



[2018] UKFTT 0061 (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 2017/0108
BETWEEN**

**IMAD AL- HADDAD
CHADIA AL- HADDAD**

Applicants

and

**RAMESH VALJI BHANDERI
VANITA RAMESH BHANDERI**

Respondents

Property Address: Land adjoining 47 Shooters Avenue, Harrow, HA3 9BQ

Title number: AGL365973

**Before: Judge McAllister
Alfred Place
4 December 2017**

Representation: Mr Simon Birks of Counsel instructed by Walter Wilson Richmond appeared for the Applicants; Mr James Sandham of Counsel instructed by Mills Chody LLP appeared for the Respondents

DECISION

Introduction

1. The Applicants, Mr and Mrs Al-Haddad, are the freehold owners of 45 Shooters Avenue ('Number 45'). The Respondents, Mr and Mrs Bhanderi, are the freehold

owners of the neighbouring property, 47 Shooters Avenue ('Number 47'). Shooters Avenue is a street of houses set back from the road. The back gardens of the Numbers 45, 47 and a number of other properties are separated from the back gardens of Rowland Avenue which, I assume, allows access to the back of the properties.

2. Between Numbers 45 and 47 is an alleyway leading to the back alleyway. The alleyway between these two properties has been referred to throughout as 'the Strip', and I will continue so to refer to it. The Strip is unregistered and the paper owner is not known.
3. The Strip measures some 75 to 80 centimetres in width, and is some 53 metres long. There is a tall wooden gate at the Shooters Avenue end of the Strip, and a gate at the other end. The Strip lies between a fence which separates the two properties, and a concrete pathway in the garden of Number 47. It is not entirely clear when this fence was erected, but it has been there since Mr Bhanderi purchased the Property in 1988.
4. It is likely, as Counsel for Mr and Mrs Bhanderi submitted, that at one time there were fences on both sides of the Strip. But, at least since 1988, there has not been a fence or boundary features between the Strip and the garden of Number 47.
5. Mr and Mrs Bhanderi applied for first registration of the Strip on 21 January 2016 based on adverse possession and were registered as owners of the Strip under title number AGL365973. Notice was served on Mr and Mrs Al-Haddad on or about 27 July 2016. The reason for the delay is explained in a letter from Land Registry dated 26 September 2016 as being due to the number of applications received at the time by Land Registry. There was no objection to the application and, on 22 August 2016, Mr and Mrs Bhanderi were registered as owners with effect from 21 January 2016. Mr and Mrs Al-Haddad were away when the application was made, and, on their return, by an application dated 1 September 2016 they applied to close this title.
6. The issue before me therefore is whether Mr and Mrs Bhanderi are entitled to be registered with possessory title to the Strip. A further point was initially taken on behalf of Mr and Mrs Bhanderi, namely whether Mr and Mrs Al-Haddad had the necessary locus standi to make the application to close their title. In view of the

authorities on this point (and in particular *Mann v Dingley* (a decision of HHJ McCahill QC sitting in the Bristol District Registry) this argument was, in my judgment rightly, not pursued at the hearing.

7. For the reasons set out below, I will order the Chief Land Registrar to cancel the application to close the possessory title to the Strip. I am satisfied that Mr and Mrs Bhanderi have acquired title by adverse possession.
8. However, there is a further and important point to note. Both Number 45 and Number 47 enjoy an express right of way over the Strip, recorded in their respective titles. This is a right of way on foot only, subject to an obligation of paying a due proportion of the expense of keeping the passage in repair. It is common ground, and plainly correct, that the possessory title acquired by Mr and Mrs Bhanderi is subject to such rights of way as may have existed in favour of Number 45 on 21 January 2016.
9. There is no application by Mr and Mrs Bhanderi to remove these entries in the register. Nor does it seem to me, on the basis of the evidence and information before me, that there is any basis on which such an application could be made. When pressed on this, Mr Sandham submitted, with some degree of hesitation, that this right might have been abandoned, but accepted in argument that this submission was not sustainable. This must be right. It follows therefore that, as matters stand, the Strip remains subject to a right of way in favour of Number 45. This means that the Strip must remain accessible to the owners of Number 45, even though the soil in the Strip belongs to Number 47.

Background and evidence

- 1). The houses in Shooters Avenue were probably built in the late 1920s. A conveyance dated 22 August 1929 between T.F Nash Ltd (the vendor and developer) and Harriet Elizabeth Cramp of Number 47 included a fencing covenant on the part of the purchaser on the south western and north western boundaries. This fencing covenant, had been complied with, would have excluded the Strip from the garden of Number 47.

11. In 1988 Mr Bhanderi bought Number 47 and was registered as the owner on 15 February 1988. At that time he was known as Ramesh Valji Patel. He changed his name by deed poll on 20 March 2001. In 2010 he was re-registered as owner together with his wife. Number 45 was owned by the London Borough of Harrow. Mr and Mrs Al-Haddad became tenants of the Council in 2003 and bought the property in July 2015 under the Right to Buy scheme.
12. Mr Bhanderi first applied to be registered as owner of the Strip on 29 May 2002. The application was met with a number of objections from adjoining owners who had a right of way over the Strip. A survey was carried out by Land Registry. The application was rejected on the grounds that Mr Bhandari had not exercised exclusive possession for 12 years 'since various parties have been able to exercise the right of way.' The survey found that the only access to the Strip was via Number 47; that there was a gate at the Shooters Avenue end which was estimated to be 10 years old; that the fence dividing Numbers 47 and 45 was 5 years + old, and that the Strip was used as a flower bed. At the other end of the Strip, the report noted that there was 'fencing resting against a fence'. The Land Registry was not satisfied that Mr Bhanderi could establish 12 years adverse possession, ie going back to 1990.
13. Mr Bhanderi made a statutory declaration in support of his further application for adverse possession of the Strip on 4 January 2016. He stated that the rear access was blocked off some 15 years ago. The front access was also blocked, first by a wooden gate, then by a metal gate (there today) installed 15 years ago. He also deposed to the fact that he had maintained the Strip throughout and that no-one else had access to it. More details were given in an affidavit dated 12 October 2016, and a witness statement dated 14 July 2017.
14. In oral evidence he stated that the small wooden gate at the front of his property was installed in about 1991. This was replaced by a larger wooden gate in 1993, and the covered passageway running alongside the house closed off at the other end. I have seen a number of photographs, taken variously in the early 1990s, 1996/7 and 1999/2000, which show the second gate, and the fence between the two properties, and the cultivation of the Strip. Mr Bhanderi was able to date the photographs by reference to the ages of his children and others shown in the photographs.

15. The new metal gate at the Shooters Avenue end of the Strip replaced a similar wooden gate. The metal gate was installed in 2002/03, before the construction of a granny annex in about 2003/2004. There had been a number of burglaries in the area, and, sometime earlier (in 1999) the police had written to Mr Bhandari suggesting that gating off the alleyways was a sensible way to deter intruders.
16. As for keys, it was Mr Bhandari's evidence that there was no key to the first small wooden gate at the front. In 1993 when the large wooden gate was installed, the gate was locked, but only he had keys to this lock. In 2002/3, when this gate was replaced with a metal gate, he again was the only person to have keys to this. The gate at the rear was installed in 2002, and he had the keys. Before that date access to the rear alleyway was blocked by fence panels.
17. Mr Bhandari accepted that before the gate was installed in 1993 it was possible to walk down the Strip from Shooters Avenue, but said that no-one from the neighbouring property (then occupied by tenants) did so. Since the installation of the gate, no-one else had access to the Strip. It was used as a vegetable patch, and for growing flowers. Again, there are photographs showing this.
18. In December 2015 Mr Bhandari replied to a letter from Mr and Mrs Al-Haddad's solicitors, and appeared to accept that their builders were using the Strip to gain access to a new building at the bottom of the garden of Number 45. He also offered to make a key available to Mr and Mrs Al-Haddad. He also stated that he would be willing to share the cost of the maintenance of the Strip going forward.
19. I accept his evidence that he meant to say that the builders gained access from the bottom of the Strip only. Certain panels in the fence had been removed by the builders in connection with the works. The builders gained access to the garden at the back of Number 45 by walking through the garage of Number 45. These works were carried out in the late summer of 2015.
20. I also heard evidence from Mr Bhandari's son, Pritesh Bhandari, who has lived at Number 47 all his life. He was born in 1991. His grandmother continues to live there.

He confirmed that, as far as he could remember, the Strip was part of their garden and used as a vegetable and flower patch. He has no recollection of anyone else ever having access to or using the Strip.

21. Mr and Mrs Al-Hadad's evidence is as follows. They were away between 19 July 2016 and 24 August 2016 and did not, therefore, receive notification of the application made by Mr and Mrs Bhandari. They accept that there has only ever been one fence dividing their property from Number 45. This fence, however, had three panels missing when they bought their property in 2003. It is their evidence that it was only closed off, by gates, at the end of 2003. Mr Al Hadad also stated that the Strip was used in 2015 when a summer house at the bottom of their garden was being built.

22. Mr Al-Hadad accepted in cross examination that the Strip is blocked and obstructed in every way. He said, though, he had a key for the metal gate until the lock was changed in January 2016. The key was given to him in October 2015. Before that date he could not gain access to the Strip unless a fence panel was removed. Mrs Al-Hadad stated that she just wanted to be able to exercise her right of way. Mr Bhandari was making it difficult for them to gain access.

The law

23. The Strip was unregistered land and accordingly the provisions of the Limitation Act 1980 apply. Mr and Mrs Bhandari need to establish that they have been in exclusive possession of the Strip, with the necessary intention to possess, since at least 21 January 2004.

24. The law has been clearly re-stated in the well known case of *JA Pye (Oxford Ltd) v Graham* [2003] 1 AC 419 in which the House of Lords cited with approval the test set out by Slade J in *Powell v Macfarlane* (1977) 38 P&CR 452. A successful claim to adverse possession requires the claimant to show both factual possession and an intention to possess. Factual possession signifies an appropriate degree of physical control. It must be single and exclusive possession... the question of what constitutes a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is

commonly used or enjoyed.... Broadly, I think what must be shown is that the alleged possessor has been dealing with the land in question as an occupying owner might be expected to deal with it and that no-one else has done so.'

25. As for intention to possess, this requires (again citing Slade J) *'an intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be himself not the possessor, so far as reasonably practicable and so far as the processes of the law will allow.'*
26. The question whether or not the test of physical possession and intention to possession have been satisfied turn on the facts of each particular case. It is not always a requirement that no one can gain access to the land save with the permission of the occupiers (see for example *Pilford v Greenmanor Ltd* [2012] EWCA Civ 756). Again, depending on the circumstances, it may be relevant to consider the motives for enclosing the land.
27. In this case, it seems to me that two specific points arise. The first is the significance, if any, of the refusal by the Land Registry to register possessory title in 2002. The second, which is some ways connected, is the effect of the express right of way granted in favour of Number 45 and 47 (and possibly other properties).
28. The decision of the Land Registry was taken before the creation of the role of the Adjudicator, set out in the Land Registration Act 2002, which Act came into force on 13 October 2013. The decision was taken by the Assistant Land Registrar. It was not taken by the solicitor to the Land Registry who, on occasion, exercised a quasi judicial function to determine whether or not an application should be given effect to.
29. It was not suggested by Mr Birks, acting for Mr and Mrs Al-Haddad, that I am bound by the conclusions drawn by the Assistant Land Registrar. As he rightly points out, her decision involved different parties. But even if the parties had been the same, I would not consider myself bound by those conclusions. Moreover, and in any event, 14 years have now elapsed since that decision. Mr Birks' submissions on that point is to say that if the evidence of usage and enclosure before the Land Registry was not sufficient in 2002, then it is at least a strong indication, or starting point, for me to conclude that

the evidence of physical possession and intention to possess since that date is also not sufficient.

30. I am afraid I do not agree with that submission. I will approach the evidence without regard to the conclusions drawn by or indications given by the Assistant Land Registrar.

31. I have dealt above with the effect of the burden of the right of way over the Strip. A related question is whether the fact that Number 47 also enjoyed rights of way over the Strip is of any relevance in deciding whether or not a claim for adverse possession has been made out. This subject is dealt with at some length in *Adverse Possession* 2nd Edition, by Jourdan and Radley-Gardner at 9-65 ff. *Littledale v Liverpool College* [1900] 1 Ch 19 and *George Wimpey & Co Ltd v Sohn* [1967] Ch 487. In both those cases it was held that a squatter with an existing easement which entitles him to use the land, but who encloses the land, has not thereby manifested an intention to possess.

32. The decisions have been criticised, not least because both rely on the decision in *Leigh v Jack* (1879) 5 ExD which is no longer good law (that is to say, the principle, later described as 'heretical' that acts done on land which are consistent with the use the true owner may make of the land do not amount 'dispossession').

33. It seems to me that the correct approach is as set out in 9-74 of *Adverse Possession*, namely to consider the evidence as to user and as to intention in each case, bearing in mind the general principle that if a person does no more than to use the land in a way permitted by the easement, then this does not manifest an intention to possess. But a person with a right over land does not, of course, have the right to exercise exclusive control over the land. If he does so, by erecting gates or fencing, or otherwise using the land in a way inconsistent with the easement, then the necessary intention to possess is made out.

Conclusion

34. I am satisfied on the evidence before me that Mr and Mrs Bhanderi have occupied the Strip exclusively, with the necessary intention to possess, since at least January 2004, if not before. I accept the evidence given by and on behalf Mr Bhanderi, which is supported by a number of photographs.
35. The Strip was closed off, at both ends, from about 1993 onwards, and was only used by the owners of and visitors to Number 47 from that date. The keys to the gates were kept by Mr Bhanderi. The width of the Strip was full enclosed within the garden of Number 47, and cultivated as part of the garden. It was not used as a pathway. I agree with Mr Sandham that it is inconceivable that anyone else would have had access to any part of the Strip. There was only one fence dividing the two properties, and that fence has remained in the same position.
36. The burglaries in 1999 may have played a part in the decision to replace the front wooden gate with a stronger metal gate, but the earlier gate was also locked. I do not consider that the fact that a decision was taken to make the gate stronger, and to deter burglars, alters in any way the intention of the Bhanderi family to exclude the world at large within the meaning of the relevant test.
37. The factual dispute between the parties is limited. Where there is a conflict, for example as to whether panels in the fence were missing in 2003, I prefer the evidence of Mr Bhanderi. I also accept that the stronger metal gate was installed before the extension was built. The events in late 2015 are irrelevant to the question whether adverse possession was made out. Mr Bhanderi was clearly prepared to give Mr Al-Hadad a key to the gate, which is consistent with Mr Al-Hadad having a right of way over the Strip.
38. As I have stated at the outset, Mr and Mrs Bhanderi take subject to the right of way in favour of Number 45. This was clearly accepted by them in their letter dated 20 December 2015.

Costs

39. The usual principle is that the successful party is entitled to recover their costs from the unsuccessful party. A schedule in Form N260 or the like is to be filed and served by the Respondents by 12 January 2018. The Applicants may respond within 14 days of receipt of the schedule. I will then decide what order to make on paper, without the need for a further hearing.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 21st day of December 2017

