004 and has no evidence to support a case prior to that.

23. Even if the Respondent had maintained a flowerbed or trimmed the hedge regularly (which she did not), these acts would be insufficient or too trivial to support a claim to adverse possession: see *Searby v Tottenham Railway Company, Hawkes v Howe*, paragraph 33(b) of the Applicant's skeleton argument. There is no evidence that they were done "unequivocally" as the acts of an owner. Most of the time, the strip or flowerbed would have been under the canopy of a well established hedge. Mr Mohammed cited in response *Norton v London and North Western Railway* Co (paragraph 13 of his skeleton argument) to demonstrate that cultivation of a strip of land separated by a hedge from the true owner's land could amount to adverse possession but the facts in that case are stronger than in this (the land in question was cultivated as part of the claimant's land, whereas in this case, there has been no such credible evidence, quite the reverse). In this case, the evidence amounts to prevalent neglect: whereas that would not matter if the Respondent had paper title, it matters if she claims adverse possession.

24. The Respondent's failure to object when the first line of fencing went up is also inconsistent with any required outward or obvious sign of ownership. See generally the authorities cited in *Adverse Possession* from 13-18. It is also notable that when Mr Pollard did go into the Respondent's garden to trim the hedge, even if it was on one occasion, there is no evidence that he was informed by the Respondent that the strip to her side of the roots, belonged to her.

25. Mr Mohammed faced a tough task in making closing submissions. He sensibly accepted that there was no evidence of cultivation (of the "flowerbed") by the Respondent on which he could rely. To meet the factual deficiencies of the Respondent's case he submitted that it matters not at all that the disputed land has been under a hedge because the important point is that the Applicant has not had access to it, it following that at all material times the Respondent has, and that, moreover she treated it as part of her garden. Even if the Applicant has not had daily access, it is clear from his evidence that until 2014 there was no objection to

him going into the Respondent's garden to cut the hedge (if only once) or to start erecting the fence. I reject Mr Mohammed's submission that his conversations with the Respondent demonstrated his non-belief in the location of his boundary and land and his belief that the Respondent owned the land: quite the reverse, he knew what he owned and was being no more than neighbourly. Even if he said in cross examination that he would not have erected the fence if the Respondent had refused permission, that would have had no impact on his title, and is hypothetical and of limited evidential use. I accept the last sentence of his witness statement, paragraph 8 (and Mr Mohammed's submissions have to be read in the context of his written evidence as a whole which I accept). It overlooks the potential application of the *Access to Neighbouring Land Act 1992* and is far too simplistic a basis on which to mount the Respondent's case. It overlooks the non-intervention until 2014 which is far more critical from an evidential point of view.

26. What is more, as the *Searby* case shows, the owner of land does not have to be micro-managing it all the time – the onus is on the person claiming adverse possession. The real point is: how do you have factual possession of land under the canopy of a hedge? Mr Mohammed says the quality of user is commensurate with a sliver of land under a hedge. Notwithstanding Mr Mohammed's submissions, I find that the nature of the land concerned can and in this case does have an impact on the concept of factual possession but not as he submits: see *Adverse Possession* at 8-08-8-10 for example. A strip of land under a hedge does not normally present itself for use; the Respondent has to show more than she has to justify her claim. In other words, she cannot say "because there has been an overgrown hedge, I am entitled to do very little: it has been mostly accessible by me". In truth, apart from clearing part of the land under the hedge in around 2010, nothing the Respondent did has had any impact whatsoever. And that underlines her problem: to get to it required active cutting and trimming, and the evidence as to that is too scanty to count. There was a physical "step up" to get to the land: it was not, to the eye, part of the garden or lawn which could be mown as such. Nothing in her conduct indicated that she or her predecessors were in possession in a way referable to exclusive factual possession as required for adverse possession. Again, I repeat the point made above that the middle of the hedge is, to the eye, set back from the obvious line of the boundary.

27. Mr Mohammed submitted, moreover (and alternatively to relying on the Respondent's activities), that time ran from the planting of the hedge, ie 1979 and therefore the limitation period of 12 years had expired years before 2004. He invited me to find that the situation had not changed from 1979-2004. As there is not a shred of evidence as to the situation in that period, I reject that submission. I have already pointed out that the Barnes letter suggests the contrary in any event. A long period without real evidence does not create a case on factual adverse possession.

28. The Respondent's case is inadequate on exclusive factual possession and I reject it. As to intention to possess, Mr Mohammed recognised the difficulty of dealing with the Respondent's evidence as to her response to the new fence building in 2013 (somewhat contrary to his earlier submissions about the effect of the Applicant seeking permission to erect the new fence). His answer was to refer to the pre-2004 period as the relevant period. For reasons given (lack of credible or any evidence) I have already rejected that. There is no evidence of intention capable of inference from any facts and no direct evidence of intention to possess until 2014 at all.

29. In the circumstances the Respondent's challenge to the DB application has failed.

30. The usual rule is that the costs follow the event. If the Applicants wish to apply for costs they should file and serve a schedule of costs incurred in relation to the reference (from 13th December 2016) by 5pm 16th October. The Respondent should file and serve a reply by 5pm 26th October. The question of costs will be dealt with after that, if not resolved by agreement before then.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

DATED 2nd OCTOBER 2017

PROPERTY CHAMBER LAND REGISTRATION

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

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REF NO 2016/1126

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Respondent

Property address: 99 and 100 Tutbury Road, Burton-on-Trent DE13 0NX
Title number: SF418429 and SF532305

Before: Judge Hargreaves

ORDER

The Chief Land Registrar is directed to give effect to the Applicants' application in Form DB dated 3rd July 2015.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

DATED 2nd OCTOBER 2017

PROPERTY CHAMBER LAND REGISTRATION