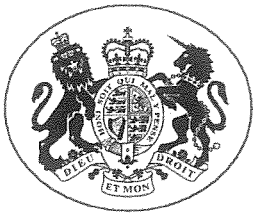


[2019] UKFTT 0589 (PC)

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION **REF/2018/0294**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

BETWEEN

(1) Colin Brassington
(2) Sheila Ann Brassington

and

(1) Maurice William Orton
(2) Sarah Jane Sayce

Property Address: 3 Coppice Cottage, Somerwood, Uffington Shrewbury SY4 4RQ

Title Number: SL202082

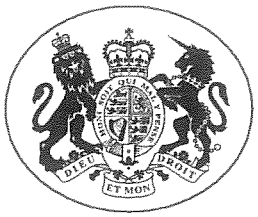
Before: Mr Simon Brilliant sitting as Judge of Property Chamber of the First-tier Tribunal

The Chief Land Registrar is directed to give effect to the Applicants' original application dated 3 October 2017 as if the objection had not been made. The Applicants' right of way is restricted to use for agricultural purposes on foot or with vehicles.

Dated 12 August 2019

SIMON BRILLIANT

BY ORDER OF THE JUDGE OF THE PROPERTY OF THE FIRST -TIER TRIBUNAL



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Title Number: SL202082

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

Sitting at: Telford Justice Centre, Telford Square, Malling Square, Telford TF3 4HX

On: 14, 15 and 16 May 2019

Site visit: 13 May 2019

Applicant's Representation: Ms S Tozer QC

Respondents' Representation: Mr P Bryne of counsel

DECISION

Easement – section 62 of the Law of Property Act 1925 – farm and cottage in common ownership – farm sold off first – issue as to whether on sale the farm acquired the benefit of a right of way over land belonging to the cottage.

Wood v Waddington [2015] 2 P&CR 11.

Introduction: the titles

1. The Co-Operative Wholesale (Society ("CWS") was at one time the largest farm owner in the country. Its first ever farm, consisting of 714 acres, was purchased at Roden, between Telford and Shrewsbury, for £30,00 in 1896. The farm produced potatoes for local CWS shops. I was told by one of the witnesses that in more recent times it had become the largest dairy farm in the country.

2. By 2004 CWS[1] was selling off its farming business. New Farm, part of the 1896 purchase, was put up for sale in two lots. Lot 1 was the farm itself, which I shall refer to as "New Farm". The original lot 2 was a small rectangular area at the southern edge of the farm, consisting of a paddock (which had been carved out of one of the New Farm fields) and a pair of adjourning cottages, 2 and 3 Coppice Cottages (respectively "2CC" and "3CC"), with a small area of land to the front of them.

3. By a transfer of part dated 28 February 2005 ("the 2005 transfer"), the applicants

[1] The relevant legal entity by this time was Co-Operative Group ("CWS") Ltd, which I shall also refer to as "CWS".

purchased New Farm from the CWS for £1,685,653.52.

4. For reasons which are not readily apparent, New Farm consists of seven different titles: SL189282, SL187273, SL189281, SL189280, SL189279, SL89278, and SL189300. The applicants were registered as the proprietors of these titles on 13 September 2007.

5. New Farm is shown edged in red on the plan annexed to this decision ("the plan")[2]. It consists of 16 named fields[3]. The original lot 2 is shown coloured orange and black on the plan. The applicants did not want to buy the original lot 2.

6. CWS then subdivided lot 2 into three separate lots, 2CC, 3CC and the paddock.

7. By a transfer dated 21 August 2009 ("the 2009 transfer"), the respondents purchased 3CC and the paddock for £250,000. On 01 September 2009, the respondents were registered as the proprietors of 3CC and the paddock under title number SL202082 ("the respondents' land"). The respondents' land is shown coloured orange on the plan.

8. By a transfer dated 28 August 2009, the applicants' son, Benjamin Brassington, purchased 2CC for £159,500. On 21 September 2009 he was registered as the proprietor under title number SL202445. 2CC is shown coloured black within the respondents' land on the plan. 2CC is not occupied by Benjamin Brassington but is let out by him.

The issue

9. On the plan a track coloured green is shown within the respondents' land ("the green track"). Its southern end is at points X and Y[4]. It goes past 2CC at point M, turns to the north west and goes past 3CC at point C. It terminates at its northern end near to points D, E, and O. The green track affords access to 2CC, 3CC and New Farm.

10. The issue in these proceedings is whether New Farm has the benefit of a right of way

[2] The plan is for illustrative purposes only.
[3] The names of the fields are shown in rectangles coloured blue on the plan.
[4] The various points are shown in squares coloured mauve on the plan.

for agricultural purposes over the green track ("the right of way")[5].

11. The applicants contend that at the time of the 2005 transfer there was also transferred to them the benefit of the right of way by virtue of section 62 the Law of Property Act 1925 ("section 62"). This is because CWS used the green track to go to and from New Farm prior to the 2005 transfer and, on the occasion of that transfer, such use ripened into a right of way[6].

12. The respondents deny that there was any such use of the green track at the time of the 2005 transfer and deny that the respondents' land is subject to the burden of the right of way.

13. As I understand it, it is common ground between the parties that if I find that the right of way existed at the time of the respondents purchasing their land in 2009, then the respondents take subject to it.

The proceedings

14. On 3 October 2017, the applicants applied to Land Registry to be registered with the benefit of the right of way. The respondents subsequently objected and the dispute was referred to the Tribunal under section 73(7) of the Land Registration Act 2002.

The geography

15. The plan shows the 16 different fields of New Farm. The buildings of New Farm lie in the north. A number of tracks, coloured blue, radiate from the buildings. I shall refer to the track between points O and T as blue track 1. The track which appears to commence south east of the buildings of New Farm and terminate at point G, is said to continue south through point Q ending up at point P. I shall refer to this track as blue track 2.

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[5] A larger scale plan of the green track is shown coloured green and pink on the exhibit to Benjamin Brassington's first witness statement at [4/65/1316].

[6] The issue can be broken down into the following questions. The applicants have to show that at the time of the 2005 transfer the right of way was apparent and continuous. In order to determine this the following questions have to be answered: (1) What physical features existed on the ground on 28 February 2005 to suggest that the green track was used to access New Farm? (2) Was the green track used to get to and from New Farm at this time? (3) If so, what was the extent of the frequency and type of user?

16. The northern boundary of New Farm abuts the B5062. There is direct access from New Farm onto this road.

17. The southern boundary of New Farm and the respondents' land does not adjoin a public highway. It abuts the northern boundary of land owned by Ms de Quincy ("the de Quincy land"). A private track coloured red ("the red track") runs north from the public highway through the de Quincy land terminating a points X and Y. There it meets the southern end of the green track.

18. In order for the respondents to gain access to their land they have to cross the entire length of the red track.

19. It is convenient to divide the green track into three parts:

(1) The southern green track lies between the southern end of the green track at points X and Y and the original Gate A1[7]. Gate A1 gave access to the field Perkins/Borehole. The applicants replaced Gate A1 with Gate A2 so as to provide better access to the field.

(2) The central green track lies between the original Gate A1 and Gate C[8]. Gate C gives access to the field 18 Acres.

(3) The northern green track lies between Gate C and Gate E. Gate E gives access to blue track 1.

The witnesses

20. The applicants called as witnesses of fact:

[7] There are gates at some of the points. Such gates will be identified by the lettering of the points where the gates are situated.
[8] Gate C can be seen in the photograph at [2/40/533].

(1) Colin Brassington, the first applicant, who first visited New Farm in the late spring or early summer of 2004. Since the applicants purchased New Farm on 28 January 2005 he has lived and worked there.

(2) Benjamin Brassington, the applicants' son. He is a qualified solicitor and a partner in the family farming business trading as CSA Brassington & Son. He also visited New Farm for the first time in the late spring or early summer of 2004. Since the applicants purchased New Farm on 28 January 2005 he has lived and worked there.

(3) Susan Holbrook, who was the tenant of 2CC between March 1978 and May 2004.

(4) Andrew Dutton, who has undertaken agricultural contracting work for the applicants since they bought New Farm.

21. In addition, the witness statements of David Shenton and Clive Alan, who have undertaken agricultural contracting work for the applicants since they bought New Farm, were read.

22. The respondents called the following witnesses:

(1) Maurice Orton, the first respondent, who simply confirmed the evidence of Sarah Orton, the second respondent.

(2) Sarah Sayce, the second respondent, who together with t Maurice Orton purchased the respondents' land on 21 August 2009.

(3) Richard Hartshorn, who was the CWS's herd manager at New Farm prior to its sale to the applicants, who lived at New Farm.

(3) Kevin Robinson, who has been Ms de Quincy's farm manager since 1978.

(4) Mark James, a builder consulted by the applicants regarding their purchase of

their land.

23. There were eight other witnesses who had prepared witness statements or statutory declarations either in these proceedings or in previous litigation between the Brassingtons and Ms de Quincy. As they did not attend for cross examination I place no weight on their evidence.

Expert evidence

24. The applicants relied upon a written report dated 7 November 2018 of Sarah Reece MRICS, who is a partner at Berrys, a firm of surveyors in Shrewsbury. Ms Reece specialises in farming subsidies and agriculture.

The 2005 sale agreement and transfer

25. The 2005 transfer was preceded by a sale agreement between the CWS and the applicants. It is dated 28 January 2005 ("the 2005 sale agreement").

26. By clause 6.2 of the 2005 sale agreement, New Farm was sold with the benefit of:

(c) all rights including rights of way (whether public or private) drainage water and electricity supplies and other rights and obligations easements quasi-easements and restrictive covenants ... and all other matters affecting the Property whether or not the same are apparent on inspection or referred to in this Agreement

27. In the 2005 transfer clause 13.1 defines the "Retained Land" as the land shown edged and hatched green on the attached Plan 2. That land is to the north east of New Farm.

28. Clause 13.8.1 of the 2005 transfer is as follows:

Insofar as they affect might affect the Retained Land Section 62 of the Law of Property Act 1925 shall be excluded from this Transfer and the Property is transferred without the benefit of any easement right quasi-easement or quasi-right over the Retained Land save as expressly set out (if at all) in this Transfer

29. Ms Tozer QC argues that s.62 is only excluded in respect of the land to the north east of New Farm. It is not excluded from New Farm. Mr Byrne argues that on a detailed examination of the facts it is likely that CWS did not intend to grant any rights to New Farm over what was the original lot 2. In my judgment, Ms Tozer QC is correct. There is no exclusion of s.62 benefiting New Farm.

Section 62

30. s.62 Law of Property Act 1925 operates to convey with the land (or the buildings):

... all ... liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance ... occupied, or enjoyed with ... the land.

31. The only authority the parties invited me to consider was the recent decision of the Court of Appeal in Wood v Waddington [2015] 2 P&CR 11.

32. Paragraph 2 of the head note of that case reads as follows:

Consideration of s.62 of the LPA required the judge to make findings of fact about the way in which the claimed rights had been used in the period leading up to the transfer. Section 62 only applied to advantages etc. "enjoyed with" the land at the time of conveyance although "the time of conveyance" included a reasonable period before the conveyance. Before the transfers to Mr and Mrs Sharman and Mr Waddington all the relevant land had been occupied by Mr Crook. Accordingly there had been no diversity of occupation. In cases where there had been no diversity of occupation, it was necessary to establish that the exercise of the relevant rights had been continuous and apparent in the sense developed for the purposes of the rule in Wheeldon v Burrows. For the purposes of s.62, if a quasi-easement fell within the category of easements "enjoyed with" the land conveyed, there was no additional requirement that such an easement had to be necessary for the reasonable enjoyment of the land. In this respect s.62 differed from, and was broader than, the rule in Wheeldon v Burrows.

33. I accept Miss Tozer QC's submission that the applicants will need to show that the green track was used to access New Farm during a reasonable period before the 2005 transfer, and that a period of about two years would be reasonable in this case.

The applicants' evidence

Colin and Benjamin Brassington

34. These witnesses viewed New Farm on at least three occasions between June and August 2004. The respondents' land was, of course, still owned by CWS although in a different lot to New Farm. These witnesses drove along the whole of the green track on different occasions during the marketing process.

35. The green track was constructed of rough stone and rubble. There were gates at points A, B, C, D and E. The marks in the gateways were indicative of tractors, trailers, sprayers, combines, balers and cultivation equipment accessing the four southern fields[9]. The wheel marks and wear shown on the ground indicated agricultural vehicles travelled in both directions along the green track to the buildings at New Farm using blue track 1.

36. Two wheel tracks were present along the whole of the northern green track between Gates C and E. There was grass and vegetation growing between the two wheel ruts along the northern green track. The wheel ruts were tractor width. It was evident that the purpose of the northern green track was to provide access to when travelling back and forth along blue track 1 to the southern fields.

37. A farmer would use an access track to drive to a field in preference to driving across an adjoining field to avoid unnecessary compaction of soil, and damaging the crop growing in the field. This would enable the yield to be maximised. The green track was in the appropriate location to provide access between the southern fields and the buildings on New Farm.

38. A great deal of evidence of a technical nature is given explaining the likely activities, such as spreading manure, ploughing, rolling, seeding, harrowing and fertilising (amongst

[9] Copy Houses, 14 Acres, 18 Acres and Perking/Borehole ("the southern fields").

other activities) in the southern fields. According to the witnesses, the likely routes were either along blue track 1 and the northern green track, or along the red track and the southern green track (depending on which of the two routes was being used).

Ms Reece

39. Gate A1 was in use until 2008, when it was replaced by Gate A2. Ms Reece's opinion is that Gate A1 would have been the main access into the field Perkins/Borehill by machines prior to the 2005 transfer, and that access would have been obtained from the south over the southern green track.

40. Miss Reece's opinion is that Gate B would not have been used frequently prior to the 2005 transfer. However, aerial imagery from 2006 suggests that access was obtained through Gate B[10]. This could have been for the purpose of fertilising/rolling the field Perkins/Borehole, harvesting the crop and checking livestock should the field be used for aftermath grazing.

41. Miss Reece's opinion is that Gate C (which is now blocked) was, on the basis of aerial imagery from 1999 and 2008[11], the main access point taking machinery and implements into fields 18 Acres and 14 Acres. It would have been impractical to access these fields by adjacent fields as the machines would have been travelling over other crops. Before the 2005 transfer, access could have been obtained from either the north or the south, and she is unable to say which direction would have been used the most.

42. Gate D has now been blocked by the respondents. They have put down a gravel path along part of the northern green land leading to Gate D. Miss Reece's opinion is that Gate D was essential to reach Gates A2, B and C.

43. In her conclusion Miss Reece states that prior to February 2005 the direction of travel is as shown in her plan 8[12] with the majority of traffic to Gate A1 coming from the south (along the southern green track) and the majority of access to gates B and C coming from the north

[10] [1/14/91] and enlarged photograph 3.
[11] [4/73/1466].
[12] [4/73/1478].

(along the northern green track). It is reasonable to assume that there would have been a small amount of through flow traffic between Gates A1 and C (along the central green track). She also calculates that in 2003 (when a maize crop was being grown on the southern fields) 382 passes were required for field operations. This maze would have been transported to New Farm yard and used as silage there. In 2004 (when a wheat crop was being grown on the southern fields) approximately 152 passes were required for field operations. Between October 2004 and the 2005 transfer there would have been around 24 passes over the green track.

Susan Holbrook

44. Susan Holbrook was the tenant of 2CC between March 1978 and May 2004. Her landlord was CWS.

45. In 2002, she became unwell and had to stop working. Thereafter she was largely at home. She has windows facing onto the green track. She recollects that CWS's farm vehicles and machinery accessed the green track from both the northern and southern directions. The gateways into the fields adjacent to the green track were regularly used as the main means of access to the fields by CWS' workers. The majority of the farm traffic that made use of the green track travelled along blue track 1. Her evidence is that CWS used the whole length of the green track with agricultural machinery, mainly weekly and more at certain times of the year. The use included a turning circle at the southern end of the green track.

46. This use continued at the same level throughout the period that she lived at 2CC.

47. The evidence of Andrew Dutton, David Shenton and Clive Alan is of less importance as they had no knowledge of the relevant land prior to the 2005 transfer.

48. Apart from the photographs mentioned above, and aerial photograph taken on 24 August 2000[13] shows that there is an established route from the northern green track, through Gate C, into field 18 Acres. The angle of the route suggest that access was only from the northern green track and not from the centre green track. Blue track 1 can be seen clearly

[13] [1/2/7] and enlarged photograph number 2.

meeting the northern green track close to Gates D, E and O which are obscured by vegetation and trees.

49. The applicants also rely upon the sales particulars prepared for the auction of 2CC and other lots on 30 July 2009. These state:[14]

A farm access track **(over which there is a right of way)**[15] bisects the paddock and a small block …

The respondents' evidence

Sarah Sayce and Maurice Orton

50. Prior to the 2009 transfer, the respondents viewed their land. The northern green track was extremely boggy and impassable with standard vehicles. There was no evidence that anyone had been using it. It was overgrown and there were no tyre tracks. A builder, Mr James, coming to inspect their land had sunk into the green track. Mr James corroborated this evidence that the northern green track was too wet and boggy for his van. There was so much water present on the track that he believed he would lose his footwear.

51. When the respondents first moved to 3CC it was not apparent that the applicants used the green track to access the surrounding fields, or to approach New Farm for any other purpose. There was no evidence of continuous use. Sarah Sayce accepted that Gate C could have been there at that time, but it was not visible. The use of the green track only became more apparent in 2012. This increased significantly in 2015, when the respondents withdrew permission for the applicants to use the green track. The respondent say that the applicants can gain access to New Farm without having to use the green track.

52. The applicants gave evidence in rebuttal. They say that at the time of the 2009 transfer the northern green track was flooded as a result of a burst water pipe. Accordingly, what could be seen at that time was not representative of its usual appearance.

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[14] [1/20/275].
[15] My emphasis.

Richard Hartshorn

53. The field Copy Houses was used for grazing during the spring and summer months. During the winter months the cows would be kept in sheds on New Farm. The cows were taken to field Copy Houses in the spring along blue track 1, not involving the green track at all.

54. The northern green track was from time to time used as a cow track, though only rarely. Occasionally the cows would be walked from field Copy Houses to fields 18 acres and Perkins/Borehole. Use of the northern green track as a cow track was rare. The most direct route was a long blue track 2, so there was no purpose in going along the green track.

55. The green track was only used temporarily for agricultural machinery many years ago while the access to New Farm from the north was resurfaced.

Kevin Robinson

56. Mr Robertson lives at The Paddocks which can be seen on the plan abutting the red track. He said he has direct knowledge of all of the comings and goings along the red track and the green track. The green track was not used by CWS for getting to and from the southern fields as it was not the most direct route. The blue tracks we used for the movement of cows. If the southern fields are being used for cereals they would go through Gate A1 just for a very short distance over part of the southern green track. He never saw CWS driving farm vehicles along the green track.

Discussion

57. I am satisfied that all the witnesses gave their evidence honestly, genuinely believing that their recollection was true and accurate. However, there is a considerable difference in recollections which I must resolve.

58. Having considered all the evidence, including that summarised above, I have no hesitation in preferring the evidence called by the applicants to that called by the respondents.

The reasons are as follows:

(1) The aerial photographs show beyond doubt that prior to the 2005 transfer the green track was being used so as to give access to and from the southern fields. It was still in use in 2009, as reflected in the sales particulars prepared for the auction. There are such aerial photographs spanning the period 2000–2006, leading to the conclusion that the use relied upon had taken place for at least two years prior to the 2005 transfer.

(2) Blue track 2 (on which the respondents place great emphasis) was not as robustly constructed as blue track 1; it was a dirt track and it is unlikely that vehicles would have used blue track 2.

(3) When the fields were being used for arable purposes, it is unlikely that access from one field to another would be undertaken internally as the crops would be damaged. It is much more likely that access to the fields would have been along blue track 1 and from the green track.

(4) The evidence of Mr Hartshorn and Mr Robinson deserves the highest respect, but Mrs Holbrook was the only witness who actually lived along the green track. She was there for 26 years and was the best placed to see what was going on. She began to live at 2CC at the same time as Mr Robinson started working for Ms de Quincy, and some 10 years before and 11 years after Mr Hartshorn worked for CWS. I accept her evidence.

(5) The unchallenged evidence of Ms Reece.

(6) The presence of the various gates on the green track are only consistent with the green track being used to access the southern fields.

(7) Although most use of the green track was confined to its northern or southern ends, there is nevertheless evidence (particularly that of Mrs Holbrook) that the entire length of the green track was in fact used.

(8) The inference to be drawn is that CWS would have used the green track

whenever the need to do so arose. This is because there was no reason for them not have done so. There was no other hard surface access to the southern fields, and the respondents' land was part and parcel of the larger farm.

(9) Contrary to the respondents' evidence, a photograph taken on 31 May 2009 shows that Gate C was visible in 2009.[16]

Conclusion

59. I shall direct the Chief Land Registrar to give effect to the original application as if the objection had not been made. The right of way will be restricted to that of agricultural use.

60. Costs normally follow the event. If the respondents wish to argue for a different order they must provide copies of their submissions to the Tribunal and to the applicants within 14 days. The applicants must within 14 days thereafter provide copies of any contrary submissions to the Tribunal and to the respondents. If no submissions are made within 14 days, I shall direct that the respondents pay the applicants their costs on the standard basis to be subject to a detailed assessment if not agreed.

Dated this 12th day of August 2019

Simon Brilliant

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

[16] see the photograph at [1/21/272], especially on the electronic copy. Can

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