



[2018] UKFTT 0607 (PC)

REF 2017/0067

**IN THE FIRST-TIER PROPERTY TRIBUNAL
(LAND REGISTRATION)**

Judge Clarke Q.C., Tuesday, 5 September 2018

BETWEEN:-

RIDDLE (HOLDINGS) LIMITED

Applicant

and

ELAINE MARION JAYNE

Respondent

**Property Address: Land lying on the east side of High Street, Cinderford
Title Number: GR402933 and GR176294**

ORDER

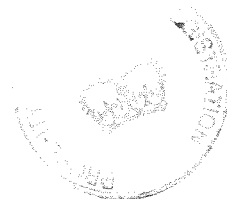
UPON the hearing of this reference

AND UPON HEARING counsel for the Applicant and counsel for the Respondent

THE REGISTRAR IS DIRECTED to give effect to the Applicant's application dated 21 July 2016 in whole.

Dated this 5th day of September 2018

Ian Clarke



A JUDGE OF THE FIRST-TIER PROPERTY TRIBUNAL (LAND REGISTRATION)



[2018] UKFTT 0607 (PC)

REF 2017/0067

**IN THE FIRST-TIER PROPERTY TRIBUNAL
(LAND REGISTRATION)**

Before: Judge Clarke Q.C., sitting at Gloucester Combined Court on 30 July 2018

BETWEEN:-

RIDDLE (HOLDINGS) LIMITED

Applicant

and

ELAINE MARION JAYNE

Respondent

**Property Address: Land lying on the east side of High Street, Cinderford
Title Number: GR402933 and GR176294**

Applicant Representation: Ewan Paton, Counsel, instructed by Fleet Solicitors.

Respondent Representation: Joss Knight, Counsel, instructed by Pitman Blackstock White, Solicitors.

DECISION

PRESCRIPTION – whether a prescriptive right of way under the doctrine of lost modern grant had arisen on the evidence prior to 1957 – whether the route of any such right-of-way included the land forming the subject matter of the application.

Cases referred to: –

Leven Holdings Limited v Johnston [2018] EWHC 223 (Ch)
Hayling v Harper [2003] 3 EGLR 5

Introduction

1. By an application in form AP1 dated 21 July 2016, the Applicant applied for the registration of a prescriptive right-of-way with or without vehicles over a strip of land comprised in the Respondent's title numbered GR402933 ("the Strip"). The land said to be subject to that right-of-way lies along the hypotenuse of a right-angled triangle to the south of the Applicant's land. If the Applicant's contention is correct, the Strip (in conjunction with other land) would afford it access to and from its registered under title number GR176294 ("3A Heywood Road") along a trackway potentially accessible from that property via a pair of double metal gates ("the gates") and which leads to the High Street, joining the same adjacent to No. 11 ("the Trackway"). The benefit of a right-of-way with or without vehicles over the remainder of the Trackway not within the Respondent's title has already been registered in favour of 3A Heywood Road. The Respondent objects to the application insofar as it relates to her registered title.
2. The evidence relied upon in support of the application is contained in a statutory declaration dated 11 April 2016 by Roland Stuart Di Palma, a director of the Applicant. In paragraph 4, it makes reference to a statutory declaration by Albert Edward Teague dated 11 March 1957. I will return to this declaration ("the 1957 Statutory Declaration") below.
3. The witness statements and evidence filed on behalf of the Applicant comprised the following: –
 - a. A witness statement of Mr Di Palma dated 22 August 2017, speaking to the acquisition of 3A Heywood Road in 1999 and the alleged use of the Trackway until the Respondent undertook works on an adjacent property in 2014. Mr Di Palma's evidence recounts discussions prior to the acquisition by the Respondent of title numbered GR402933 of the alleged right-of-way. Mr Di Palma also refers to the 1957 Statutory Declaration;
 - b. A witness statement of David Smith dated 25 August 2017, speaking largely to the same matters;
 - c. A witness statement of Frederick Collett, a long-standing local resident who worked for the Midlands Electricity Board initially between (approximately)

1954 and 1961 and then between 1968 and 1974. The Midlands Electricity Board occupied and traded from 3A Heywood Road. I shall return to Mr Collett's evidence below.

d. The 1957 Statutory Declaration.

4. The Respondent's evidence comprised her first witness statement dated 13 July 2017 and her second witness statement dated 3 October 2017, as well as the witness statements of Graham Swaine dated 28 February 2017, Ross White dated 25 September 2017, Kenneth Mason dated 25 September 2017 and Glenn Pitman dated 26 September 2017. This evidence is sought to address the use of the Trackway (and thus the Strip) in (relatively speaking) recent years (2007+).
5. However, in opening, Mr Paton made it clear that the Applicant's case rested solely and exclusively upon such findings as I might make based upon the 1957 Statutory Declaration and the plan thereto which (he submitted) established the use for which the Applicant contends when properly understood within the factual matrix of the time. In particular, I was invited to have regard to the conveyance dated 22 March 1957 and made between Mr Teague and the Midlands Electricity Board conveying 3A Heywood Road to the Board. I shall refer to this further below. I was also invited to have regard to Mr Collett's witness statement, although that evidence was to be adduced as hearsay since Mr Collett was unable to attend. I was also invited to have regard to the relevant OS plans in evidence at pages 276+ of the trial bundle.
6. As a result, and whilst Mr Di Palma and Mr Smith were tendered for cross examination, Mr Knight did not cross-examine them since they did not purport to give any relevant evidence in relation to the case advanced. For the sake of completeness, I should also record at this stage that the Respondent, Mr White and Mr Mason were each tendered for cross examination but that no questions were asked of them by Mr Paton. I was invited to have regard to Mr Swaine's evidence as hearsay since he was unable to attend. As a result, I heard no evidence *viva voce* and the hearing simply comprised submissions on the documents. Whilst the Skeleton Arguments raised the possibility of a point being taken on the manner in which the Applicant had pleaded its case, in the event no such points were taken.

7. The Respondent's opposition to the application focused on the deficiencies of the 1957 Statutory Declaration (particularly that it makes no description of the nature of the use of the right-of-way), challenging the weight to be given to such a document in any event and challenging the Applicant's ability to establish a right-of-way over the Strip as identified on the Application on the basis that it appeared from the OS maps that the rear garden of the property lying to the west of the Trackway and immediately adjacent to the gates ("1 Heywood Road") may have encroached into the Trackway, with the effect that any prescriptive right required would not be over the Strip.

Site View

8. I had the benefit of viewing the Trackway on the morning of 30 July 2018 in the presence of the parties and their counsel. It consists of a relatively steep, unmade track leading from the High Street. It turns and curves around the rear of 1 Heywood Road. Ultimately, it leads to the gates on the southern boundary of 3A Heywood Road. The gates were clearly of long-standing; Mr Collett refers to these gates being present at this point of the boundary between 1968 and 1974 and their construction and condition would not be inconsistent with them having been at least of that age; certainly, there was no evidence to suggest (or, for that matter, any suggestion) that the gates were of any more recent construction and I would accept Mr Collett's evidence in this regard. The northern end of the Trackway, adjacent to those gates is now strewn with hard-core and other such debris but, from the witness statement refers to above, it would appear (and I so find) that this is a relatively recent state of affairs.

The 1957 Statutory Declaration

9. The 1957 Statutory Declaration is not a long document. In it Mr Teague declared the following (inserting numerals in lieu of words): –
 1. *I am 83 years of age.*
 2. *The property described in the Will dated 13 April 1887 of my father Cornelius Edward Teague... as "my farm buildings and land situated in the Township of East Dean..." was converted in the year 1935 by me into a Market now known as the Central Market Cinderford Office Garages and Lock up Sheds and the land and*

premises edged Read on the plan annexed hereto.... formed if not the whole of the land referred to at any rate some part of it.

3. *As to the right-of-way on the East side of the property leading out of High Street Cinderford to the Garages and back of the Market it is within my knowledge that this right-of-way has been used as a right-of-way to the property as of right upwards of 50 years jointly with the owners and occupiers of the properties adjoining it...and as my family have always been the main users thereof they and I have kept it in repair for the benefit of the property hereinbefore described but have never been under any obligation to anyone to carry out the repairs.*
4. *To the best of my knowledge and belief the position with regard to boundary walls and fences in respect of the property... is as follows....”*

and paragraph 4 proceeds to describe the boundary structures by reference to lettered points upon the attached plan. Pausing there, no boundary structure is described along the line of the gates referred to above, which line is marked upon the plan as “approximate boundary line” leading me to infer that in this part (which could on one analysis be described as the “East side” of the property), there was no physical boundary.

10. The plan attached to the 1957 Statutory Declaration warrants some further analysis. The Trackway is shown marked “right-of-way”. It is the only land so marked. The matters referred to in paragraph 3 of the 1957 Statutory Declaration clearly refer to the Trackway. If one stood where the gates are now positioned and looked to the north (towards what is now Edge Hill Road), there were buildings situated immediately ahead marked “stone and brick buildings used for garages etc.”. Further to the north and on the western boundary, there were some “derelict would buildings” and to the east of them a “wood building”. The passageway between these last two buildings appears relatively narrow and certainly no more materially commodious than that afforded by the Trackway.
11. The 1957 Statutory Declaration was made 11 days prior to the conveyance dated 22 March 1957 referred to above. It was self-evidently meant to assure to the purchaser those rights enjoyed by the property conveyed. However, the conveyance makes no express mention of them which, consistent with unregistered conveyancing practice, is

to be expected. The conveyance dated 22 March 1957 itself is therefore of limited utility in determining the matters which I must decide.

Mr Collett's witness statement

12. Mr Collett makes no mention of any use of the Trackway during his employment by the Midlands Electricity Board between 1954 and 1961. However, his evidence upon his return in 1968 is as follows: –

5. *In 1968 I went back to work for the MEB at 3A Heywood Road and I worked with them as a commercial assistant until 1974. The yard at the rear of the premises was used as a rear access for deliveries into the showroom. The yard was also used by the three meter readers employed by the MEB who had a base there. The three meter readers each had a small basic van. They would arrive at 3A Heywood Road in the morning, they would then go out and do their meter reading rounds and then come back at the end of the day to complete their paperwork. The meter readers were employed full-time and they would go out on their rounds on a daily basis. The usual entrance onto the yard was in Edge Hills Road but the meter readers would quite often use the lane at the other side of the yard which led onto the High Street as an exit as it was nearer to the main building and exited straight onto the High Street. There were metal gates leading from the yard onto the little lane. The gates were left open during the day to allow free and easy access from the yard.*
6. *The yard was also used by people visiting the MEB property. There used to be stores upstairs above the shop and TV mechanics, repair workers and electricians would visit the stores to collect equipment and cable before going out to do their jobs. These visiting MEB staff would park their vehicles in the yard and would often use the lane onto the High Street as an exit.*
7. *When I was working for the MEB I would often drive to work and park my car in the yard. There were about 3 or 4 of us that worked at the MEB that parked our vehicles in the yard. In fact my 14 year old son started to learn to drive by coming to the yard and driving my car around the yard. On occasion I would use the little lane to exit out of the yard and go home. I would not use the lane to drive into the yard as it was quite steep and a bit rough. I would regularly use the little lane as a pedestrian access to go into the centre of Cinderford and so did other MEB staff.*

8. *I confirm that I have seen photographs of the gates on the yard leading to the lane and I can confirm that the gates are the same gates that I recall when I worked at the MEB.*

The OS maps

13. Two maps at a useful scale (1:2500) were in evidence from 1902 – 1903 and 1922. (The other maps were of too smaller scale to be of any utility.) Each show the Trackway; and where the gates are now situated, the trackway continued northwards along the western boundary of what is now 3A Heywood Road and had buildings constructed adjacent to it on neighbouring titles both to the west and to the east, the latter being on land which now comprises part of 3A Heywood Road. One of those parcels to the east was the subject matter of a conveyance by mortgagees to William George Teague and Albert Edward Teague dated 8 June 1927 (“the 1927 conveyance”). The plan attached to that conveyance shows the land in question had buildings adjacent to a gateway leading onto the continuation of the Trackway marked “right-of-way to High Street” as well as an aperture on the eastern boundary of the land onto a track marked “right-of-way to Dockham Road”.

The burden of proof

14. Before proceeding to analyse the evidence and the Respondent’s challenges to it, I remind myself that the Applicant, as the party asserting a prescriptive right-of-way, bears both the legal and evidential burden of proof to establish a prescriptive right-of-way, with and without vehicles over the Strip for a period of 20 years as of right. The essence of this case turns upon the adequacy of the evidence relied upon; the Respondent makes no other challenge to the applicability of the presumption of lost modern grant relied upon nor seeks to argue that any right acquired by 1957 has been abandoned or otherwise lost in the intervening years. Accordingly, it must follow that if I am satisfied that there was 20 years such user by the time of 1957 Statutory Declaration then – subject to the point made about the encroachment into the Trackway by 1 Heywood Road – I should determine the application in the Applicant’s favour.

Discussion

User

15. Mr Knight submitted strongly against my placing any reliance upon the 1957 Statutory Declaration; just because it was an old document, he submitted, did not mean that it was true or persuasive, particularly in circumstances where it was part of a commercial transaction to the declarant's benefit. I was referred to the case of *Leven Holdings Limited v Johnston* [2018] EWHC 223 (Ch) at [23] where His Honour Paul Matthews considered the weight to be given to a witness statement not made for the purposes of the proceedings before him by an individual who had subsequently died. For the reasons given in that paragraph and in paragraph [24] (where the Judge observed the evidence given in the witness statement was incorrect in circumstances where it was hard to avoid the conclusion that either the deponent knew it to be so or put the evidence forward recklessly), the Judge viewed the evidence given with extreme caution.

16. In my judgment, the discussion in *Leven* is of no assistance. It was considering materially different circumstances. The evidence with which I am concerned is given in a statutory declaration; to knowingly give false evidence would be an offence of perjury under the Perjury Act 1911. Secondly, whilst I accept that Mr Teague could not be cross-examined and was not a disinterested declarant, his evidence is not challenged by evidence to the contrary and is, in material regards, borne out by other matters. His family connection to the locality is recited in the conveyance dated 22 March 1957; his recollection of the use of a right-of-way upwards of 50 years is consistent not only with his age but also of the configuration of the immediate locality as revealed by the plan to the 1927 conveyance (to which he was a party) showing the existence of the extended Trackway. Indeed, the 1927 conveyance shows the most ample point of access and egress to the close thereby conveyed to be via gates onto the continuation of the Trackway and thus by the Trackway itself to the High Street; indeed, it would appear that the buildings erected on that land may have been separated from the remainder of the land (accessed by a more narrow gateway onto the right-of-way to Dockham Road) by a fence or some other structure and only capable of access via the Trackway. There are also the OS plans from 1902 – 1903 and 1922 which show the access route to the land in the vicinity afforded by the Trackway and

its continuation. I therefore accept that the Trackway had been used as Mr Teague declares – namely upwards of 50 years.

17. However, Mr Knight makes the valid point that the 1957 Statutory Declaration does not describe how the right-of-way has been used as a right-of-way for that period; it is completely silent. He submitted that in circumstances where there was no evidence as to how the right-of-way was used, I cannot be satisfied that it is a right-of-way with vehicles.
18. Whilst there is no direct evidence within the narrative of the 1957 Statutory Declaration, there is some evidence upon which to make an evaluation. The 1957 Statutory Declaration speaks of the conversion of 3A Heywood Road into a market with an office in garages on it in 1935 and the plan annexed thereto shows the garages towards the southern end of the site. *The Shorter Oxford English Dictionary* defines a “garage” as “a building for the storage or refitting of motor vehicles”. In my judgment, the presence of garages means that it is clear from the 1957 Statutory Declaration that for a period in excess of 20 years, access to and egress from 3A Heywood Road had been with motor vehicles. I also infer that in those circumstances, those vehicles would have gained access to and egress from the property along the Trackway. It led directly onto the High Street; the boundary was unfenced; it was the nearest point of access and egress and no more or less commodious than the alternative route from the property. The Trackway is not sufficiently steep nor sufficiently narrow to lead me to the conclusion that all vehicular traffic passed to the north; as for the submission that the Trackway would have been in poor condition, it seems to me that this is expressly refuted by the terms of the 1957 Statutory Declaration itself.
19. I have made no reference to the evidence of Mr Collet when reaching these conclusions which, in my judgment, are justified by virtue of the contents of the 1957 Statutory Declaration and its factual matrix alone. However, in relation to Mr Collet’s evidence, I accept it, not least because it is unchallenged by any evidence to the contrary. Moreover, this evidence adds credibility to the evidence of Mr Teague and of the user which I have found existed prior to 1957: see *Hayling v Harper* [2003] 3 EGLR 5, [21], [22]. The purchaser of 3A Heywood Road was the Midlands Electricity Board which, certainly during the period 1968 – 1974, continued to use the Trackway

in the manner that Mr Teague records in the 1957 Statutory Declaration. Mr Collet's evidence also clearly demonstrates the suitability of the Trackway for use by cars and light vans and the likelihood of those vehicles using the same when starting or finishing a journey were access along the High Street was required.

20. Accordingly, and subject to the encroachment point which I will consider next, I consider that the Trackway was used with motor vehicles as of right (as Mr Teague declares) for at least the period 1935 – 1957. A prescriptive right to that extent is, subject to the encroachment point, made out under the doctrine of lost modern grant.
21. I would also reach a similar conclusion in relation to pedestrians; it is inconceivable that a pedestrian on the High Street would choose to walk the long way round to gain access to a vehicle in the garages on 3A Heywood Road from the north rather than proceed along the Trackway. Indeed, no one has suggested otherwise before me. Accordingly, and to the extent necessary, I will also conclude that the rights exercised during the period referred to in the 1957 Statutory Declaration also included a right-of-way on foot to and from the High Street.
22. Finally, Mr Knight submitted that the conclusion I reach in paragraph 20 above would mean that because of the physical limitation of the Trackway, such a right would be a possessory one and therefore could not amount to an easement since the Respondent would not be able to utilise the Strip for fear of infringing the easement; in effect, the Applicant would have exclusive and unrestricted use of the same. I have no hesitation in rejecting that submission. If it were correct, no right-of-way could exist as an easement, especially one running along a narrow, defined track. Such a right is not possessory – there is no concomitant right to possession as in a parking space or where there is as a right to tunnel – but merely a right to pass and re-pass. Such a right clearly exists as an easement.

Encroachment

23. The plan attached to the AP1 dated 21 July 2016 comprises a coloured copy of the official copy of title plan to 3A Heywood Road. It shows the southern and eastern rear boundary of 1 Heywood Road as a curve. At the site view, I observed that the boundary structure consisted in part of a wooden fence and in part a concrete block wall (the latter closest to the gates). It was slightly curved.

24. Paragraph 15 of the Defence asserts that “*a visual inspection of the site shows that the garden of [1 Heywood Road] has been extended and has the effect of blocking any vehicular access along [the Strip] ...*”. The point being made in this paragraph is that if regard is had to the OS maps and even to some of the official copy title plans to other registered titles (for example GR249609 at page 235 of the bundle), the corner of 1 Heywood Road appears to originally have been a much straighter line. Mr Knight submitted that any prescriptive right-of-way acquired prior to 1957 would have been over part of the Trackway now within the curtilage of 1 Heywood Road which has been extended, such that the right-of-way would not have been over the Strip. This, the Respondent contends, is apparent from “*a visual inspection of the site*”. No evidence was adduced in support of this allegation as to the amount by which it is said 1 Heywood Road has encroached into the Trackway or of the location of the Strip and its distance from what is said to have been the original boundary of the Trackway in order to demonstrate that it otherwise lay outside the route that any vehicles would have taken when travelling to and from 3A Heywood Road.
25. For my part, I reject the invitation to make such a finding based solely (as it must be, in the absence of any other evidence) upon my visual inspection of the site. There is no reliable evidence to show that 1 Heywood Road has encroached into the Trackway and if so by how much. Nor is there any evidence to demonstrate that absent any encroachment by 1 Heywood Road, any vehicle using the Trackway and approaching 3A Heywood Road is likely to have done so on land not comprised within the Strip. It is simply not possible to reach such a conclusion from a visual inspection. Indeed, from my visual inspection of the site, it seemed to me likely – given the limited space available both along the Trackway and approaching the gates, the gradient of the slope at the corner and the angle of the boundary of 3A Heywood Road relative to the Trackway – that vehicles would have approached 3A Heywood Road along the middle of the Trackway and not close by the boundary of 1 Heywood Road and, given the relative position of the Strip to the southern boundary where the gates are now situated, have utilised the Strip in order to approach 3A Heywood Road, effect the turn and enter it. This process would have been repeated when gaining access to the High Street. Accordingly, I reject the Respondent’s case in this regard; I do not consider that these matters defeat the application.

Conclusion

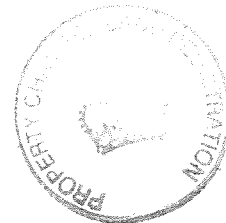
26. For these reasons, I will direct that the Registrar give effect to the Applicant's application dated 21 July 2016 in whole.

Costs and further directions

27. At the conclusion of the hearing before me, the parties agreed that any issue of costs should be determined on paper. In light of my judgment above, if the Applicant wishes to claim its costs, it must file and serve by 4 PM on the fourteenth day after receipt of this judgment a costs schedule in CPR Form N260, together with submissions in support of this entitlement both to any time costs claimed and disbursements post-dating the date of reference to the Tribunal. Any disbursements claimed must be supported by receipts and/or verified in a document containing a statement of truth. In addition, I would wish to know when the Applicant first communicated to the Respondent that its case was confined to one of a prescriptive right arising by virtue of user prior to 1957.
28. The Respondent must within 14 days of receipt of that schedule of costs, file and serve her written submissions as to (a) why she considers that a costs order should not be made and (b) why, if I were minded to summarily assess those costs (which I am), which items on that bill should be disallowed or reduced and if so on what basis and in what amount. The Applicant shall have 7 days thereafter to respond to those submissions. The matter shall be referred back to me either for further directions or determination.

Dated this 5th day of September 2018

Ian Clarke



A JUDGE OF THE FIRST-TIER PROPERTY TRIBUNAL (LAND REGISTRATION)