



[2018] UKFTT 0079 (PC)

PROPERTY CHAMBER
FIRST - TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

REF/2016/0895

BETWEEN

(1) Mr WILLIAM JOHN MONTGOMERY
(2) Ms EMMA LOUISE STANWORTH

APPLICANTS

and

(1) Mr ANDREW RICHARD RAINE
(2) Ms NICOLA JAYNE RAINE

RESPONDENTS

Property Address: Land at 165 Birmingham Road, Lichfield WS14 9BJ

Title Number: SF612690

Before: Dr Anthony Verduyn sitting as Judge of the Property Chamber of the First-tier Tribunal

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

On: 17th October 2017

Applicants represented by Ms I. Halstead of Counsel instructed by Ansons Solicitors Limited

Respondents represented by Mr D. Raine, father of the first Respondent and a retired Solicitor

DECISION

1. By application in form FR1 dated 17th December 2015, the Applicants as recently registered proprietors of 165 Birmingham Road, Lichfield, Staffordshire WS14 9BJ ("No.165") applied to register a narrow strip of unregistered land ("the Disputed Land") located between No.165 and the property of their immediate next door neighbours, the Respondents, at 167 Birmingham Road ("No.167"). The application was disputed and referred to the Tribunal on 31st October 2016. The hearing of the Application took place on 17th October 2017, without a site view. The core of the dispute relates to the interpretation of documents, although brief oral evidence was heard from each of the Applicants and the First Respondent. I will not recount the oral evidence, as it does not contribute significantly to the decision, save in one respect set out below. In general, the witnesses were too remote from the key events in the inter-war years, and could not add to their respective cases beyond producing the documents comprised in the trial bundle.
2. I append to this decision a copy of the Plan provided by the Applicants and marked with the various title numbers, current postal addresses and historic postal addresses (some with a question mark to indicate where matters are uncertain). The plan is adapted from an Indenture of 1920.
3. Essentially, there is no dispute that in 1900 a parcel of land was sold by the Mayor, Aldermen and Citizens of Lichfield to Mr Henry Harden, and detailed in an abstract of title for No.165 appearing in the trial bundle and appended to the Applicants' Statement of Case. Two pairs of semi-detached houses were constructed upon this plot, and from north to south these are currently numbered 163, 165, 167 and 169. Gardens were assigned to Nos. 165, 167 and 169 of about half the depth of the original plot and there was for a time an orchard beyond this (part of which, at a date unknown, was incorporated into No.169). By reason of the angle of the plot to the road, the gardens assigned were not immediately behind the respective houses, but extended in a north-easterly direction. This arrangement has a somewhat odd effect: No.163, as the end property, has a substantial connection to the garden land largely to one side of it; No.165 is connected to its garden over an apparent pathway running along the rear of the house and connecting with the garden; No.167 is narrowly connected with its garden on its registered title plan (although disconnected on the Indenture by which it was first sold), but would more readily access it

over a small portion of the Disputed Land; and No. 169 has a modest connection to its rear garden.

4. The plan also shows markings consistent with a pedestrian path running along the rear of Nos. 169, 167 and 165, and connecting with No.163. A small part of this is the eastern end of the Disputed Land. No.169 has a registered right of way along the rear of No.167 which connects to the Dispute Land and it would appear to have a right of way over the Disputed Land. The bulk of the Dispute Land runs between the houses and front gardens of No.165 and No.167, connecting this path (or at least the parts of it to the rear of No. 165 and No.167) to the highway. At a superficial reading of the plan, therefore, the Disputed Land would appear to be a pedestrian service route to the rear of the four houses that were built in the early 20th century, and familiar in many areas of England as providing a route for the taking of coal in, and waste away from, the rear of a row of houses where some or all of them have no direct connection between the rear of the house concerned and the highway. This observation is not indicative of title, since paths like this could belong to either of the contiguous properties (No.165 and No.167), or even be land retained by the original developer (particularly if that developer retained one of the houses built). Although the Respondents for good reason do not claim the Disputed Land for themselves (No.167 was granted a legal easement over it at its first transfer by an Indenture in 1920), the differing possibilities as to ownership are at the heart of the dispute between the parties.

5. The Applicants bought No.165 on 19th September 2014 and it was first registered on 1st October 2014. They state that they believed the Disputed Land would be registered with their title, but it was not. The sale was on behalf of a deceased estate and the picture of ownership was not entirely clear, with an apparent conflict between information from the sellers that there was an obligation to contribute to maintenance, but also an assertion by them of ownership. A hedge (since removed) grew along the Disputed Land between the properties. In any event, the Applicants discovered that they had not been registered with title to the Disputed Land in September 2015. Similarly, it had not been registered to No.167 at its first registration on 12th July 1983.

6. The purchase of the original block of land was by Mr Henry Harden senior in 1900 with Abstracts of Title. Once developed with four houses, parts were sold off. The first identified transfer is by Indenture dated 1st July 1920 and was of No.167, the Respondents' property (the Indenture plan forming the basis of the plan appended to this decision). This included notable rights of way:

"Together with full liberty for the said Alfred Millward [the purchaser] his heirs assigns and his and their agents and all other persons authorised by him or them and the owner and occupiers for the time being of the hereditaments hereby assured in common with the owners and occupiers for the time being of the dwellinghouse and premises on the South Side and the two dwellinghouses and premises on the North side of the said premises hereby conveyed from time to time and at all times for the purposes to go return and re-pass through along and over the passage coloured green on the said plan on the North side of the said premises [...] Subject nevertheless to the full and free right for the owners and occupiers for the time being of the dwellinghouse on the southern side of the premises hereby conveyed of the garden belonging thereto in common with the said Alfred Millward his heirs and assigns to go return pass and repass over and along the said part passage coloured brown on the said plan and over and along the side footpath colour blue on the said plan through the wicket gate leading in to the said footpath [...]"

7. One plan shows the Disputed Land appearing in green (although another plan in the Trial Bundle shows it in blue, and shading in blue would be, I find, an obvious error, since no green otherwise appeared on the plan at all), and that No.167 comprised separate blocks of land, one being the garden and the other, the house and its front garden. The green land connected the two blocks and, as noted above, connected also to the highway. The dwellinghouse to the south side is No.169 and the two to the north are No.165 and No.163. The brown land was a portion of the path connecting No.169 to the green land / the Disputed Land and then to the highway. This Indenture is definitive to the extent that the Disputed Land is not part of No.167 (as the Respondents' readily accept), nor No.169 (there being no reason why it and the brown land would not have been included in the title to No.169, were it to pass with that property). It offers no unequivocal assistance in

respect of the claim by No.165, because it is silent as to the title to the servient land of the right of way.

8. No.169 was sold shortly after No.167 on 5th March 1923. The Land Registry records the Deeds and documents of title as having been lost prior to first registration in 17th August 1987.
9. The early history of No.165 and No.163 is a little obscure. In his Will dated 4th February 1927, Henry Harden senior referred to himself as resident at No.163 (then, I find, known as No.177) and left this to his son, Henry Harden junior. He left No.165 to his daughter, Hannah Thornton. Henry Harden senior died on 4th March 1932, no longer at No.163, but at 44 Blackpool street, Burton on Trent, the given address of his daughter's husband. No.165 demonstrably did pass to his daughter by way of an assent dated 27th May 1932. There is no evidence concerning what happened to No.163, as the assent is silent on this. Neither the assent nor any of the subsequent conveyances of No.165 make any mention of the Disputed Land or a right of way over it. The assent did contain an acknowledgment of the right of Hannah Thornton to production of the 1900 Conveyance, two mortgages and the probate of the Will of her father.
10. It seems to me probable, and I accordingly find, that at the death of Henry Harden senior, No. 163 was in his possession but not in his occupation. It seems to me improbable that he would have disposed on that property before his death, without remaking his Will to deal with any inheritance by his son (the balance of the residual estate being provided for with equal division between son and daughter). I also consider it probable and find that No.165 was in separate occupation from No.163, whether tenanted or not, since there is no reason to believe that Hannah Thornton was not residing with her husband (and, until his death, her father) elsewhere. Further, it seems to me probable and I find, that the assent of No.165 preceded any assent of No.163, since it would be natural for an executor to deal with others prior to himself (and Henry Harden junior was a sole executor) and this would explain why the right to production of documents was set out in the assent, since these were remaining in the possession of others.

11. I am urged by the Respondents then to treat the absence of express reference to the Disputed Land passing under the assent with No.165 to conclude that it was retained with No.163 (whether it was subsequently retained thereafter with No.163, or retained by the estate at the assent or other disposal of No.163). Such retention, I consider to be improbable and I reject it, for the following reasons:
12. Firstly, it seems to me to be implausible. The Applicants suggested that it was unnecessary for No.163 to retain title or rights over the Disputed Land because there was adequate access to the highway from the frontage of No.163. This I consider to be wrong, as the northern boundary of No.163 appears to be abutting or very close to the corner of the building, so the path to the rear would have utility. Further, Mr Andrew Raine gave evidence that a doorway opened from the rear of the house at No.163 on to the path across the rear of the houses. A former owner of No.163, Mrs Shirley May Wheat, gave a statutory declaration asserting user as a right of way from 1972 to 2004. The usefulness of the route is, accordingly, well attested. It does, however, seem to me that to retain land across the rear of No.165 and between No.165 and No.167 would be a very odd decision to take. It would be far more sensible to pass this land with No.165 as it is contiguous with it. Indeed, the statutory declaration of Mrs Wheat is consistent with an easement being exercised, rather than possession taken.
13. Secondly, had the Disputed Land not been assented with No.165, it would have been necessary to grant a right of way over it (just like that granted to No.167 and, I find, to No.169 completing its rear access to the highway). To have omitted rights over land that affords access to the highway from the rear of the house at No.165 would have been a serious omission, and one that did not arise in the Indenture in respect of No.167. The absence of reference to such rights, I consider indicative of the freehold passing with No.165.
14. Thirdly, the absence of express reference to the Disputed Land does not suggest it was excluded from the assent, but the opposite: it formed part and parcel of No.165 and was transferred as part of the general words. Had it been excluded, then there would be two possibilities: firstly it was to be treated as part of No.163, which strikes me as unlikely as already observed; or, secondly, it fell into the residual estate and was inherited jointly by

Henry Harden junior and his sister, but treating it very differently from No.163 and No.165 would make very little sense.

15. The Respondents have made various points about the limited number of documents available overall and there being scant information on No.163, No. 169 and the orchard to the rear of all the properties in the early 20th century. I do not consider that these uncertainties detract from the persuasive arguments on behalf of the Applicants, and the Tribunal must do the best it can with the limited (but I find sufficient) information available. I have noted above Mrs Wheat's statutory declaration regarding a mere right of way exercised by No.163. I have also noted that the seller to the Applicants considered that there were maintenance obligations over the Disputed Land and, whilst this could suggest an obligation attached to an easement, it could also be a recognition that other users were not obliged to pay the full cost of maintenance. Indeed, the seller of No.165 also asserted title when inquiry was made. It follows that I do not find these points by the Respondents negative the claim by the Applicants; indeed, they are suggestive that the Disputed Land was not reputed to be part of No.163. I also note that a previous owner of No.165 appears to have grown a hedge down the space between the houses, which rather suggests that it was treated as part of that property (No.167 rightly having no claim to the freehold of this land).

16. In summary, the evidence is clear that the Disputed Land was not conveyed to No.165 in 1920, and it is unlikely that it was transferred to No.169 in 1923. At the death of Henry Harden senior, it was unlikely that the Disputed Land would be dealt with separately from No.163 and No.165. For the reasons set out above, I find that it was treated as part and parcel of "All that dwellinghouse and premises situate and being Number 179 [now 165] Birmingham Road in the City of Lichfield" and devolved with that title to the Applicants. There is no evidence for retention of the Disputed Land with No.163, such retention was unnecessary and would have required the grant of a right of way in favour of No.165 that is wholly absent from the good records for that property. In the circumstances, I will direct that the Chief Registrar give effect to the application.

17. In respect of costs from the date of the reference to the Tribunal (1st November 2016), these should usually follow the event, meaning that the costs of the successful Applicants

should be paid by the Respondents, unless some good reason can be given for doing otherwise. The Tribunal does not make orders in respect of costs incurred before the date of the reference. The Applicants should accordingly provide a schedule of the relevant costs to the Tribunal and the Respondents within 21 days of the date of the Order in this case. The Respondents should provide any objection in principle to the award of costs, or any objection to any items comprising costs, or the scale of costs in general or individually by item, to the Tribunal and the Applicants within 21 days thereafter. Any reply by the Applicants to the Respondents' submissions should be made to the Tribunal and copied to the Respondents within 7 days thereafter. The decision on costs will then be made on the papers.

ORDER

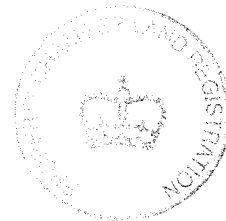
Upon the trial of this Reference

And upon hearing the Applicants represented by Counsel and the Respondents by a Solicitor (retired)

The Chief Land Registrar is directed to give effect to the Application made by the Applicants in Form FR1 dated 17th December 2015 for first registration of the pedestrian access adjacent to 165 Birmingham Road, Lichfield WS14 9BJ (title Number SF612690).

Dated this 16th January 2018

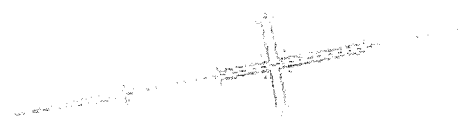
Anthony Verduyn



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

L. B. M. W. RD

Orchard



LAND EDGED PINK
Now 169 B'HAM RD
Title Number SF24081
Previously 183 B'HAM RD (?)

AND EDGED GREEN
Now 163 B'HAM RD
Title Number: SF487073
Previously 177 B'HAM RD (?)

163/ 165/ 167/ 169/
177(?) 179 181 183

AND EDGED BLUE
original parcel of land
inherited by Mayor Alderman
John Calverts of Lichfield
Henry Marden in 1900
NOW AS 179 B'HAM RD

DISPUTED PATHWAY

LAND EDGED BLACK
Now 165 B'HAM RD
Title Number: SF600650
Previously 179 B'hams Rd
(?)

LAND EDGED YELLOW
Now 167 B'HAM RD
Title Number: SF197731
Previously 181 B'HAME
(?)

