[2017] UKFTT 0476 (PC)

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2016/0622

BETWEEN

JAMES ROGER HOPE

Applicant

and

(1) PAUL JOHN WALTON
(2) SUSANNAH WALTON

Respondent

Property Address: Land lying to the north east of Myers Road, Potton, Sandy
Title number: BD294994

The Chief Land Registrar is ordered to give effect to the application dated 5 January 2016

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 17th day of May 2017

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Before: Judge McAllister
Sitting at Alfred Place, London
9th May 2017

Representation: The Applicant was represented by Samuel Loughton of Counsel instructed by Metcalfe Copeman and Pettefar Solicitors; the Respondents appeared in person.

DECISION

Introduction

1. The issue in this case is the location of the boundary between two parcels of land at Jay Farm, Myers Road, Potton, Bedfordshire. The Applicant and the Second Respondent are brother and sister. The Applicant is the registered owner of the land shown on the plan to title number BD193504. This land was transferred to him by his mother, Kathleen Hope, by a transfer of part dated 5 December 1995 ('the First Transfer'). I will refer to this as 'the Blue Land'. The Respondents are the registered

owners of the adjacent property registered with title number BD294994 ('the Adjoining Land'). The Adjoining Land was transferred to them by Kathleen Hope, by a transfer dated 9 June 2014 ('the Second Transfer').

2. The dispute relates to the eastern boundary of the Blue Land. By an application dated 5 January 2016 the Applicant applied to alter the title plans of the respective properties to show the boundary in the position of a fence which, by common consent, has been in the same position since 1979. The Respondents' objected on the grounds that this fence ('the Fence') was never intended to mark the boundary. It is their case that the boundary is further west, and is now marked by a fence erected by them on 21 March 2015 ('the New Fence'). I have no precise measurement as to the gap between the Fence and the New Fence, but, having seen the land, it seems to me that it would be at least 20 metres wide, and wider still at the northern end. The disputed boundary runs almost the entire length of the entire boundary, north to south (the Blue Land extends further south than the Adjoining Land, but nothing turns on this).

3. The application is made pursuant to paragraph 5 of Schedule 4 to the Land Registration Act 2002 ('the 2002 Act'). It is an application to alter the register to correct a mistake. The alteration will result, as explained more fully below, in a more accurate general boundary.

4. For the reasons set out below I will order the Chief Land Registrar to give effect to the application.

Background and evidence

5. The First Transfer is a transfer of part under rule 72 of the 1925 Land Registration Rules. The Blue Land was described as: *'Land situate at Jay Farm, Myers Road, Potton, Bedfordshire edged and hatched blue on the plan annexed hereto.'* In the definition section, the land was described as: '*The land shown edged blue and hatched blue on the Plan together with any buildings or other erections (if any) thereon.'* The retained land was defined as the land '*now belonging or formally [sic] belonging to the transferor (and each and every part thereof) the same being shown edged red on the Plan'* ('the Red Land').

6. The price for the Blue Land was stated to be £10,000. There is an issue as to whether this money was paid. The Applicant's evidence is that he entered into a mortgage with his mother whereby she lent him £10,000 protected by a charge which was released in 2010. In any event, this issue (if indeed it is an issue) is irrelevant to the question I have to decide.

7. The plan attached to the First Transfer ('the Plan') is clearly taken from a plan prepared in March 1977 by Carter Jonas of Huntingdon. It is an extract taken from certain OS maps. The scale is 1/2500. On the Blue Land is written '11.375 approx' and on part of the Red Land is written '6 acres approx'. These acreages are irrelevant for present purposes. The explanation for these acreages can be traced back to an earlier Deed dated 7 October 1992 between Gladys and Marion Warboys and Mrs Hope relating to a right of way, in which the plan used is the basis for the Plan.

8. The Red Land included the Adjoining Land and further land to the south, now registered with title number BD147435 in Mrs Hope's name on 16 June 1989 in her name and that of her husband, James Hope. Mrs Hope lives in a bungalow erected on this land.

9. By clause 3 of the First Transfer, the Applicant covenanted with Mrs Hope to observe and perform the covenants set out in the Third Schedule. Paragraph 1 of that Schedule provides as follows:

   'To maintain in a good and substantial state of repair order and condition the fencing along the boundary between points A-B on the Plan.'

10. The points A-B mark the eastern boundary of the Blue Land. It is marked on the Plan by a thick red and blue line, which appears roughly parallel with the western boundary, although there is a dog leg at the southern end. There is a measurement of 522' on part of the southern boundary of the Red Land, but this does not relate to the disputed boundary.

11. The Applicant was registered as the owner of the Blue Land on 29 February 1996. The extent of the land shown on the filed plan is, in broad terms, in accordance with the Plan. The eastern boundary is shown as a dotted line (as is the western boundary of the Adjoining Land) which means it is not coincident with any physical features on the ground. A note on the plan says: 'The boundaries shown by dotted lines have been plotted from the plans on the deeds'.

12. On 28 June 2010 Mrs Hope was registered as first proprietor of title number BD273811, that is to say the Red Land but excluding the land on which her bungalow has been built (BD147435) and two small parcels of land between the disputed boundary and this land. These two parcels are not relevant to this dispute. By the Second Transfer, Mrs Hope transferred most of the Red Land to the Respondents (the Adjacent Land). This was given a new title number: BD294994.

13. The Applicant moved to a temporary mobile home on Jay's Farm land with his mother when he was 10 years old. The bungalow was built in the late 1980s. He confirmed that the Fence was erected in 1979. It was a post and wire fence. The Fence can be seen on a Google aerial photograph in 2014. There has never been any other fence until the Respondents erected the New Fence.

14. The Applicant moved away in the early 1990s, and returned in 1995. Between 1995 until early 2014 the Applicant and Mrs Hope co-operated in running horse trials and shows from their respective properties. The Fence was maintained as necessary. There were gates at various points. He believed at all times that the Fence marked the boundary, and recalls that the Fence was referred to by his mother as the boundary when they attended the solicitors' offices prior to the First Transfer. I also heard evidence from his then partner, Sara Poulton, who lived with the Applicant in the mobile home between 1990 and 2006. She too recalled the visit to the solicitors, and the conversation about the boundary being marked by the Fence.

15. Mrs Hope did not attend the hearing, although she was present at the site visit the day before. She wrote a letter dated 17 April 2016 to the relevant Land Registry office. In this she stated that the land registry plan is correct, and that it was never intended that the Fence would mark the boundary. The reference to the Applicant being responsible

for maintaining the fence referred to such fence as might in future be erected along the boundary. The land on both sides of the Fence was being used jointly to run equestrian events, so there was no need then to mark the boundary.

16. The subjective intentions of the parties are not, however, relevant to the process of determining what was conveyed by the First Transfer. This is a question which must be answered objectively, by reference to what a reasonable purchaser or transferor believed he would be buying.

17. The Second Respondent moved away from Jay Farm many years ago, and returned only recently. The Respondents instructed Kempston Surveys Ltd to mark out the correct boundary, and the New Fence was built along the line plotted by them. There is no report from Kempston. The inference must be that this line was drawn from the filed plans. The plans attached to the Transfers are unlikely to have been of any great assistance. It is of course correct that the plan attached to the First Transfer (and indeed the filed plans for the both the Blue Land and the Adjoining Land) appear to show the Blue Land as a rectangle, with the eastern boundary running parallel to the western boundary in what appears to be a straight line north to south. The Fence line runs at an angle, so that it veers eastwards as it goes north.

Legal Analysis

Construing the Transfers

18. The approach to construing conveyances is well established. As was stated by Lord Hoffman in *Alan Wibberley Building Limited v Insley* [1999] 1 WLR 894:

    (1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land…

    (2) An attached plan stated to be 'for the purposes of identification only' does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land

    (3) Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the tiem of the conveyance

(4) In principle there is no reason for preferring a line drawn on a plan based on the Ordnance Survey as evidence of the boundary to other relevant evidence that may lead the court to reject the plan as evidence of the boundary.

19. This guidance has been followed in a number of cases. In *Pennock v Hodgson* [2010] EWCA Civ 873, Mummery LJ also said this (at paragraph 12): ' Looking at the evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction…'

20. As mentioned above, the parties' subjective beliefs are inadmissible. The test is, in effect, what would the reasonable purchaser believe he was buying? Cases are fact specific, but of some relevance to the present proceedings are *Strachey v Ramage* [2008] EWCA Civ 384 and *Drake v Fripp* [2012] 1 P&CR 4. In the former case the claimant sought a declaration that the boundary was a fence which existed since 1988 when the land was first divided. The 1988 conveyance required the vendors to 'maintain in good and stockproof condition the boundary fence between the property and the retained land and which is between points A and C on the plan…' The defendant argued that the plan attached to the conveyance appeared to show the boundary in a different position to the fence. The land was registered, and the filed plan showed the boundary approximating the boundary on the plan. As Rimer LJ put it, hearing the appeal against the finding that the boundary followed the line of the plan, and not the fence : '*The contest at trial was, therefore, as to whether the relevant section of the boundary…. Followed (a) the imaginary line asserted by Mr Ramage or (b) the line of the fence erected in 1988.*' On the facts of that case, the appeal succeeded. The boundary was marked by the fence. This was the most relevant topographical feature.

21. In *Drake v Fripp* the registered file plans showed a Cornish hedge as the boundary. Mr Fripp argued that the boundary was a post and wire fence. The hedge and the fence were parallel and about 4 to 5 metres apart. It was held that the position of the boundary turned on the construction of the relevant conveyance in the context of the

surrounding circumstances. The parcels clause and the conveyance plan were ambiguous. Other clauses in the conveyance, including various covenants concerning the fence, pointed to the fence being the boundary. This was also consistent with the position on the ground. Moreover (and I will return to this point below) correction of the title plans would not amount to rectification, but would merely record more accurately the position of the general boundary.

22. It seems to me clear that the reasonable transferee under the First Transfer would have had no doubt but that he was taking all the land up to the Fence. I agree with the submissions made on behalf of the Applicant on this point. The Transfer must be looked at as a whole in the light of the surrounding circumstances to establish the objective intention of the parties. The Plan did not define the land transferred (it was marked 'for identification purposes only') and the parcels clause is of little assistance. The strongest, and best evidence, as to the position of the boundary is the obligation to '***maintain*** *in a good and substantial state of repair order and condition* ***the fencing along the boundary between points A and B on the Plan'*** (my emphasis'). The fencing was clearly already in place. The obligation was to maintain the fencing that was already there. The fencing was along the eastern boundary between points A and B. There would be no point in assuming that obligation if the fence was not the boundary. To argue that the line on the plan should prevail is to prefer an imaginary line to one which clearly existed. It seems to me that the only way to construe paragraph 1 of the Third Schedule to the First Transfer is on the basis that the obligation was to maintain the boundary fence. To suggest that this obligation refers to a future, undefined, fence seems to me to make no sense.

The effect of registration

23. Section 60 of the 2002 Act provides that:

    (1) The boundary of a registered estate as shown for the purposes of the register is a general boundary, unless shown as determined under this section

    (2) A general boundary does not determine the exact line of the boundary.

24. The register, therefore, is not conclusive. It may, or may not, show the exact line of the boundary. In *Drake v Fripp,* Lewison LJ said this: *' Accordingly in my judgment the*

registration of ... as proprietor by reference to a filed plan on which the boundary line followed the Cornish hedge left the position of the precise boundary undetermined. Once the position of the exact boundary had been (retrospectively) determined... it could be seen that [the registered owner] never had title to the disputed strip.' It followed, therefore, that he had not 'lost' the disputed strip. It was never his to lose.

25. Removing land which from the filed plan, therefore, does not mean that land is being removed from the registered title. This point was clearly made in *Derbyshire County Council v Fallon* [2007] EGLR 44, in which it was held that altering the filed plan would merely produce ' *another general boundary in a more accurate position than the current general boundary'*.

26. On the other hand, if land is outside the scope of the general boundaries rules, then removal of this land does amount to removing land from the registered title. The distinction is between a 'boundary dispute' on the one hand, and 'a property dispute' on the other. The distinction between these two kinds of dispute will always be a matter of fact and degree. The amount of land in question might be relevant, as might be the fact that the land is physically distinguishable from other land in the registered title and is of particular importance to the registered proprietor (*Paton v Todd* [2012] 2 EGLR 19). But the amount of land in question is not itself determinative as to whether the dispute is a boundary dispute or a property dispute.

27. In the present case, the dispute is, on a proper analysis, a boundary dispute. The issue between the parties is the location of the boundary of the land transferred by the First Transfer. There is nothing to indicate that it is a 'property' dispute.

Alteration of the register

28. Schedule 4 of the 2002 Act provides as follows:

1. In this Schedule, references to rectification in relation to alteration of the register, are to alteration which;
   (a) involves the correction of a mistake, and
   (b) prejudicially affects the title of a registered proprietor.

5. The registrar may alter the register for the purpose of-

(a) correcting a mistake

6 (3) If on the application for alteration 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.

29. If the alteration is properly rectification (because it prejudicially affects the title of the registered proprietor) a further level of protection is afforded by paragraph 6 (2). In this case, however, as the issue is a boundary dispute, and not a property dispute, the alteration is not rectification. What is at issue is the boundary between the Blue Land and the Adjoining Land. The land between the Fence and the New Fence was never within the Respondents' title.

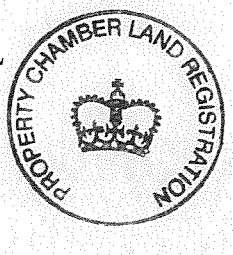
30. The alteration to the plan must be made, unless there are exceptional circumstances which justify not making the alteration. There are no such circumstances here, and accordingly the order will be made.

Costs

31. In principle the Applicant, as the successful party, is entitled to his costs. A schedule in Form N260 (the form for summary assessment used in the courts) is to be filed and served by 2 June 2017. The Respondents may make such objections or representations as they deem appropriate 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 17th day of May 2017