

[2018] UKFTT 441 (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 2017/0801
BETWEEN**

HUGK BUCKERIDGE

Applicant

and

**JEFFREY PETER NIBLETT
KATHRYN MARY NIBLETT**

Respondents

**Old Stable Barn, Dades Lane, St John's Fen End, Wisbech PE14 8JJ
And Smeeth House Farm, Dades Lane (as above)
Title numbers: NK309464 and NK305281**

ORDER

1. The Chief Land Registrar is ordered:
 - (i) To cancel the application dated 24 March 2017 for alteration to correct a mistake in the register of title NK305281 in so far as the application relates to the rights noted as right 13.1 and 13.2 (as set out in the transfer dated 13 February 2004) only in the entry at A2 of the said register;
 - (ii) To give effect to the application dated 24 March 2017 for alteration to correct a mistake in the register of title NK305281 in so far as the application relates to the right noted as right 13.3 (as set out in the transfer dated 13 February 2004) only in the entry at A2 of the said register;

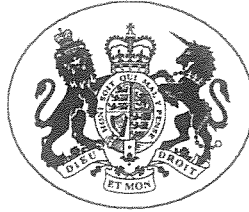
- (iii) To amend the entry at C1 in title number NK309464 so as to note the burden of the rights set out as 13.1 and 13.2 only in the transfer dated 13 February 2004 (in other words, to cancel the application dated 24 March 2017 in relation to this title in so far as the application relates to the rights set out in clause 13.1 and 13.2 of the transfer dated 13 February 2004);
 - (iv) To give effect, by making the necessary amendments in the entry at C1 of title NK309464, to the application dated 24 March 2017 to cancel the right set out in clause 13.3 of the transfer dated 13 February 2004.
2. Liberty to the Chief Land Registrar to apply in relation to the implementation of this order.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 5th day of July 2018





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**Properties: Old Stable Barn, Dades Lane, St John's Fen End, Wisbech PE14 8JJ
And Smeeth House Farm, Dades Lane (as above)
Title numbers: NK309464 and NK305281**

**Before: Judge McAllister
Cambridge County Court
19th June 2018**

Representation: Mr Asela Wijeyaratne of Counsel instructed by Ward Gethin Archer solicitors appeared for the Applicant; the First Respondent appeared in person on behalf of both Respondents.

DECISION

Introduction

1. The Applicant and the Respondents are neighbours. The Applicant, Mr Buckeridge, is the registered owner of Old Stable Barn, Dades Lane, St John's Fen End. He purchased the property on 6 June 2014. The Respondents, Mr and Mrs Niblett, are the

registered owners of Smeeth House Farm at the same address. They purchased this property on 16 April 2010.

2. The dispute between the parties relates to the validity of three easements registered against the title of both properties. At the time of Mr Buckeridge's purchase of Old Stable Barn the easements were not noted against his title, and it is common ground that he was not aware of them.
3. The easements were created by the first transfer of Smeeth House Farm from the former owners of both properties, Michael Licquorice and Jean Licquorice. The transfer is dated 13 February 2004 ('the 2004 Transfer') and was made subject to rights over 'the retained land' which forms part of Old Stable Barn. The details are set out in clauses 13.1, 13.2, and 13.3 of the 2004 Transfer. The retained land is the area of land between the entrance to the property and the house. This was once the crew yard of the farm.
4. The rights, set out more fully below, are (i) a right for the passage and running of mains water through pipes and conduits constructed under the retained land ('the Mains Water Easement') (ii) the right for the passage and running of surface water from Smeeth House Farm to the retained land ('the Surface Water Easement') and (iii) the right to enter the retained land for the purpose of repairing and maintaining the boundary wall of the property ('the Wall Easement'). The wall is to the north west of Smeeth House Farm and is approximately 32 metres in length.
5. The mains water pipe runs through a pipe from a water meter just outside the gate of Old Stable Barn under or along (on the Old Stable Barn side) the boundary wall for a little over half its length before turning south into Smeeth House. The wall is an old wall which has been in place since at least 1936 (and may be considerably older: Smeeth House dates back to 1725). There are three small gullies, more or less evenly spaced at the base of the wall, which allow surface water to run into the retained land from a gulley running the length of the wall.
6. In circumstances more fully set out below Mr Buckeridge built a new wall parallel to the existing boundary wall. The new wall tapers towards the existing wall at the

eastern end. At the western end, where it diverges further from the existing wall, it is less than 12 inches away from the existing wall. It is not possible, therefore, to exercise the Wall Easement from the Old Stable Barn side.

7. By an application dated 24 March 2017 Mr Buckeridge applied to alter the registers of both properties to remove the respective entries relating to the easements. I agree with the submission made by Mr Wijeyaratne that each of the easements must be considered individually. They do not stand or fall together.
8. For the reasons set out below I will order the Chief Land Registrar to:
 - (i) Cancel the application to cancel the entries in the titles in so far as they relate to the Mains Water Easement and the Surface Water Easement;
 - (ii) Give effect to the application to cancel the entry in the titles in so far as it relates to the Wall Easement.

Registration and procedural history.

9. At the time of the 2004 Transfer the land in common ownership of the Licquorices was unregistered.
10. Entry number 2 of the register of title number NK305281 (Smeeth House Farm) provides as follows:

'The land has the benefit of the following rights granted by a Transfer of land in this title dated 13 February 2004 made between (1) Michael Roland Licquorice and Jean Mary Licquorice (Transferors) and Susan Evevln Hurd (Transferee):

The Property will be transferred with the following rights:-

13.1 Full right and liberty for the passage and running of mains water through the Conducting Media (which means all drains channels and pipes) which are now constructed in or under or belong to the Retained Land and the Transferee and her

successors in title being responsible for the payment of a due proportion of the cost of maintaining and repairing the same

13.2 Full right and liberty for the passage and running of surface water from the Property to the Retained Land as presently enjoyed

13.3 Full right and liberty as aforesaid from time to time and at all reasonable times (but not at night except in an emergency) to enter with or without workmen materials and machinery on the Retained Land for the purpose of inspecting cleansing repairing maintaining and renewing the boundary walls of the Property and the Conducting Media the Transferee and her successors in title making good nevertheless at her expense all damage or disturbance which may be caused in the exercise of the right and liberty hereby granted'

NOTE: The Retained land referred to is the land tinted pink on the title plan.

11. As stated above, at the time of the purchase by Mr Buckeridge of Old Stable Barn none of the above easements were noted in the title register of title number NK309464.
12. By letter dated 2 November 2015 the then solicitors acting for Mr and Mrs Niblett wrote to Mr Buckeridge in relation to the building of the new wall. The letter enclosed copy entries for Smeeth House Farm. Mr Buckeridge's solicitors replied on 20 November. They made the point that the easements were not noted in Mr Buckeridge's title and that he was not aware of them when he purchased.
13. On 23 December 2015 Mr Buckeridge's solicitors wrote to Land Registry asking why the rights set out in the Smeeth House Farm register were not noted in his title. Land Registry's reply was that the title to Smeeth House Farm was completed correctly on first registration: the subsequent registration of Old Stable Barn was also correctly completed because no copy of the February 2004 transfer was submitted with the application or mentioned in any of the documents lodged.
14. Land Registry also wrote to Mr and Mrs Niblett's solicitors stating that, at the time of the creation of the easements, title to servient land was unregistered. The rights created by the 2004 Transfer were accordingly over-riding interests until such time as the

easement was registered. It followed, therefore, that even if the 2004 Transfer was not disclosed the easement would still over-ride.

15. On 7 December 2016 Mr and Mrs Niblett applied to Land Registry to enter the burden of the easements of the title of Old Stable Barn. This application was given effect to by 22 December 2016. Mr Buckeridge was informed of the application on 13 December 2016. Mr Buckeridge objected on 15 December 2016. Land Registry replied on 22 December 2016 stating that the objection was groundless. The application was completed by Land Registry before the deadline given to Mr Buckeridge. Land Registry apologised for this.

16. Land Registry's analysis of the situation was as follows. The easements should have been apparent or disclosed on the sale of Old Stable Barn and first registration of that title. By reason of the transitional provisions in paragraph 10 (the reference to paragraph 9 is probably a mistake) of Schedule 12 to the Land Registration Act 2002 ('the 2002 Act') the legal easements over-rode the registered disposition where, as here, the property was registered between 13 October 2003 and 13 October 2006. I should state at this point (although I doubt if it needs stating) that the Tribunal is wholly independent of the Land Registry. We are not bound by any views expressed or decisions made by them.

17. Mr Buckeridge applied to alter the two titles on 24 March 2017 to remove the entries relating to the benefit and burden of the easements on the ground that these entries are mistakes under paragraph 5 of Schedule 4 to the 2002 Act.

Legal framework

18. The starting point is section 29 of the 2002 Act. This provides, so far as material, as follows:

' (1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate

immediately before the disposition whose priority is not protected at the time of the disposition.

(1) For the purposes of subsection (1) the priority of an interest is protected

(a) In any case, if the interest-

(ii) falls within any of the paragraphs of Schedule 3.'

19. In the event of first registration, however, section 11(4)(b) of the 2002 Act provides that the estate is vested in the proprietor subject only to unregistered interests which fall within any of the paragraphs of Schedule 1. Paragraph 3 of Schedule 1 refers to a legal easement or profit a prendre.
20. It follows therefore that on the first registration of Old Stable Barn on 15 June 2004 the purchasers, Mr and Mrs West, took subject to the easements created by the 2004 Transfer even though they were not noted on their title and irrespective of whether or not the provisions of Schedule 3 were met.
21. The sale from Mr and Mrs West to Mr Buckeridge on 6 June 2014 was a registrable disposition.
22. To establish whether or not the easements have over-riding status, and therefore bind Mr Buckeridge even though they not registered against his title at the time of his purchase, three provisions need to be considered. Two of these are transitional provisions and the third is set out in paragraph 3 of Schedule 3.
23. The transitional provisions are introduced by section 134 of the 2002 Act and are found in paragraphs 9 and 10 of Schedule 12 to the Act. Paragraph 9 provides as follows:

' (1) This paragraph applies to an easement or profit a prendre which was an overriding interest in relation to a registered estate immediately before the coming into force of Schedule 3, but which would not fall within paragraph 3 of that schedule if created after the coming into force of that Schedule.

(2) in relation to an interest to which this paragraph applies Schedule 3 has effect as if the interest were not excluded from paragraph 3.'

This provision has no application here as it relates only to those easements or profits a prendre which were over-riding interests before the entry into force of Schedule 3 (13 October 2013). The easements in this case were created in 2004.

24. The second transitional provision is to be found in paragraph 10 of Schedule 12 to the Act. This provides as follows: '*For the period of three years beginning with the day on which Schedule 3 comes into force, paragraph 3 has effect with the omission of the exception*'.
25. The effect of this somewhat cumbersome provision is that a registered disposition of the servient tenement will take subject to an existing legal easement without more if the disposition takes place between October 13, 2003 and October 12, 2006.
26. The disposition to Mr and Mrs West took place in this time period. In addition, as stated above, they took subject to the easements by virtue of section 11(4)(b). A question which arises is whether an easement or profit which falls within the transitional provisions as an over-riding interest (but which thereafter would not qualify under paragraph 3 of Schedule 3) nonetheless retains its over-riding status against further registered dispositions outside the three year period. The point is raised in *Ruoff & Roper Registered Conveyancing* at 17.026. The view expressed is that such easements would not continue to over-ride.
27. This seems to me to be correct analysis. The purpose of the Act as a whole and of paragraph 3 of Schedule 3 in particular is to ensure that (apart from those easements falling within that paragraph) all newly created easements are entered on the register. The transitional provision in paragraph 10 preserves the over-riding effect for three years as if the qualification to Schedule 3 did not operate: it does not modify Schedule 3. If this provision is read as extending the over-riding status to every disposition, no matter how far in the future, so long as a disposition took place between October 2003 and October 2006, the policy of ensuring that easements are entered on the register would be weakened to the point of being almost ineffective.
28. Paragraph 3 of Schedule 3 provides as follows, under the heading 'Unregistered interests which override registered disposition':

‘ (1) A legal easement or profit a prendre, except for an easement or profit a prendre which is not registered under the Commons Registration Act 1965, which at the time of disposition –

(a) Is not within the actual knowledge of the person to whom the disposition is made and

(b) Would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable

(2) The exception in sub paragraph (1) does not apply if the person entitled to the easement or profit proves that it was exercised in the period of one year ending with the day of disposition’.

29. In other words, easements not noted on the servient owner’s title will nonetheless be binding if either they were known to the purchaser, or would have been obvious to him or her on a reasonably careful inspection, or, in any event, if the dominant owner can prove that they were exercised in the period of one year before the disposition.

30. Finally, reference needs to be made to paragraphs 5 and 6 of Schedule 4 to the 2002 Act. Paragraph 5 provides that the registrar may alter the register for the purpose of, amongst other things, correcting a mistake. Where the correction of the mistake prejudicially affects the title of the registered proprietor, the alteration is a rectification. Paragraph 6 further provides that in such a case no alteration may be made without the proprietor’s consent in relation to land in his possession unless:

‘(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake or

(b) it would for any other reason be unjust for the alteration not to be made.’

Knowledge and notice/discoverability of the easements

31. It is clear from all the evidence, and not in disputed, that Mr Buckeridge had no actual knowledge or notice of any of the easements when he purchased the Old Stable Barn. The easements were not disclosed by the Wests during the course of the pre-contractual enquiries made by his solicitors. Mr Buckeridge did not have a survey done before he purchased. I also accept his evidence that Mr Buckeridge was not told

of the easements by the Wests when he visited the property on a number of occasions before the completion of the purchase.

32. I have seen a letter from Mr and Mrs West to Mr Buckeridge dated 15 February 2017. In this letter they stated that they had no idea that the easements existed when they bought nor were they ever informed by the owners of Smeeth House Farm of the existence of the easements. The letter also states that, to their knowledge, the Nibletts never exercised any right of entry to their property.
33. The next issue is whether all or any of the easements would have been obvious on a reasonably careful inspection of the servient tenement. I agree with Mr Wijeyaratne's submission that the test is an objective one, which does not require additional inquiries.
34. It seems to me unarguable that neither the Mains Water Easement nor the Wall Easement would have been obvious on a reasonably careful inspection.
35. Mr Buckeridge's evidence is that he did not notice the gulleys when he walked around the property with Mr West. I accept his evidence on this. But the question is whether the Surface Water Easement would have been obvious on a reasonable careful inspection. This issue is more difficult. The three gullies discharge water into the Old Stable Barn. I have seen photographs taken by Mr Buckeridge shortly after he purchased the property which show vegetation growing out of and at the base of the boundary wall in a number of places. It is true that the vegetation is most dense at the points where the gullies discharge water but the very density of the vegetation would have made it difficult, in my view, to note, on a reasonably careful inspection, that gullies existed at those points. Taking everything into account, I am of the view that the Surface Water Easement would not have been obvious on a reasonably careful inspection.
36. The next question is whether Mr and Mrs Niblett can prove, on a balance of probabilities, that one or more of the easements were exercised in the 12 months before the disposition to Mr Buckeridge, namely in the period 6 June 2013 to 6 June 2014. This provision is a safety net for those easements which, whilst not known or obvious, are nonetheless used for the benefit of the dominant tenement. As is stated in

Gale on Easements, 14th Ed, at paragraph 5-25, this provision is intended to cover the numerous invisible easements such as rights of drainage or the right to run a water supply over a neighbour's land.

37. Mr Wijeyaratne conceded, at the outset of the hearing, that the Water Mains easement was used in the 12 month period before the disposition to Mr Buckeridge. This concession was plainly right. I also find that the Surface Water Easement was exercised in this period. I do not accept that the evidence suggests that the easement is only used in periods of excessively heavy rainfall. Mr Niblett described on particularly torrential downpour in 2010 when Mr West complained of the water entering his property, but he also stated that the easement is used every time it rains. Before the land was divided, the farm was a working farm. Mr Licqourice needed his drains to be effective. The surface water running down the main gulley by the side of the old wall has nowhere else to go. I accept this evidence. It is clear from the evidence and the site inspection that the main gulley and the three gulleys in the wall allow water to flow away from Smeeth House Farm.
38. Mr Niblett stated in evidence that the construction of the new wall has not caused any problems with the drainage. The water, I imagine, runs away between the two walls. There has been no ponding or pooling on the Smeeth House Farm side. In the event that difficulties arise in the future, the obvious solution would be to create three corresponding openings in the new wall. It may well be that this will never be necessary.
39. I do not however accept that the Wall Easement was exercised in the 12 months prior to the disposition to Mr Niblett. There are a number of reasons why I have come to this conclusion. The first is the state of the wall. On the side of the wall facing Smeeth House Farm, it has been covered with pebbledash and overlaid with fence panels. As the photographs show the side of wall facing Old Stable Barn was clearly in a poor state of repair. The second is the evidence of Mr and Mrs West as set out in their letter dated 15 February 2017 in which they say, as stated above, that (so far as they knew) Mr and Mrs Niblett never exercised those rights and would have been asked to leave if they had been seen on their land. Thirdly, in a letter dated 7 June from Mr and Mrs Niblett's former solicitors, the assertion is made that the Nibletts continually exercised their right to enter Mr Buckeridge's land , but the specific examples given related to

one occasion in July 2014 when Mr Niblett entered the Old Stable Barn land to clear the wall, and three occasions in the 12 month period up to July 2015 when, it was said, Mr Buckeridge asked Mr Niblett to water his garden, during which time they cleared the wall. This is denied by Mr Buckeridge. In any event, even if true, it does not assist Mr and Mrs Niblett's case. In his statement of case Mr Niblett stated that the Wests gardener was employed between June 2013 and June 2014 to keep the property presentable for viewings.

40. Fourthly and most importantly, the evidence given at the hearing by Mr Niblett was that he entered Old Stable Barn after the sale to Mr Buckeridge, but before he moved in, to ensure that his side of the wall was clear of vegetation (this is in any event denied by Mr Buckeridge). Mr Niblett also stated that, in the past, he would inform the Wests when he wanted to go into their land to clear the gulleys on their side or to clear the wall. He recalled one occasion when buddleia was growing from their side of the wall, and Mrs West asked if it could be kept. He said that he did not consider himself to be exercising his rights as dominant owner, but as a neighbour.
41. Pressed on what he did during the year before the sale to Mr Buckeridge, he candidly stated that he could not say specifically what was done by him to the wall on the Old Stable Barn side, nor when it was done.
42. My overall impression from Mr Niblett's evidence is that he rarely entered the Wests' land without permission to do any work on the wall from their side, if at all. I accept that he did so after the sale to Mr Buckeridge (but before he moved in) but I am not satisfied that he did so within the previous 12 months.

The schedule 4 point.

43. The old wall is clearly in the possession of Mr and Mrs Niblett. The effect of removing the entries relating to the Wall Easement in their title and the title of Old Barn Stable will be to prejudicially effect their title.
44. Paragraph 6 of Schedule 4, as stated above, provides that, even if the register is to be altered to rectify a mistake (as is the case with the Wall Easement, since that easement

is of no effect as a result of the provisions of the 2002 Act) the alteration will not be made unless it would be unjust not to make the alteration (the mistake was clearly not the result of any fraud or lack of proper care on the part of Mr and Mrs Niblett). In short, the provision effectively introduces a presumption against alteration, but will allow alteration if, in all the circumstances, it would be unjust to leave the register as it is.

45. The courts have considered this provision on a number of occasions. The task of the Tribunal (or the court, as the case may be) is to look at all the relevant factors in making this decision. In my judgment, there is no doubt that it would be unjust not to make the alteration.
46. Mr Buckeridge offered to demolish the old wall and rebuild a new one at his cost: an offer which, in the end, was rejected by Mr and Mrs Niblett. Mrs Niblett's initial response (as set out in an email dated 22 November 2014) was to welcome the proposal. As she put it, '*it would certainly be very nice to have a lovely new wall.*' Mr Buckeridge bought bricks and materials in the expectation that there would be no difficulty in building a new wall. Relations seem to have deteriorated within 12 months, in part, perhaps, because Mr Buckeridge removed some 9 or 10 bricks from the old wall without informing Mr and Mrs Niblett of his intention to do so.
47. The first letter from Mr and Mrs Niblett's solicitors, in which the question of the easements was raised for the first time, is dated 2 November 2015. This letter stated, amongst other things, that unless access to the old wall was granted to Mr and Mrs Niblett, an injunction would be sought. No injunction was sought, and it seems to me that none would have been granted, precisely because the court would have concluded that the Wall Easement did not over-ride the disposition to Mr Buckeridge.
48. The new wall took some time to complete. Some of the work was done before December 2015. There was then a gap, and work resumed in July/August 2016 and was completed in December 2016. As I have said, no attempt was made at any stage to obtain an injunction to prevent the wall being erected. Mr Buckeridge received advice throughout that this easement was not binding on him.

49. In short, in view of the fact that the Wall Easement does not over-ride the disposition to Mr Buckeridge, and in view of the fact that, in any event, the easement is now of no practical effect because of the construction of the new wall, I have no hesitation in concluding that it would be unjust for the alteration not to be made.

Conclusion

50. The effect of my decision is that the application to remove the easements from the two titles fails in respect of the Water Mains Easement and the Surface Water Easement, but succeeds in relation to the Wall Easement. I have drawn up an order to the Chief Land Registrar to this effect.

51. In relation to costs, I invite the parties to file and serve written submissions by 20 July 2018. I will then consider whether further submissions in reply are necessary and if not, will make an order relating to costs without a further hearing.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 5th day of July 2018.

