

[2019] UKFTT 0586 (PC)

**PROPERTY CHAMBER
FIRST – TIER TRIBUNAL
LAND REGISTRATION DIVISION**

2017/0887

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

BETWEEN

(1) Peter James Lawley

(2) Margaret Lawley

APPLICANTS

and

Hilda Jean Currell

RESPONDENT

Property Address: Maycroft, Aylescroft, Bosbury, Ledbury HR8 1QA

Title Number: HW122762

Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the First-tier Tribunal

The Chief Land Registrar is directed to cancel the Applicants' original application dated 10 November 2016.

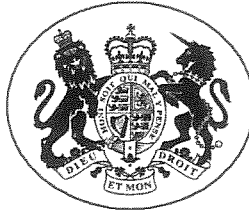
Dated 28 August 2019

Simon Brilliant



BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST – TIER

TRIBUNAL



[2019] UKFTT 0586 (PC)

**PROPERTY CHAMBER
FIRST – TIER TRIBUNAL
LAND REGISTRATION DIVISION**

2017/0887

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

BETWEEN

**(1) Peter James Lawley
(2) Margaret Lawley**

APPLICANTS

and

Hilda Jean Currell

RESPONDENT

Property Address: Maycroft, Aylescroft, Bosbury, Ledbury HR8 1QA

Title Number: HW122762

**Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the First-tier
Tribunal**

**Sitting at: Birmingham Employment Tribunals, Centre City Tower, 5-7 Hill Street,
Birmingham B5 4UU**

On: 9 and 10 July 2019

Site visit: 8 July 2019

Applicant's Representation: Mr R Mullan of counsel.

Respondent's Representation: Mr G McLeod of counsel.

DECISION

Alteration of the register – parties registered as proprietors of adjoining parcels of land - dispute concerns a small triangular piece of land at the north eastern tip of the respondent's registered title - applicants claiming a paper title to the disputed land - applicant seeking alteration of the respective titles to show the disputed land within their title.

Wigginton & Milner Ltd v Winster Engineering Ltd [1978] 1 WLR 1462; Scott v Martin [1987] 1 WLR 841; Ali v Lane [2007] 1 P&CR 26; Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 89 (Ch); Antoine v Barclays Bank plc [2019] 1 WLR 1958.

Introduction: the titles and the layout of the land

The brown land

1. Mr and Mrs Lawley, the applicants, are the proprietors of land described as lying to the south of Ailscroft, Bosbury, Hereford HR8 1QA registered under title number HE36762. I shall refer to this land as “the brown land”. Mr and Mrs Lawley purchased the brown land on 4 March 2016, and were registered as the proprietors on the same day.

2. The eastern part of the brown land is shown coloured brown on the plan annexed to this decision (“plan 1”)¹.

3. The brown land is a field and is used for agricultural purposes.

¹ The plan is for illustrative purposes only.

4. As can be seen from plan 1, the brown land is landlocked. Access between the green brown land and the public highway is over the land coloured green on plan 1 (“the green land”).

5. Entry A2 in the property register of the brown land begins as follows:

The land in this title has the benefit of a right of way with or without vehicles for agricultural purposes only over the land tinted yellow on the title plan.

6. The land tinted yellow on the title plan is (a) the land shown coloured purple on plan 1 (“the purple land”) and the green land².

7. Entry A2 concludes as follows:

The registered proprietor also claims that the land has the benefit of a similar right over the land tinted brown on the title plan but that right is not included in this registration. The claim is supported by a statutory declaration made by Edward Charles Lock on 25 February 2016.

8. The land tinted brown on the title plan is shown coloured pink on plan 1 (“the pink land”). The pink land is unregistered land and is a track giving access from the green land both to the brown land and to Ailscroft.

Maycroft

9. Mrs Currell, the respondent, is the proprietor of Maycroft, Aylescroft, Bosbury, Ledbury, Hereford HR8 1QA registered under title number HW122762. I shall refer to the whole of this title as “Maycroft”.

10. As can be seen from plan 1, Maycroft is divided into three component parts.

11. That part of Maycroft coloured yellow (“the yellow land”) comprises the respondent’s residence and surrounding land.

² Strictly only part of the purple land is subject to the right of way, but nothing turns on this.

12. That part of Maycroft coloured purple is the purple land first referred to in paragraph 6 above, and comprises land used by the respondent as a chicken coop.

13. That part of Maycroft coloured green is the green land first referred to in paragraph 4 above, and it forms a mouth giving access between the public highway, on the one hand, and the brown and pink land on the other. The green land is the land which is in dispute in these proceedings. As will be explained below, the applicants' case is that the green land is not land belonging to Maycroft over which they have a mere right of way, but is land properly falling within their own title.

14. Entry C1 in the charges register of Maycroft is as follows:

The land tinted blue on the title plan is subject to a right of way in favour of Ailscroft, Bosbury, Ledbury. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen.

15. The land tinted blue on the title plan is the green land.

16. Entry C2 in the charges register is as follows:

The land tinted blue and the land tinted yellow on the title plan are subject to a right of way with or without vehicles for agricultural purposes only for the benefit of the adjoining land registered under title HE36762 [the brown land]. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen.

17. As already explained, the land tinted blue on the title plan is the green land. The land tinted yellow on the title plan is the purple land.

Ailscroft

Ailscroft can be seen on the plan as the property to the north of the brown land. Ailscroft has the benefit of a prescriptive right of way over the green land.

Summary of easements

18. In order to avoid confusion, it will be helpful to summarise the actual and claimed easements relevant to these proceedings by reference to the colours on plan 1.

(a) The brown land has the benefit of a right of way with or without vehicles for agricultural purposes over the green and purple land. The applicants do use the green land as the means of gaining access to and from the brown land. The purple land does not, however, form such an access as it is blocked by the respondent's chicken coop. These proceedings are not concerned with whether or not the brown land does have the benefit of a right of way over the purple land or whether or not it has been blocked. These proceedings are only concerned with the green land.

(b) The brown land claims to have the benefit of a prescriptive right of way over the pink land, but that right is not registered.

(c) Maycroft has the burden of a prescriptive right of way over the green land for the benefit of Ailscroft.

(d) Maycroft has the burden of a prescriptive right of way over the green and purple land for the benefit of the brown land.

These proceedings

19. By an application in form AP1, dated 10 November 2016, the applicants applied to alter of the title of Maycroft by removing the green land, pursuant to paragraph 5 of schedule 4 to the Land Registration Act 2002 ("the 2002 Act") ("the original application").

20. The applicants' grounds are that the green land was included in a conveyance dated 29 December 1952 ("the 1952 conveyance") between the Church Commissioners for England and George Collet, their predecessor in title, and as such forms part of their title.

21. By an objection dated 21 December 2016, the respondent objected to the original application. Her grounds were that the green land formed part of a transfer dated 6 November 1992 (“the 1992 transfer”) which referred to an earlier deed dated 12 August 1950 (“the 1950 conveyance”) between (1) Janet Beith and Charles Masefield and (2) Alfred Fletcher, her predecessor in title.

22. The respondent’s case is that she holds a superior documentary title to the green land because the 1950 conveyance predates the 1952 conveyance.

23. The dispute was referred by Land Registry to the Tribunal pursuant to s.73(7) of the 2002 Act on 21 September 2017.

The witnesses

24. The applicants each gave oral evidence. They called the following witnesses:

(a) Andrew Lawley, the applicants’ son.

(b) Edward Lock, whose family had owned the brown land since at least 1967. He sold it to the applicants in 2016.

(c) Elizabeth Williams, who has lived at 2 Aylescroft since 1987. This property can be seen on plan 1 to the north east of the brown land.

(d) John Jordan, who has worked for 48 years as an agricultural contractor in the village.

25. The respondent gave oral evidence. She called the following witnesses: all

(a) Robert Preece, the joint owner of Ailscroft.

(b) Diana Preece, the joint owner of Ailscroft.

(c) Vera Martin, who had lived at Dowdings Brook Cottage, in the village, between 1978 and 2012.

26. The applicants relied upon an expert surveyor's report by Mr Philip Wood, dated 8 March 2019. The respondent did not require Mr Wood to attend for cross examination, and his report was read.

The maps

The 1840 tithe map

27. The 1840 tithe map³ appears to show the brown land as field 192a and Maycroft, together with land to the west of it, as field 192. The plan is not very clear, but it would appear that field 192a is landlocked and does not at any point meet the public highway.

The 1887 ordnance survey map

28. The 1887 ordnance survey map shows (1) the brown land and (2) Maycroft, together with land to the west of it, all within the same field 807 measuring 2.540 acres. This field has access to the public highway.

The 1904 ordnance survey map

29. The 1904 ordnance survey map is identical in all material respects to the 1887 ordnance survey map.

The 1926 ordnance survey map

30. The 1926 ordnance survey map shows a division between (1) the brown land, and (2) Maycroft, together with land to the west of it, as separate fields. There is shown clearly under a magnifying glass a lip at the south-east corner of the brown land giving access directly from the brown land to the public highway. This lip is, or includes, the green land.

³ Illustration 3 in Mr Wood's report.

The 1928 ordnance survey map

31. The 1928 ordnance survey map is similar to the 1926 one, save that the brown land is now identified as field 807a with an acreage of 1.085, and Maycroft, together with land to the west of it, is now identified as field 807 with an acreage of 1.455. Again, there is shown clearly under a magnifying glass the same lip at the south east corner of the brown land giving access directly from the brown land to the public highway. In addition, the pink land is shown for the first time as a footpath.

The 1953 ordnance survey map

32. The 1953 ordnance survey map again shows the brown land with the same lip at the south east corner. For the first time, Maycroft, together with a parcel of land to the south west of it,⁴ has been built on, and this land is shown separately from the land to the west⁵.

The 1974 ordnance survey map

33. The 1974 ordnance survey map differs from the earlier ones. It shows the brown land braced with the purple, green and pink land.

The 1923 conveyance

34. The first conveyance in time is dated 23 May 1923 (“the 1923 conveyance”). It is the conveyance which separates Maycroft and the land to the west of it from the remainder of field 807. The parcels clause is as follows:

First ALL that freehold piece or parcel of arable land called “Ailscroft” and containing by estimation 1 acre two roods and 12 perches or thereabouts⁶ ... All which hereditaments are situated in the Parish of Bosbury in the County of Hereford and numbered in the Bosbury Tithe

⁴ Shown coloured red on plan 1.

⁵ Shown coloured blue on plan 1.

⁶ This equates to 1.575 acres.

Apportionment Part 192 ... and for the better identification thereof only delineated in the plan drawn in the margin of these presents and thereon edged with the colour pink and described in the Schedule hereto such plan and Schedule being respectively a tracing and extract from the Ordnance Survey Map for England (Second Edition)⁷

35. The relevant part of the Schedule is as follows:

No on O.S. Map	Cultivation	Acreage
Part 807	Arable	1.575

36. The map refers to Part field 807 and the land conveyed appears on the plan to include the purple and green land, thereby giving no access onto the public highway to the land retained, which is the brown land.

The 1927 conveyance

37. The second conveyance in time is dated 4 March 1927 (“1927 conveyance”). It is a conveyance, amongst other land, of Maycroft and the land to the west of it. It conveys the land by reference to the 1923 conveyance and relies upon the same plan.

The 1950 conveyance

38. The third conveyance in time is the 1950 conveyance. It is the conveyance by which Maycroft was carved out of the land conveyed by the 1923 and 1927 conveyances. The parcels clause as follows:

ALL THAT piece or parcel of land situate in the Parish of Bosbury in the County of Hereford numbered Part 807 on the Ordnance Survey Map for the said Parish and containing .251 acres or thereabouts TOGETHER with the messuage or dwellinghouse and buildings erected thereon one some part thereof and known as “Maycroft” All which said hereditaments are in the occupation of the Purchaser and are for the purpose of identification only more

⁷ 1904.

particularly delineated in the plan annexed hereto and therein coloured pink

39. The plan refers to Part field 807 and to .251 acres. The pink colouring appears to include the purple and green land.

The 1952 conveyance

40. The fourth conveyance in time is the 1952 conveyance. It is the first conveyance to deal with the brown land. The parcels clause as follows:

ALL the land (hereinafter referred to as "the said land") more particularly described in the Schedule hereto

41. The Schedule is as follows:

ALL THOSE pieces or parcels of land situate in the Parish of Bosbury in the County of Hereford containing 1.085 acres or thereabouts As the same is for the purpose of identification only more particularly delineated on the plan annexed hereto and thereon coloured pink

42. The plan refers to field 807a with an acreage of 1.085. The south-east tip of the land conveyed meets the public highway and would appear to contain the green land.

The 1992 transfer

43. The fifth conveyance in time is the 1992 transfer. It is the transfer of Maycroft to the respondent. It transfers the land conveyed in the 1950 conveyance.

The 2016 transfer

44. The sixth of transfer in time is dated 4 March 2016. It is the transfer of the brown land to the applicants.

The green land

45. The green land is a mixture of scrubby grass and gravel. There is a dropped curb where it joins the public highway. There are hedges either side of the entrance. The respondent's chicken coop is to the left as one enters the land. I have seen good quality photographs taken between 2016 and 2019.

The issues

46. The first issue I have to decide is whether the respondent's title includes the green land or whether the applicants' title includes it. If I find for the respondent on this issue that is the end of the matter. If, however, I do not, there are number of consequential issues which arise.

Does the respondent's title include the green land?

47. Mr Mullan relies upon the 1950 conveyance of Maycroft. Part of field 807 is being conveyed (0.251 acres). No part of field 807a is being conveyed. The 1928 ordnance survey map clearly separates field 807 from field 807a, with the green land forming part of field 807a.

48. Mr McLeod says in his strike out application (which was unsuccessful) that conveyances from 1950 and earlier plainly show the green land as being conveyed as part of what is now the respondent's title. Mr McLeod is right in that I have to look at the earliest conveyance.

Construction of the 1923 conveyance

49. This is not an easy task. The land conveyed is described by admeasurement. This is never a satisfactory method, particularly when any measurement took place almost a century ago. In the parcels clause, the area of the land being conveyed is said to be 1.575 acres, being part of field 192 in the Bosbury tythe apportionment map⁸. The map is exhibited to Mr Wood's report as illustration 3. It is on a very small scale and the crucial part of the land is obscured by the line showing the whereabouts of field 193. As discussed at the hearing, Mr Wood has not measured the 1.575 acres.

⁸ Interestingly, this map shows separate fields at 192 and 192a.

50. In the parcels clause, the land being conveyed is also described by reference to the second edition of the ordnance survey map. This is the 1904 edition. That shows field 807 undivided with an acreage of 2.540. What is conveyed is that described as Part field 807 with an acreage of 1.575.

51. The plan to the 1923 conveyance is for identification only. As already stated, it does appear to include the green land within the land being conveyed.

52. In contrast to the 1904 ordnance survey map, the 1926 map, and all other maps up until 1974, show the division between fields 807 and 807a, with the green land appearing as part of field 807a.

53. The wording of the 1923 conveyance does not identify the boundaries of the land being conveyed with any degree of certainty. It is not known where in field 807 the area of 1.575 acres actually lies. Mr Wood does not attempt to cast any light on this.

54. In the circumstances, it is open to me to place reliance on the plan, even though it is said to be for identification only⁹.

55. In Ali v Lane [2007] 1 P&CR 26, the Court of Appeal held that in the context of a conveyance of land, where the information contained in the conveyance was unclear or ambiguous, it was permissible to have regard to extraneous evidence, including evidence of subsequent conduct, provided the evidence was of probative value in determining what the original parties intended. Evidence of physical features which were in existence later was of no relevance unless there is some reason to think that they were in existence at the date of the conveyance, or they were replacements of, or otherwise related, to physical features which were in existence at the time of the conveyance.

56. It is known that the 1926 ordnance survey map shows fields 807 and 807a which by

⁹ See Emmett & Farrand on Title paragraph 17.014. A plan may be looked at for the elucidation but not for contradiction of the verbal description: Wigginton & Milner Ltd v Winster Engineering Ltd [1978] 1 WLR 1462, followed in Scott v Martin [1987] 1 WLR 841.

then were divided, and that the green land appears to lie within field 807a. Although it may be the case that this physical division was in place at the time of the 1923 conveyance, there is no evidence that it was and it would be wrong for me to speculate. In any event, use of the green land by the owner of the brown land is not necessarily probative of ownership. It is equally probative of the owners of the brown land using the green land as a right of way (which, of course, is what the current registers show).

57. I therefore conclude that the 1923 conveyance did convey the green land to the respondent's predecessor in title. Accordingly, although the 1952 conveyance did purport to convey the green land to the applicants' predecessor in title, it could not do so as the green land had already been conveyed to the respondent's predecessor in title.

Mistake and rectification

58. If I am wrong on the above, I propose to express my views on what, if any, order should be made rectifying the registered title plans. This is out of deference to Mr McLeod's detailed submissions on the point. But as I have decided there should be no order of rectification, I will state my reasons shortly.

59. The power for the tribunal to correct a mistake in the register is to be found in schedule 4 to the 2002 Act.

60. Paragraph 1 of schedule 4 to the Act provides that references to rectification, in relation to alteration of the register, are to alteration which involves the correction of a mistake and prejudicially affects the title of a registered proprietor.

61. Paragraph 5(a) provides that the registrar may alter the register for the purpose of correcting a mistake.

62. Paragraph 6(1) applies paragraph 6 to such a power, so far as relating to rectification.

63. Paragraph 6(2) provides no alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 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.**

64. The relevant date for the land to be in proprietor's possession is the date of the relevant application to Land Registry to correct the mistake (Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 89 (Ch), [101]). In this case it is 10 November 2016.

65. Paragraph 6(3) provides that if on an application under paragraph 5 the registrar has power to make the alteration, the application must be approved, **unless there are exceptional circumstances which justify not making the alteration.** In these proceedings the Tribunal is exercising the powers of the registrar.

Further issues

66. Mr McLeod identified the following further issues:

- (1) Is there jurisdiction?
- (2) Is the respondent in possession of the green land?
- (3) If she is in possession, would it for any other reason be unjust for the alteration not to be made?
- (4) Are there exceptional circumstances which justify not making alteration?

Is there jurisdiction?

67. There is jurisdiction to rectify the register where a person has been registered as the proprietor of land that in fact belonged to another person because the plan annexed to a conveyance was inaccurate and incorporated neighbouring land¹⁰.

¹⁰ Megarry & Wade *The Law of Real Property* 9th edition paragraph 6-133, example (vi). The reliance by Mr McLeod on paragraph 40 of the judgment of Asplin LJ in Antoine v Barclays Bank plc [2019] 1 WLR 1958 is misplaced. was taken out of context as it concerned voidable transactions.

Possession

68. No party was in possession of the green land on 10 November 2016. Where there is a conflict of evidence about the activities on the green land, I prefer the evidence called by the applicants to that called by the respondent. The evidence of some of the respondent's witnesses is coloured by their being in dispute over a different boundary with the applicants.

69. A glance at the excellent colour photographs which were handed in makes it quite apparent that nobody is in possession of the green land which, as already stated, is a mixture of scrubby grass and gravel. Any work carried out by the respondent or her witnesses was purely cosmetic in nature and was not done with any intention to possess the land. The respondent had erected a clear barrier along the outside of her chicken coop.

70. Mr McLeod's submission that the registered proprietor is in possession for the purposes of paragraph 6(2) is not a good one¹¹.

Unjust/exceptional circumstances

71. If the respondent was in possession, it would not be unjust for the alteration not to be made. The respondent is not in possession, and there are no exceptional circumstances preventing rectification. A prescriptive right away limited to agricultural use prevents the applicants from using the land for other purposes or for developing it.

Conclusion

72. I shall direct the Chief Land Registrar to cancel the original application.

73. Costs normally follow the event. If the applicants wish to argue for a different order they must provide copies of their submissions to the Tribunal and respondents within 14 days. The respondent must within 14 days thereafter provide copies of any contrary submissions to the Tribunal and to the applicants. If no submissions are made within 14 days, I shall direct

¹¹ Ruoff & Roper Registered Conveyancing paragraph 46.013⁷.

that the applicants pay the respondent her costs on the standard basis and that the respondent provides a summary of cost in form N260 to enable me to decide whether costs should be assessed summarily or be subject to a detailed assessment

Dated this 28th day of August 2019

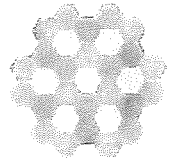
Simon Gilliat



**A BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF
THE FIRST- TIER TRIBUNAL**

Land Registry Notice plan

Title number **HW122762**
Ordnance Survey map reference **SO7043NW**
Scale **1:1250** enlarged from 1:2500
Administrative area **Herefordshire**



© Crown copyright and database rights 2016 Ordnance Survey 100026316.

You are not permitted to copy, sub-license, distribute or sell any of this data to third parties in any form.

This is the plan referred to in the accompanying notice dated 05/12/2016 Title no. HW122762



This plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground.

