PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2015/0510

BETWEEN

CLAIRE WRIGHT
KEVIN DAVID WRIGHT

Applicants

and

CHERYL ANNE BEACH
LUKE ASHLEY BEACH

Respondents

Property Address: Land to the south side of 39 Sandford Road, Aldershot, Hampshire
Title number: HP772693

ORDER

The Chief Land Registrar is ordered to give effect to the application in Form ADV1 dated 1 July 2014

BY ORDER OF THE TRIBUNAL

McAllister

Dated this 6th day of July 2016

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Before Judge McAllister

24 June 2016

Alfred Place, London

Representation: Daniel Burton of Counsel instructed by Wellers Hedleys Solicitors appeared for the Applicants; the First Respondent appeared in person, assisted by Sandra Tutty.

DECISION

Introduction

1. The Applicants are and have been the registered owners of 39 Sandford Road, Aldershot, Hampshire ('No 39'), since January 2000. The Respondents are and have been the registered owners of 41 Sandford Road, Aldershot ('No 41') since July 2013. No 41 fronts onto Sandford Road. To the rear is a garden. No 39 is one of four houses set back from Sandford Road. It has a front garden which abuts the rear of No 41's garden. The issue in this case is, in effect, the extent of No 41's rear garden and the extent of No 39's front garden.

2. By an application dated 1 July 2014 the Applicants applied to acquire title by adverse possession of the disputed land ('the Disputed Land'). This is an area of land, roughly triangular in shape, running west to east, which is 12ft 6 inches at its widest point, and tapers down to nothing. The widest point is to the west, where it abuts the pavement leading to No 39.

3. The application was made under paragraph 1 of Schedule 6 to the Land Registration Act 2002 ('the Act') In the ADV1 form, the applicants put a cross in the box stating that they would be relying on paragraph 5(2) of Schedule 6. The Respondents objected on 17 November 2014. Box 5 of the form requires the Respondents to state where they consented to the application, or required the registrar to deal with the application under paragraph 5 of Schedule 6, or objected to the application. The Respondents put a cross in this last box. The Applicants argue that, by failing to make it clear that they required the Applicants to satisfy one of the three conditions in paragraph 5, the Applicants need only show that they were in adverse possession for ten years before the date of the application, and do not need to satisfy any of the three further conditions set out in paragraph 2. I will come back to this point below.

4. The Statement of Truth in support of the application stated that the owners of Nos 33, 35 and 37 Sandford Road (which are all the properties set back from Sandford Road) were willing to give evidence to the effect that the fence separating the two gardens had been in the same position in excess of 25 years. The Respondents informed the

Applicants and the Tribunal shortly before the hearing that they do not dispute this evidence.

5. The issue between the parties arose when a fence panel blew down in 2014. The Respondents checked their title deeds and the land registry filed plan and objected to the fence being re-instated in its original position.

6. At the hearing the Applicants argued that, in the alternative, the relevant conveyancing plans should be rectified to show the fence in the position it occupied from at least the 1970s to now (although part of panels came down in 2014, the line of the fence remains the same). This point was not in the event pursued with any vigour at the hearing, in my view rightly. There is simply insufficient evidence to order rectification.

7. However, for the reasons set out below, I will order the Chief Land Registrar to give effect to the application. I am satisfied that the Disputed Land was occupied exclusively by the Applicants and their predecessors in title, from the early 1970s onwards, with the necessary intention to possess. This being the case, the Applicants do not need to rely on the provisions of the Act, but are entitled to be registered under the transitional provisions set out in paragraph 18 of Schedule 12 which applies the 'old law' under the Limitation Act 1980.

8. In any event, if I am wrong in concluding that the Disputed Land was occupied exclusively by the Applicants' predecessors in title from at least 1978 onwards, I find that the Applicants are entitled to succeed in their claim under Schedule 6 to the Act.

Conveyancing history

9. Both No 39 and No 41 were sold by the original developer (Dick Hampton (Earth Moving Ltd). No 39 (then known as Plot 3) was sold by a transfer dated 29 July 1965 to Gordon William Wood. The parcels clause describes the land sold as follows: *'the land and house with garage known as Plot Number 3 Sandford Road Aldershot in Hampshire and shown edged red on the plan bound up within....TOGETHER with a*

right of way (in common with the vendor and all others who have or may hereafter have the like right) at all times and for all purposes in connection with the user of the property hereby transferred over and along the proposed new road and footpaths coloured brown on the said plan..'

10. The plan clearly shows the south western boundary of Plot 3 running from the edge of the pavement in a diagonal line to a point where it meets the eastern boundary of No 41, ie excluding the Disputed Land. The brown land is the turning circle in front of Nos 33 to 39, and the pavement leading from the road to No 39.

11. No 41 was sold by a transfer made between the developer and Michael John Barnes and Linda Joan Barnes dated 31 August 1966. No 41 was then known as Plot 2. The same rights over the land coloured brown on the plan were granted to the purchasers. On this plan, too, the north western boundary of No 41 meets the top of the pavement leading to No 39. The purchasers also covenanted for ever to maintain the fences running along the sides of the property marked 'T' within the boundary. A 'T' mark is shown on the northern boundary of No 41, dividing the back garden of No 41 from the front garden of No 39.

12. A wayleave agreement dated 23 February 1965 was entered into by the developer and the Southern Electricity Board permitting the electricity board to lay underground low voltage cables as near as possible to the northern boundary of No 41 as shown on the conveyance plan. The Applicants argue that the developer moved the boundary further into what would be the garden of No 41 to ensure that there was no danger of anyone digging or erecting a fence or posts over the cables. I am not persuaded by this argument, not least because the plan used by the Southern Electricity Board was the plan to the original conveyance of No 39. The Board saw no problem in laying cables just on No 39's side of this boundary line.

13. It is therefore clear that the paper title to No 41 includes the Disputed Land, and the paper title to No 39 excludes the Disputed Land. There is no ambiguity in the plans to the relevant conveyances.

14. The developer was dissolved on 7 February 1995 and the brown land became vested in the Crown. The Solicitor for the Affairs of Her Majesty's Treasury (the Crown's nominee) transferred the brown land to the owners of Nos 33,35,37 and, in the case of 39 Sandford Road, to the Second Respondent on 25 April 2005 for the sum of £500.00

The position of the fence between Nos 39 and No 41

15. The position of the close boarded fence (1.8m high), as it is now, is shown on the plan prepared by the Applicant's surveyor in March 2015. Mr and Mrs Wright moved to No 39 in November 1999. It is their unchallenged evidence that the fence (consisting of six wooden panels and seven wooden posts) has at all times been in the same position. In addition, a number of witnesses prepared statements, confirming that the fence has remained in the same position since, at the earliest date given, 1978.

16. As mentioned above, the Respondents agreed this evidence, and it was therefore not necessary to hear from any of the witnesses. One of the witnesses, Lesley Hall, is the owner of No 35 Sandford Road. She is also a solicitor and acted for the four purchasers when they bought the turning circle in front of their houses. She stated in her witness statement that she checked everything at the time of the purchase and the front garden of No 39 was quite obviously a clear and definitive area with the fence in situ. It was, in her view, clear from the look/condition that it had been there for some time.

17. Whilst I understand the point made by the Respondents that Ms Hall would have noticed, if, as she says, she checked everything carefully, that the fence was not in the position as shown on the conveyance plans, it seems to me that this does not in any way detract from the (accepted) evidence that the fence has not moved since 1978, if not from before that date.

18. The Applicants also referred to the Property Information Questionnaire received by them on their purchase of No 39 which stated that none of the boundaries had moved in the last 20 years. They stated that they bought No 39 believing the relevant fence to mark the boundary. Their evidence is supported by this document. I have no hesitation

in accepting their evidence that they had no reason to query the position of the boundary between their property and No 41 until 2014, and that they believed at all material times that the Disputed Land formed part of their garden. They remained of the view that the fence marked the boundary even after the challenge by Mrs Beach, and it seems to me that, in all the circumstances, this belief was reasonable. The purchase of the turning circle in 2005 did not, I find, result in the Applicants realising that they did not own the Disputed Land. Mrs Wright did not look at the conveyancing plan on that occasion and had no reason to do so. The very fact that Mr and Mrs Wright began to replace the missing fence panels with meshing re-enforces their evidence that they believed that the fence marked the boundary.

Use of the Disputed Land

16. The evidence of the Applicants, which I fully accept, is that the Disputed Land was used as, and formed part of, their front garden from the time they moved in November 1999. The gardening was done mainly if not wholly by Mrs Wright, who planted and maintained ferns, shrubs, strawberries and other plants and cut the grass regularly. She cultivated the Disputed Land in exactly the same way as she cultivated the back garden. Some of the shrubs were already there when they moved in. Conifers were planted in 2008. There is mesh wire fencing around some shrubs which extend into the Disputed Land. This was put around the bushes and shrubs by Mrs Wright. The fence was maintained and repainted. No-one else used the Disputed Land, and, before part of the fence blew down, it was not possible to enter the Disputed Land from the garden of No 41.

17. Mr Wright confirmed the use of the Disputed Land, and explained the difficulties he and his wife would face if they lost the Disputed Land. At the moment, they can manoeuvre their car over part of the Disputed Land to leave via the brown land or turning circle, which is something they need to do if a car is parked behind them. But of course the issue is not whether it is inconvenient for the Applicants not to be able to use the Disputed Land; the sole issue before me is whether they have acquired title to this land by adverse possession.

18. Mr Wright also referred to a conversation which, he said, took place between a Mr Ron Allen and Mrs Wright. Mr Allen bought No 43 in 1966. It seems that, at the time, there was no fence between No 41 and No 43. It also seems that he said that he had put up the fence between No 41 and No 39 in 1965, in the position it now is in. I do not attach any weight to this evidence. There is no statement from Mr Allen, and the evidence is in any event second hand hearsay.

19. Mrs Beach's evidence was, not surprisingly, largely concerned with the events which took place following the partial collapse of the fence in February 2014. As I explained during the hearing, whilst it is understandable that feelings can run high, these are not matters which are relevant to my decision. In her Statement of Case Mrs Beach had stated that the Disputed Land was not cultivated but kept unkempt, but she did not really press this point in evidence. When giving evidence Mrs Beach very fairly accepted that she only noticed the state of the Disputed Land after February 2014, and that, until she checked her deeds, there was nothing to alert her to the possibility that her garden extended further towards No 39. The reason for checking her deeds was because Mr Wright began to put up temporary green fence meshing even though she had told him that she would do the work.

The Law

20. Leaving aside for the moment the provisions of paragraphs 3 and 5 of Schedule 6 to the Act, a person seeking to claim title to land by way of adverse possession must show that he or she has been in possession of the land for a period of 10 years ending on the date of application if the claim is made under Schedule 6. If made under the transitional provisions, the period of adverse possession is 12 years. The Applicants must be able to establish a 12 year period before the coming into force of the 2002 Act, ie before 13 October 2013. They can, of course, rely on their predecessors' occupation.

21. The test is the same whether the period relied on is 10 or 12 years. It has long been established that the applicant must show factual possession (a sufficient degree of physical custody and control) and an intention to possess (ie an intention to exercise control and custody on his or her behalf and no one else). As I have stated above, I

accept the evidence of Mr and Mrs Wright that since late 1999 they have exercised sufficient control and custody of the Disputed Land to the exclusion of anyone else with the necessary intention to possess. The Disputed Land, as I have said, is part and parcel of their front garden. It is used and treated as such. Although it is open to the pavement on the west side, the lay out of the front garden (including the Disputed Land) is such that no-one other than the owners of No 39 or their visitors would set foot on the Disputed Land. It is (or was until part of the fence came down) completely separate from the back garden of No 41 and from the other property to the east. For an application based on adverse possession it is not necessary to show that the disputed land is fully enclosed.

22. In all the circumstances, it seems to me, on a balance of probabilities, that the Disputed Land was used and occupied in exactly the same way (ie as part of the front garden) by all the various owners of No 39 going back at least to 1978, if not before. This is why it seems to me that the Applicants can rely on the Limitation Act 1980, and do not need to rely on Schedule 6 to the Act.

23. However, I realise that the case was put on the basis of Schedule 6, and, for that reason (and because I may be wrong on the pre-1999 situation) I need to consider what the position is under these provisions. The scheme of Schedule 6 is as follows. Once an application under paragraph 1 is made, the registrar must give notice to the registered proprietor. The person given notice may require that the application be dealt with under paragraph 5. Paragraph 5 in turn requires the applicant to meet one of three conditions before he or she can be registered as owner. However, if an application is *not* required to be dealt with under paragraph 5, the applicant (assuming he or she can establish 10 years adverse possession) is entitled to be entered in the register as the new proprietor of the estate.

24. In this case the Respondents filed a notice objecting to the application on 17 November 2014. Panel 5 requires the person objecting to put an x in the appropriate box or boxes. The first box is that the respondent consents to the application. The second is that the respondent requires the registrar to deal with the application under Schedule 6, paragraph 5. The third states that the respondent objects on the grounds set out in panel 6. Mrs Beach put a cross in this box, and, in panel 6, referred to 'the

details attached'. The document attached was a letter which relied on the conveyancing and filed plans, and stated that the Applicants had not cultivated the land.

25. On 16 November 2015 Judge Mark ordered the Respondents to set out, in a witness statement, all the facts and matters relied on in support of the contention that the application was required to be dealt with under paragraph 5 of Schedule 6. A statement was served by Mrs Beach on 9 December 2015. Mrs Beach dealt with the matter by pointing out that the Applicants were also at fault, in that, in their original application, they relied on paragraph 5(2) of Schedule 6. This paragraph allows an application to be registered if it would be unconscionable by reason of an equity by estoppel for the registered proprietor to be able to dispossess the applicant. If the applicants have to rely on one of the three conditions in paragraph 5, it would not be this one, but paragraph 5(4) (which, in essence, requires the applicants to believe for a period of ten years before the application that they owned the land in dispute).

26. These provisions were considered by Voss J in *Hopkins v Beacon* [2011] EWHC 2899. The test to determine whether the Respondent has triggered paragraph 5 is to ask whether the reasonable registrar would have been left in no reasonable doubt that his or her notice was, in fact, invoking paragraph 5. In my judgment the letter cannot, in any way, be read as invoking paragraph 5. If anything, it seems to suggest that Mrs Beach accepted that Mr Wright believed the Disputed Land to be his.

27. It is true to say that in the ADV1 form the Applicants stated that, if a counter noticed was served by the Respondents was lodged, they would be relying on paragraph 5(2). But the important point to note is that the Applicants' statement as to which ground they would rely on only comes into play if the Respondents make it clear, in their counter notice, that paragraph 5 is invoked. This may seem overly technical, but this is the scheme of the Act. If paragraph 5 is not invoked by the Respondents it does not matter that the Applicants mistakenly stated they would rely on paragraph 5(2), rather than 5(4).

28. It follows, therefore, in my judgment that it is sufficient for the Applicants, under the Schedule 6 to rely on 10 years adverse possession. I should also add that I am in

any event satisfied that the Applicants reasonably believed for a period of at least 10 years ending on the date of the application that the Disputed Land belonged to them.

Conclusion

29. For all these reasons, therefore, the application by the Applicants to be entitled to be registered as owners of the Disputed Land succeeds. I should add that Ms Tutty, who spoke on behalf of Mrs Beach, put forward every point open to her, and was helpful throughout the hearing.

30. The Applicants, as the successful party, are in principle entitled to their costs. A schedule in Form N260 or the like is to be filed and served by 22 July 2016. The Respondents may raise such objections or make such representations within 2 weeks of receipt of the schedule. I will then consider what order to make.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 6th day of July 2016

PROPERTY CHAMBER LAND REGISTRATION