[2019] UKFTT 0051 (PC)

REF/ 2017/0963

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) CHARLES PETER BRENDON MCGHEE
(2) CHRISTINA JUNE MCGHEE

APPLICANTS

and

MARK TAYLOR

RESPONDENT

Property Address: Land adjoining The Old Cottage, Somersal Herbert, Ashbourne, Derbyshire
Title Number: DY450819

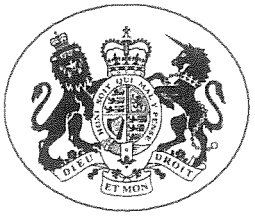
ORDER

The Tribunal orders that the Chief Land Registrar do cancel the application of the Applicants made in form ADV1 dated 16th June 2016 .

Dated this 17th December 2018

Michael Michell

BY ORDER OF THE TRIBUNAL



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Property Address: Land adjoining The Old Cottage, Somersal Herbert, Ashbourne, Derbyshire
Title Number: DY450819

Before: Judge Michell

Sitting at: Derby Magistrates Court

On: 16th August 2018

Applicant Representation: In person
Respondent Representation: Mr Jonathan Barham, counsel, instructed by Geldards

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DECISION

Cases referred to

Powell v McFarlane (1977) 38 P and CR 452
J A Pye (Oxford Ltd) v Graham [2003] AC 419

1. The Applicants, Mr and Mrs McGhee applied to be registered as proprietors of a strip of land ("the Garden Strip") which is registered with other land under title number DY450819. The Respondent, Mr Taylor is the registered proprietor of that title. He objected to the application. The application is made under Schedule 6 to the Land Registration Act 2002. Mr Taylor required the application to be dealt with under paragraph 5 of Schedule 6. Mr and Mrs McGhee indicated on their application form ADV1 that they would rely on the first and third conditions in paragraph 5 of Schedule 6.

2. I inspected the Garden Strip and neighbouring land on the afternoon before the hearing and accompanied by the parties. Mr and Mrs McGhee are the registered proprietors of and live at The Old Cottage, Somerset Herbert, Derbyshire registered under title number DY425530. The Garden Strip adjoins the southern boundary of the land in that title. It is an open area of grassland. There are no clear physical features marking either the boundary between the land in Mr and Mrs McGhee's title and the Garden Strip or the boundary between the Garden Strip and the other land in title DY450819. There is a post and rail fence on the land in title DY450819 but the land the subject of this application does not extend as far as that fence. However, the land in the McGhees' title, the Garden Strip and the land on the other side of the Garden Strip running up to the fence is all principally mown grassland. The land out of which the Garden Strip was carved is a paddock and I shall refer to it as "the Paddock".

3. Mr and Mrs McGhees' case is that on 30th July 1998 they paid £4,000 to the then proprietor of DY450819, Caroline Ludlam for the Garden Strip. They did not enter into any written contract for the purchase of the Garden Strip. They do have a receipt for the payment of the £4,000 signed by Caroline Ludlam's husband, Michael Ludlam. The receipt reads

   "Received from Brenda McGhee the sum of £4,000 for the land at the back of the cottage bounded by Caroline's fence that is to be made over to Brendan".

   It is dated 30th July 1998.

4. Mr and Mrs McGhee say that from the date of payment of the £4,000, they treated the Garden Strip as if it were owned by them, enjoying exclusive use of it, planting trees and plants, erecting huts and play facilities for their children, enjoying it as an extension to their garden and inviting guests onto it. Those guests included Mr and Mrs Ludlam.

5. Mr Taylor accepted following late disclosure at the start of the hearing of a conveyance to Mr and Mrs McGhee that the land Mr and Mrs McGhee agreed informally to buy from Caroline Ludlam in 1998 was the Garden Strip and not a smaller triangular area of land adjoining the highway.

6. Mr McGhee gave evidence. He confirmed the truth of the contents of the Applicants' Statement of Case and his witness statement. In the Statement of Case the Applicants said that they had enjoyed exclusive possession of the garden strip and that this possession included

> "(i) cultivating and mowing the land as an extension of their garden.
> (ii) at the Applicants' own expense planting new trees and plants and landscaping the area generally
> (iii) Erecting huts and play facilities for the Applicants' children
> (iv) Exclusively enjoying the land as an extension of their pre-existing garden for the enjoyment of the Applicants, their family and friends
> (v) Inviting over 150 guests to the Applicants' wedding held on the land itself
> (vi) All other use synonymous with the use by the Applicants as a private garden".

7. In his witness statement Mr McGhee said "We took immediate possession of this land with the Ludlam's full knowledge and consent and continued to enjoy a good relationship with them. We entertained them in our garden and saw them most days when they were attending to their horses in the paddock behind our house because our boundary fence was also the boundary fence to their paddock and they never complained or would even comment that we were in occupation of land that didn't belong to us. We maintained the land exclusively as our own without any intervention at all. We also held our children's birthday parties in the garden.".

8. The Respondents did not challenge the Applicants' evidence as to their use of the Garden Strip.

9. Mr McGhee's evidence as to the fence between the Garden Strip and the Paddock was that this was put up by Mr Ludlam in 1998 at the time the McGhees agreed to buy the Garden Strip. He could not recall in cross-examination whether the fence was put up before or after the McGhees handed over the £4,000 purchase money.

10. It is common ground that the fence now in place was not the fence put up by Mr Ludlam in 1998. It is not on the boundary between the Garden Strip and the Paddock. Mr McGhee said in cross-examination that the fence was taken down by Caroline Ludlam's son, William Ludlam. He first said this was in 2003 or 2004 but when it was pointed out to him that William Ludlam would then have been 12 years old, he said it was in 2008. Mr McGhee gave no real explanation as to why he did not challenge William Ludlam or complain when the fence was taken down. He said that he did not mind the fence coming down because William Ludlam planted 5 large conifer trees on the boundary. It was not suggested that the Ludlams came onto the Garden Strip after the fence was taken down (other than at the invitation of the McGhees) or did anything on it. Mr Taylor said that he saw Mr McGhee remove the fence along the boundary of the Garden Strip. This was one of two parallel fences that created a gallop for the Ludlam's horses. Mr McGhee denied Mr Taylor's claim that Mr McGhee took the fence down in 2010.

11. The question of who took down the fence is not relevant to my decision. If it were relevant, I would have accepted Mr Taylor's evidence. He had a very clear recollection of seeing Mr McGhee take down the fence. I can see no reason for him to have given that evidence if he had not seen what he said he saw. I think it is more likely than not that Mr McGhee took down the fence so that he could use all the land up to the other fence on the far side of the gallop.

12. Mr and Mrs McGhee stated in their Statement of Case that it became apparent to them in 2008 when they applied for first registration of The Cottage that the Garden Strip was not registered with their title. HM Land Registry wrote to Mrs McGhee on 27th February 2008 stating that the Garden Strip appeared to be occupied with The Cottage but had not been included in the registered title because no documentary title had been shown.

13. On 23rd September 2008 solicitors for Mrs Ludlam, Messrs Shacklocks, wrote to Mr and Mrs McGhees' solicitors, Underwood Vinecombe stating that they understood the solicitors had been instructed to act for Mr and Mrs McGhee in the purchase of some land from Mrs Ludlam, that Mr and Mrs McGhee had already paid £4,000 for the land and it was now a matter of formalising the transfer of the land into Mr and Mrs McGhees' name. Shacklocks stated that they were having difficulties identifying the land to be transferred. The letter also stated

    "I understand that your client has provided mains water supply to my client's land and I enclose a copy of the original letter for your information".

14. On 7th October 2008 Shacklocks again wrote to Underwood Vinecombe stating that they had seen their client to go through additional conditions to be incorporated in the contract and that they understood the McGhees had agreed to purchase an additional piece of land for £2,000. The land was said to be shown edged green on the plan attached to the contract enclosed with the letter. The letter also refers to another area of land coloured red on the plan, which was said to have been purchased informally by the McGhees in 1998. The letter enclosed separate draft contracts for the sale of the green land and for the sale of the red land. Copies of the plans to the draft contracts were not included in the hearing bundle.

15. On 27th October 2008 Shacklocks wrote again to Underwood Vinecombe asking for a more accurate contract plan and stating that Mrs Ludlam required to have a right of way over the land to be sold to the McGhees.

16. Mr Taylor said that in January 2010 Mr McGhee told him that Caroline Ludlam had sold 11 of the 13 acres of land she owned but retained 2 acres, which included the garden strip and the paddock. Mr McGhee told Mr Taylor that he was trying to buy this land but was having trouble raising the money to buy it. Mr Taylor said Mr McGhee told him he was very concerned because he did not own the garden strip and that if he could not buy the two acres, he could lose the garden strip. Mr Taylor said that he suggested to Mr McGhee that he, Mr Taylor should put up the funds to buy the 2 acres and if he was successful in buying them then he would transfer title to the garden strip to the McGhees. Mr Taylor said that he subsequently bumped into Mr McGhee in a local supermarket and in answer to Mr Taylor's asking if he still wanted to go ahead with Mr Taylor's suggestion, Mr

McGhee told him that he had bought the 2 acres, including the garden strip. Mr Taylor said that he was then surprised in April 2010 to receive a call from Mr Ludlam asking if he wanted to buy the 2 acres. Mr Ludlam told him that there had been an agreement for the sale of the 2 acres to Mr McGhee but that this had fallen through because Mr McGhee had been unable to come up with the purchase money. Mr Taylor subsequently purchased the land for £20,000.

17. By 2010 the Department for Business Innovation and Skills had the benefit of an injunction preventing Caroline Ludlam from disposing of assets. Irwin Mitchell wrote to Mr and Mrs McGhee on 12 February 2010 stating that the Department for Business Innovation and Skills had given its consent in principle to the sale by Caroline Ludlam to the McGhees of the area of land shown on the enclosed plan for £6,000. The plan showed the land lying to the southwest of and adjoining the Garden Strip.

18. The Garden Strip together with the other land now in title DY450819 was transferred by Caroline Ludlam to Mr Taylor by a transfer dated 28th April 2010.

19. Mr McGhee accepted in cross-examination that he knew by May 2010 that the Garden Strip was included in Mr Taylor's registered title. He then instructed solicitors who wrote the letter of 11th May 2010 to Mr Taylor.

20. On 11th May 2010 Underwood Vinecombe wrote to Mr Taylor stating that Mr and Mrs McGhee had purchased the area of land shown on the plan with the letter, from Mrs Ludlam; that Mrs Ludlam held the land on trust for the McGhees; that the McGhees interest in the land was an overriding interest and enclosing a draft transfer of the land to the McGhees.

21. Mr Taylor's case is that Mr and Mrs McGhee went onto the Garden Strip with the consent of Mrs Ludlam following an informal conditional purchase. The purchase was conditional on the supply of water by Mr McGhee to Mrs Ludlam's land. Mr Taylor says that the consent came to an end when the conditions of the purchase were not met. He says that Mrs Ludlam showed her consent to the McGhees going into possession by erecting a fence between the Garden Strip and the rest of her land. If the McGhees were in possession otherwise than with the consent of Mrs Ludlam, then Mr Taylor says that there is no good proprietary estoppel claim to the land against him because he did not

make any representation or stand by while the McGhees acted to their detriment. Further, he says that there was no good proprietary estoppel claim against Mrs Ludlam because the McGhees did not honour the conditions of the informal sale. Mr Taylor also says that the McGhees cannot rely on the third condition in paragraph 6 because they did not have a reasonable belief that they owned the garden strip and there was never any doubt about the boundary of the land in their registered title.

22. Mr Taylor's evidence was that he was told by Michael Ludlam that the McGhees' use of the garden strip was permissive and in return for the supply of water.

23. Mr McGhee denied that he agreed as a condition of being sold the garden strip that he would supply water to Caroline Ludlam's adjoining land. He accepted that he had written a letter addressed to "To whom it may concern" stating that in 1998 he purchased some land from Caroline Ludlam and "one of the conditions of the purchase was that I should supply mains water to her remaining paddocks and with my agreement, any building that may be erected on the ground in the future. This agreement was to be in perpetuity and would be valid while ever the supply of water was in my control". However, he said that he had written this in 2008 when he was trying to buy the paddock. He maintained that he had not in fact so agreed in 1998.

Law

24. Law of Property (Miscellaneous Provisions) Act 1989 s. 2 provides

> "(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
>
> (2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.
>
> (3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract".

There was no document in this case to satisfy the provisions of s. 2 and accordingly, there was no contract for the sale and purchase of the land. However, s. 2(5) provides that nothing in the section affects the creation or operation of resulting, implied or constructive trusts.

25. The land in question is and was at the time the McGhees paid the £4,000 to Caroline Ludlam registered land. A transfer of registered land is required to be completed by registration – Land Registration Act 2002 s. 27(2)(a). A transfer does not operate at law until it is registered – LRA 2002 s. 27(1). A transfer of registered land only has effect if it complies with the requirements as to the form and content of the transfer provided by the Land Registration Rules – LRA 2002 s. 25(1). Land Registration Rules r. 58 prescribes the form in which a transfer of registered land must be. There was in this case no transfer to satisfy the requirements of rule 58.

Adverse Possession: Law

26. No period of limitation under Sections 15 of the Limitation Act 2002 runs against a registered proprietor of registered land and section 17 of that Act does not operate to extinguish the title of the registered proprietor – LRA 2002 s. 96(1) and (2). LRA 2002 Schedule 6 Para 1(1) provides

> "A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application".

27. The question to be answered when considering whether a person occupying land is "in adverse possession" for the purpose of Schedule 1 paragraph 8 to the Limitation Act 1980 is

> "...whether the Defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner... Beyond that... the words possess and dispossess are to be given their ordinary meaning."
>
> (per Lord Browne-Wilkinson in *J A Pye (Oxford Ltd) v Graham* [2003] AC 419 at paragraphs 36, 37).

28. Legal possession is comprised of two elements:

(1) A sufficient degree of physical custody and control ("factual possession"); and

(2) An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). "What is crucial is to understand that, without the requisite intention in law there can be no possession. Such

intention may be, and frequently is, deduced from the physical acts themselves." (*ibid* paragraph 40).

29. Factual possession has been described as follows:

> "It signifies an appropriate degree of physical control. It must be a single and [exclusive] possession ... Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute 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 ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."
>
> (per Slade J in *Powell v McFarlane* (1977) 38 P and CR 452 at pp. 470-471, cited at paragraph 41 in *J A Pye (Oxford) v Graham).*

30. What is required for the intention to possess is the intention to exclude the whole world, including the true owner of the paper title, from the land so far as is reasonably practicable and so far as the processes of the law will allow – see per Slade J. in *Powell v. McFarlane* above. The intention must not only be the subjective intention of the squatter but the squatter must also show by his outward conduct that he has such an intention. The intention must be manifested by unequivocal action – see *Prudential Assurance Co ltd v. Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87. The use of the land must be such that the true owner, if he took the trouble to be aware of what was happening on his land, would know that the squatter was in possession

> "It would plainly be unjust for the paper owner to be deprived of his land where the claimant had not by his conduct made clear to the worlds including the paper owner, if present at the land, for the requisite period that he was intending to possess the land" – per Peter Gibson LJ in *Prudential Assurance Co Ltd v. Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87

31. In *JA Pye (Oxford) Ltd. v. Graham* [2002] UKHL 30 at paragraph [37] Lord Browne-Wilkinson said

> "It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of [the Limitation Act 1980]. Beyond that, as Slade J said, the words possess and dispossess are to be given their ordinary meaning".

32. In Powell *v. McFarlane* (1977) 38 P&CR 452 at 469 Slade J said

> "... time can never run in favour of a person who occupies or uses land by licence of the owner with the paper title and whose licence has not been determined, because no right of action to recover the land has ever accrued against the owner; consequently such a person has no "adverse possession" however long his occupation or use may have lasted".

Decision

33. In this case it is not in dispute that the McGhees went into possession of the Garden Strip in the sense that they had a sufficient degree of physical custody and control to amount to factual possession and that they had the intention to possess. This appears from Mr McGhee's unchallenged evidence. However, it is also not in dispute that the McGhees had possession of the Garden Strip with the consent of Caroline Ludlam in return for the payment of £4,000. There is no evidence that Caroline Ludlam ever withdrew her consent. Therefore, while Caroline Ludlam remained the owner of the Garden Strip, the McGhees did not have adverse possession of the Garden Strip for the purposes of the Limitation Act 1980 and therefore they were not in adverse possession for the purposes of Schedule 6 to the Land Registration Act 2002. They have not been in adverse possession of the Garden Strip for a period of 10 years or more and their application cannot succeed.

34. I would add that I consider on the facts alleged by Mr and Mrs McGhee and applying the test set out in the passage from *Powell v. McFarlane* set out in paragraph 32 above, they were not in adverse possession because Caroline Ludlam had no cause of action to recover the Garden Strip from them. Mr and Mrs McGhee agreed with Caroline Ludlam that they should have the Garden Strip in return for the payment of £4,000. The agreement was not subject to any condition, according to the evidence of Mr McGhee. Pursuant to that

agreement, the McGhees made the payment of £4,000 and went onto the Garden Strip. The McGhees and Caroline Ludlam had a common agreement, understanding or intention that the McGhees should have the Garden Strip in return for the payment of £4,000 and in reliance on that agreement, the McGhees acted to their detriment by paying the sum of £4,000. The effect was that after receipt of the payment, Caroline Ludlam held the Garden Strip on a constructive trust for the McGhees. As she held on constructive trust for the McGhees she had no cause of action to recover possession from them.

35. If the McGhees had been in adverse possession for a period of more than 10 years then it would have been necessary for me to have considered whether one of the conditions of paragraph 5 of Schedule 6 had been satisfied. Mr and Mrs McGhee stated in their application in form ADV1 that they intended to rely on the conditions in paragraph 5(2) and 5(4) of Schedule 6. The condition set out in paragraph 5(2) ("the first condition") is that

> "(a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant and
>
> (b) the circumstances are such that the applicant ought to be registered as the proprietor.

36. The condition set out in paragraph 5(4) ("the third condition") is that

> "(a) the land to which the application relates is adjacent to land belonging to the applicant;
>
> (b) the exact line of the boundary between the two has not been determined under rules under section 60,
>
> (c) for at least ten years of the period of adverse possession ending on the date of the application the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him
>
> (d) the estate to which the application relates was registered more than one year prior to the date of the application"

37. The first condition is not made out on the facts. The evidence does not show that it would be unconscionable for Mr Taylor to seek to dispossess the McGhees. He did not make any representation to them to cause them or encourage them to believe that they were the owners of the Garden Strip. He did nothing to encourage the McGhees to act to their

detriment in the belief that they were the owners of the Garden Strip. He did not stand by while the McGhees to his knowledge acted to their detriment in the belief that they were the owners of the Garden Strip. Indeed, there is no evidence that the McGhees did anything to their detriment in reliance on the belief that they were the owners of the Garden Strip at any time after the payment of £4,000. They simply enjoyed the land as an adjunct to their garden.

38. The third condition is not satisfied. Mr and Mrs McGhee did not believe for a period of at least 10 years of the period of adverse possession ending on the date of the application that the land belonged to them. They knew from January 2008 that the land was not included in their registered title and they knew from at least May 2010 that it was included in Mr Taylor's registered title.

Conclusions

39. The application of the McGhees to be registered with title to the Garden Strip must fail. They were not in adverse possession of the Garden Strip for a period of at least 10 years. Even if they had been in adverse possession for the necessary period, their application would have failed because none of the conditions of paragraph 5 of Schedule 6 to the Land Registration Act 2002 are met. I shall direct the Chief Land Registrar to cancel the application.

40. The usual order in proceedings before the Land Registration division of the Property Chamber is that the unsuccessful party pay the costs of the successful party. The attention of the parties is drawn to Practice Direction 9 of the First-tier Tribunal Property Chamber Land Registration division practice directions. Any party who wishes to apply for an order for costs should do so in writing with reasons by 5pm on 25th January 2019 and serve a copy of the application on the other party by the same time.

BY ORDER OF THE TRIBUNAL

Michael Michell

PROPERTY CHAMBER LAND REGISTRATION

DATED this 17th December 2019