

[2018] UKFTT 330 (PC)

REF/ 2016/0543

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) **DANILO ZECEVIC**
(2) **SANDRA ZECEVIC**

APPLICANTS

and

GIZELA MAGDALENA GAJKOWSKI

RESPONDENT

Property Address: 38 and 40 Castlebar Park, London W5 1BU

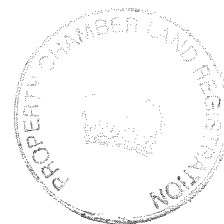
Title Numbers: MX419866 and MX201084

ORDER

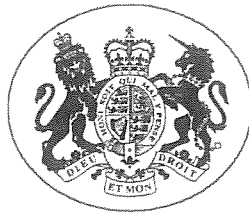
The Tribunal orders that the Chief Land Registrar do give effect to the application of the Applicants dated 29th April 2015 for registration and noting of a prescriptive right of way in favour of 38 Castlebar Park, London W5 1BU over 40 Castlebar Park, London W5 1BU for the purpose of access to and egress from 38 Castlebar Park and the public highway via the gate in the rear garden fence to 38 Castlebar Park

Dated this 14th May 2018

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BY ORDER OF THE TRIBUNAL



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IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN:-

- (1) DANILO ZECEVIC
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APPLICANTS

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GIZELA MAGDALENA GAJKOWSKI

RESPONDENT

Property Address: 38 and 40 Castlebar Park, London W5 1BU
Title Numbers: MX419866 and MX201084

Before: Judge Michell

Sitting at: 10 Alfred Place, London

On: 2nd February 2018

Applicant Representation: Mr Francis Piesse, solicitor

Respondent Representation: Mr Daniel Gajkowski, lay representative

DECISION

Cases referred to

Mills v. Colchester Corp. (1867) LR2CP 476

Tehidy Minerals Ltd. v. Norman [1971] 2 Q.B. 528

Diment v. Foot (NH) [1974] 1WLR 1427

1. The Applicants, Danilo Zecevic and Sandra Gonzalez are the registered proprietors of 38 Castlebar Park, Ealing under title number MX419866. That property has been divided into flats. The Applicants live in the ground floor flat. The Applicants have applied to HM Land Registry to register in the property register the benefit of a pedestrian right of way over part of the adjoining property, 40 Castlebar Park and to note the burden on the right of way in the charges register of that title. The Applicants claims that a right of way has arisen by prescription. The Respondent, Mrs Gajkowski is the registered proprietor of 40 Castlebar Park, which is registered at HM Land Registry under title number MX201084. Mrs Gajkowski objected to the application and the matter was referred to the Tribunal for determination.

2. 38 Castlebar Park is a detached house. 40 Castlebar Park is to the south of and adjoins 38 Castlebar Park. 40 Castlebar Park is an end of terrace house and adjoins 42 Castlebar Park. There is a path forming part of 40 Castlebar Park between the northern flank wall of 38 Castlebar Park and the southern flank wall of 40 Castlebar Park. There is a gate in line with the front wall of the house at 40 Castlebar Park across this path. This gate is now secured by a lock. To the front or west side of the gate, the path continues to meet the public highway. The path is bounded to the front of the houses by brick walls on each side. The rear garden fence of 38 Castlebar Park runs in a straight line projected from the northern flank wall of 38 Castlebar Park. Mrs Gajkowski (or her son with her permission) has built a large outbuilding in the back garden of 40 Castlebar Park. The southern flank wall of the new building is only about 30 to 45 centimetres or so from the garden fence of 38 Castlebar Park. A gate in the garden fence of 38 Castlebar Park opens onto the strip between the fence and the flank wall of the new outbuilding. The Applicants claim a right of way over the path between the highway and the gate in their rear garden fence.

3. The main entrance into the house at 38 Castlebar Park was a front door in the southern side wall of the building. There was at one time a path that ran down the side of the building at 38 Castlebar Park giving access to the front door and continuing along to give access to the rear garden. The front door now provides access to the ground floor flat in which the Applicants live. The former path beyond the front door is blocked by an extension which gives access to the two upper-floor flats. That extension replaced a lean-to extension that was on the site from before 1992 and also blocked external access to the garden. The only way of

getting into or out of the garden of 38 Castlebar Park without passing through the Applicants' flat is via the path at 40 Castlebar Park and the gate in the garden fence.

4. The issue between the parties is whether there has been sufficient use of the path as a means of access to and egress from 38 Castlebar Park by the Applicants, their predecessors in title and visitors to give rise to an easement. Where there has been at least twenty years user of a way and the user has been "as of right", the law will presume that there was a grant of the right of way and that the deed of grant has been lost. In *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528 at 552 Buckley L.J. (delivering the judgment of the court) said

"In our judgment *Angus v. Dalton* decides that, where there has been upwards of twenty years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the twenty-year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made".

The necessary qualities to fulfil the requirements of prescription are that the user was not enjoyed by force, in secret or by permission. In *Mills v. Colchester Corp.* (1867) LR2CP 476 at 486 Willes J. said

"In the case of prescription, long enjoyment in order to establish a right must have been as of right, and therefore, neither by violence, nor by stealth nor by leave asked from time to time".

The enjoyment will not be in secret if the owner of the land over which the right is claimed either knew of the user or had the means to know – *Diment v. Foot (NH)* [1974] 1WLR 1427 at 1433 per Sir John Pennycuik V.-C.

5. The Applicants produced and rely on a signed witness statement containing a statement of truth, made by Mr Pietro Iacoponi, who together with his wife, owned and lived at 38 Castlebar Park from 1992 until they sold it to the Applicants in the 2007. Mr Iacoponi now lives in Italy and was not called to be cross-examined. He stated that there was a gate from the garden of 38 Castlebar Park leading onto the path at 40 Castlebar Park and that from 1992 until 2007 he and his wife used that path as a means of access between the garden and the street. He said that they used the path openly and without permission. Although there

was a shed on part of the land now covered by the new building, there was sufficient width to get from the gate onto the path.

6. Mr Iacoponi's statement was substantially corroborated by the evidence of Mrs Mary Pidduck. Mrs Pidduck has lived at 42 Castlebar Park since 1996. She recalled that there was a gate in the rear garden fence of 38 Castlebar Park and that the gate opened onto the side path to allow access to the street. She herself had walked through that gate on a number of occasions over the years. She could see part of the gate from her garden before the new outbuilding was constructed. She said that Mr Iacoponi was busy about his property and used the path frequently. He would use the path to bring things into the garden when he was doing work on the house and to take rubbish in and out of the garden. There was a bolt on the inside of the gate across the path by the corner of the house at 40 Castlebar Park. That bolt could be opened from the inside.

7. Mr Iacoponi's statement was also substantially corroborated by the evidence of Mr Bartle. He lives at 44 Castlebar Park and has done so since 1997. He confirmed that there has been a gate in the garden fence of 38 Castlebar Park for the whole time he has lived at 44 Castlebar Park. The gate was visible when he walked out of the rear garden of 44 Castlebar Park. The gate was partially obstructed from view by the shed at the rear of 44 Castlebar Park but could be seen when he walked on the path beside the fence. He helped Mr Iacoponi repair part of the fence in about 2006 by replacing some panels but the gate was retained at that time. His evidence was that both the Iacoponi family and the Applicants' family used the path continuously. He himself often used the path to get from his rear garden to the street and he had gone through the gate into the garden of 38 Castlebar Park.

8. Mr Zecevic's evidence was that since 2007 he and his family have used the path as a means of access to and from his garden. The gate in the rear garden fence of 38 Castlebar Park was there when he bought the property. Since 2007 he has used the path to take green garden waste out of the garden about 6 or 7 times a year. He and his family have used the path to bring their bicycles in and out of the garden. He, his wife and son all have bicycles. He estimated that they would have used these bicycles about 20 to 30 times a year, taking them out from and back into the garden over the path. In addition, he has used the path to bring large items such as building waste, a table tennis table, and a summerhouse and out of

the garden. The summerhouse was brought into the garden via the path in 2011. The table tennis table was taken out over the path in 2012. If the gate across the path was bolted and he wanted to bring something into the garden from the street, he would first go through the gate in his garden fence to unbolt the gate from the inside and then go through to bring the item into the garden.

9. The Applicants relied on two other signed statements made by witnesses who were not called for their evidence to be tested by cross-examination. Mr Johnny Radjenovic signed a statement in which he said that in 2010 a wooden tree house was transported from his house at 1 Royle Crescent, Ealing to the rear of 38 Castlebar Park, being carried down the path and through the gate in the rear garden fence. The tree house was taken back by the same route from 38 Castlebar Park in the spring of 2013 and a table tennis table was brought into the garden over the path. Tessa Kostrzewa and Franck Jeandon signed a joint statement. They live at 37 Castlebar Park. They stated that in 2012 two to three metre long rafters were carried from the garden of 38 Castlebar Park through the garden gate and over the path.

10. The Respondent, Mrs Gajkowski was registered as proprietor of 40 Castlebar Park on 13th June 2013. The new outbuilding was constructed in the garden of 40 Castlebar Park in the latter half of 2014.

11. Mr Thomas Gajkowski is the Respondent's son. He said that when he first visited 40 Castlebar Park he did not see a gate. He thought that the gate was just a custom-sized fence panel. He described it as a "secret gate" with "hidden hinges and a hidden lock". Having visited the site and seen the gate, I do not accept Mr Gajkowski's evidence. It is quite apparent from the side of 40 Castlebar Park that the gate in the side fence of 38 Castlebar Park is a gate.

12. Mr Gajkowski sought to throw doubt on the evidence of Mr Iaconi on the basis that plans attached to the statements made by Mr Iaconi on 20th April 2015 and 20th November 2015 show the position of the gate in slightly different places. On the plan with the earlier statement, the position of the gate is marked as being to the front of the former shed in the rear garden of 40 Castlebar Park. On the plan with the later statement, the gate is shown as being beside the side wall of the former shed. Given the small scale and sketch-like nature of

these plans and the fact that Mr Iacoponi left 38 Castlebar Park in 2007, I do not think there is anything in this point.

13. Mr Gajkowski sought to rely on a photograph which accompanied an application made to Ealing Borough Council in June 1995 for planning permission to construct a conservatory in the garden of 38 Castlebar Park. Mr Gajkowski asserted that the photograph taken from beside the rear wall of the house and looking down the rear garden did not show a gate in the garden fence along the boundary with 40 Castlebar Park. The copy of the photograph as reproduced in the trial bundle is of too poor a quality for me to be able to see whether a gate is or is not shown in the photograph. The copy had been reproduced from a microfiche kept by Ealing Borough Council. After the hearing both the Applicants' solicitors and the Tribunal made attempts to obtain a clear copy of the photograph from the Council. The Applicants' solicitor informed the Tribunal by note dated 7th February 2018 that he had spoken to the Council's planning department on 5th and 6th February 2018 and been told that the microfiche file could not be found. Natalie Greenfields of customer services at the Council emailed Mr Zecevic on 20th February 2018 saying that the Council had the microfiche in 2017 but that the file has since gone missing. Natalie Greenfields wrote to the Tribunal on 5th March enclosing a copy of the planning decision notice but did not supply any copy of the photograph the Respondent relies on.

14. I accept Mr Iacoponi's evidence in his witness statement that there was a gate in the fence at the time he purchased 38 Castlebar Park. Mrs Pidduck's evidence shows there was a gate in place in 1996. The copy photograph relied on by Mr Gajkowski itself does not show whether or not there was a gate. If the gate is not visible in the original photograph that could be because of the angle at which the photograph is taken or because it is covered or obstructed by vegetation. In any event, there is no evidence as to the date of the photograph. The photograph was sent to the Council in 1995 but that does not mean that it was taken in 1995. It could have been an old photograph.

15. Mr Gajkowski also relied on the site plan accompanying the planning application and the fact that no gate is shown in the line drawn on the plan to mark the northern boundary of the site and that the plan shows direct access was then possible to the garden through the then side extension of 38 Castlebar Park. I do not consider that this demonstrates that there was no

gate in the fence in 1995. There was no need for the gate to be shown on the site plan. The fact that it was then possible to access the garden by going through the side extension of the house does not mean that the garden could not also be accessed and would not have been accessed through the gate in the garden fence and via the path.

16. Mr Gajkowski challenged Mr Zecevic's evidence on the grounds that he had shown the position of the gate in different places on two different occasions. On the plan with a Statement of Truth dated 16th April 2015 Mr Zecevic showed the gate as being in a position to the front of the former shed in the garden of 40 Castlebar Park. On the plan with his Statement of Truth dated 20th November 2015 he showed the gate as being by the side wall of the former shed. I do not consider anything turns on this. There plainly was a gate when the Applicants bought 38 Castlebar Park and a slight mistake as to the position of the gate on a small-scale plan is not a reason to doubt the veracity of Mr Zecevic's evidence as a whole.

17. The Applicants were not able to use the path between early 2015 and late 2017 because the Respondent kept the gate onto the street locked with a numeric coded lock installed on the outside of that gate.

18. I am satisfied that there has been sufficient user in extent and regularity of the path as a means of access to and from 38 Castlebar Park to be capable of creating a right of way. That use has been open. I reject the submission of the Respondent that it was use in secret. It was seen by and known to the occupants of 42 and 44 Castlebar Park and so was or could have been known to the owner of 40 Castlebar Park. I am satisfied that the user has continued since at latest Mr Iacoponi purchased 38 Castlebar Park. There was user for a period in excess of 20 years, namely between 1992 and 2014. A right of way has arisen under the doctrine of lost modern grant.

19. I shall direct the Chief Land Registrar to give effect to the Applicants' application.

20. My preliminary view is that the Respondent must pay the Applicants' costs of the proceedings, to be assessed on the standard basis. Any party who wishes to submit that some

different order should be made as to costs should serve written submissions on the Tribunal and on the other party by 5pm on 28th May 2018.

DATED this 14th May 2018

Michael Michell

BY ORDER OF THE TRIBUNAL

