[2018] UKFTT 173 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF/2016/1042

BETWEEN

Clifford Kitching

Applicant

and

The Council of the Borough of Middlesbrough

Respondent

Property Address: land and buildings on the north east side of East Side And land and buildings on the south west side of West Side, Nunthorpe Title Number: CE191762

Judge Colin Green

ORDER

It is ordered that the Chief Land Registrar give effect to the Applicant's application as if the Respondent's objection of 18 April 2016 had not been made.

Colin Green

PROPERTY CHAMBER LAND REGISTRATION

Dated this 8th day of February 2018

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Judge Colin Green

At: Leeds Employment Tribunal
On: 7 July 2017

Applicant Representation:	Nigel Kidwell of counsel
Respondent Representation:	Matthew Maddison of counsel

DECISION

Introduction

1. By an application made in Form AP1 dated 21 March 2016 the Applicant, Mr. Kitching, applied for the registration of a prescriptive easement over that part of title

number CE191762 as is shown coloured brown on a plan which is contained at page 66 of the hearing bundle ("the Plan"). The Respondent Council is the registered proprietor of that land, and objected to the application. To understand the route of the right of way which is claimed, I should describe briefly the general layout of the land in question. There is an open area of land ("the Yard") which has buildings on three sides, entrance to which is gained from the main road, West Side. A track ("the Track") leads off from the Yard in its south-west corner which runs behind the gardens of the houses fronting onto West Side. The Track eventually leads back onto West Side, and there is another access from West Side to the Track about half-way along it's route. The Yard, surrounding buildings and the Track are all comprised in the Respondent's title.

2. Mr. Kitching is one of the registered proprietors of 4 West Side ("No. 4") under title number CE45813, the rear of which abuts the Track. On the other side of the Track is another plot of land ("the Top Land") of which Mr. Kitching is also a joint proprietor, under title number CE85150. It is claimed that a prescriptive right of way, vehicular and pedestrian, has arisen in favour of both No. 4 and the Top Land which runs from the entrance of the Yard from West Side, across the Yard, and along the Track to No. 4 and the Top Land, which lie either side of the Track ("the Route").

Ownership and occupation

3. It will assist if I set out the relevant history of ownership and occupation, which is largely undisputed. In about 1926, Mr. Kitching's father, Charles Kitching, began to rent 4 West Side from Winifred May O'Neill. By a conveyance dated 31 July 1947 the Respondent purchased land including No. 4 from Mrs. O'Neill, so that Charles Kitching became its tenant. By a conveyance dated 17 December 1979 the Respondent sold the freehold to No. 4 to Charles and Clifford Kitching, and Elaine Kitching, Clifford's wife. The latter two were registered as proprietors on what appears to have been a first registration on 10 January 1980.

4. The Top Land was originally let by the Respondent to Charles Kitching under a lease dated 18 December 1979 for a term of five years from the date of the lease, to be used as a private garden. The freehold to the Top Land was purchased by Charles from the Respondent by a conveyance dated 3 June 1985 and title was subsequently transferred

to Mr. Kitching and his wife who were registered as proprietors of the freehold on 21 June 1988.

5. Mr. Kitching was born on 28 July 1932 and lived at No. 4 until 1975, moving back when the freehold was purchased in 1979. His case is that both he, his wife and his father used the Route to gain access to the rear of No. 4, on foot and with vehicles, and subsequently also to the Top Land. Mr Kitching's wife passed away in March 2013, but the titles to No. 4 and the Top Land remain registered in their joint names.

Issues

6. Initially, in both its objection to the application and Statement of Case, the Respondent contended there was no easement due to any such access having been exercised pursuant to permissions granted by the Respondent, so that there can have been no user "as of right" for a sufficient period to form the basis of a prescriptive easement. Counsel were agreed on the relevant law that licence prevented use which could be relied on for a prescriptive easement though they differed as to whether permission had been granted, and in respect of what.

7. The skeleton argument of Mr. Maddison on behalf of the Respondent also raised the objection that until the purchase of the freehold to No. 4 in 1979, Charles Kitching, Mr. Kitching's father, was the tenant of the person (Mrs. O'Neill) or body (the Respondent) which owned the freehold of the land over which the right of way is claimed, and that a tenant cannot have an easement against his landlord – a prescriptive easement cannot be acquired in respect of land in common ownership, see: *Gale on Easements,* 20th Edition at paragraph 4-154. Therefore, he argued, no use could be relied upon until after the severance of common ownership by the purchase of the freehold in 1979.

8. This led to Mr. Kidwell, on behalf of Mr. Kitching, wishing to raise an implied grant as an alternative argument if he was not successful is his claim to an easement by prescription, but since he had not been able to prepare any submissions on the point, prior to hearing submissions on all other matters, I gave directions that counsel should after the trial file with the Tribunal and exchange written submissions concerning the wish to argue for the existence of an easement by way of implied grant, recognising

that this encompassed whether that argument could be raised at all in these proceedings, and if so, whether such an easement could be made out. Initial submissions and submissions in reply were provided by both counsel.

9. Accordingly, I will deal with the issues in the following order:

9.1. A prescriptive easement, including issues concerning permission.

9.2. Whether I can consider the issue of an implied grant of an easement, and if so, whether such a grant can be established.

Prescriptive easement

10. Mr. Kitching gave evidence that he and his family, including his father, had used the Route to come and go from the rear of No. 4 and later, from the Top Land, both on foot and by vehicle. He claimed to have been driving since about 1955 and parked a variety of vehicles at the rear of No. 4 by taking the Route and driving out in the reverse direction. After the lease of the Top Land was granted to his father in 1979, but not immediately, the Top Land was used for parking instead. Most bulky deliveries were made to the rear of No. 4, using the Route and when building work was carried out, a skip was placed on the Track, delivered and collected by the Route. Until the introduction of wheelie bins, rubbish bins were collected from the rear of No. 4 in the same way. Mr. Kitching's wife parked her car mainly on the main road but would on occasions park it at the back of No. 4.

11. I also heard evidence from John Storer, who has lived at 10 West Side, two doors down from Mr. Kitching, for over forty years. He confirmed that during that time Mr. Kitching had accessed the rear of No. 4 by the Route and parked his vehicle at the rear, not daily but more than occasionally. In cross-examination he said that it was only a few years ago that Mr. Kitching started parking on the Top Land, and that before that his parking was split between the Yard, at the rear of No. 4, and on the main road.

12. For the Respondent, the sole witness was John Stonehouse, the Council's Land Terrier Officer, who understandably was not able to provide any direct evidence concerning matters but only to speak as to documents in the Council's records.

13. It was not disputed that for many years Mr. Kitching and his father had made use of adjoining buildings, around the Yard, together with other tenants of the Respondent. On the southern side of the Yard are two buildings referred to as the Blacksmiths and Joiners Workshop (or Store) respectively, access to which is gained from the Yard. The Joiners Workshop was let to Mr Kitching's father from about 1955 to 1981, when a fresh tenancy was granted to Mr. Kitching, who rented it until about 1991. The lease of 30 April 1981, for a term of five years, contains the grant:

> *"TOGETHER WITH the full right and liberty for the Tenant (in common with all others so entitled) to pass and repass over the access road or way adjacent to the demised premises between the demised premises and West Side aforesaid for the purpose of obtaining access to and egress from the demised premises"*

There appears to have been a further lease of the Joiners Workshop to Mr. Kitching in 1985 (no copy available) and another lease of the same premises for a term of five years dated 5 July 1989, including the grant of a right of way in like terms to the 1981 lease.

14. There is a licence of storage premises for the storage of Mr. Kitching's motor vehicle dated 2 September 1991 to continue for successive six-month periods until determined by six months' notice. The premises are what is known as the old gas house and were used by Mr. Kitching for storage rather than parking and although he accepts that the licence was formally terminated by the Respondent in 2003, he says that he had not used such premises or paid the licence fee for several years before that.

15. I accept Mr. Kitching's evidence in its fundamental respects, even though I think it is exaggerated in his claiming daily access. He accepted that while he was renting the Joiners Workshop he would often park his vehicle outside those premises in the Yard, and it is only when he ceased to use the premises in about 1991 that he would park on the Top Land. The Route is an obvious and convenient means of gaining access to the rear of No. 4 and where necessary, the Top Land, and is the only means by which vehicular access can be had to the rear of No. 4 and the Top Land. I consider that this occurred with sufficient regularity for it to be the kind of user that would support a prescriptive right of way.

16. On the material before me it is a reasonable inference that the Respondent has owned the land over which the right of way is claimed since 1947, when it acquired No. 4, with other Land, from Mrs. O'Neill. It is very likely that Mrs. O'Neill also owned the freehold to all the relevant land. Therefore, for the purposes of prescription, the user relied upon cannot be prior to 1979. In respect of the Top Land there was common ownership of the freehold until Mr. Kitching's father's purchase in 1985, so that prescriptive user cannot have begun until after that purchase.

17. In both cases, access and egress on foot by the Route will have been for more than twenty years – the minimum period required under the Prescription Act 1832 and doctrine of lost modern grant – prior to making the application to the land Registry. Concerning access by vehicle, the rear on No. 4 was the favoured spot when there was no parking in the Yard or main road up until about 1991, when parking on the Top Land began. Again, in both cases there has been parking on both locations for more than twenty years in those successive locations, so that in each case a vehicular right can be established under the doctrine of lost modern grant.

18. As regards permissive use, the Respondent relies on the leases mentioned above and the licence of the gas house. Although the latter contains no express grant of a right of way, one must be implied across the Yard as there would be no other means of obtaining access to those premises. Therefore, until about 1991 in respect of the Joiner's Workshop and 2003 in respect of the old gas house, there existed across the Yard rights of way to access such premises, although the routes taken across the Yard to do so would be rather different given the location of those two premises. In my view, it does not follow that access to the rear of No. 4 or the Top 'Land could properly be regarded as being, in part, the exercise of either or both of such rights. The Route does indeed cross the Yard, but use is also made of part of the Track to gain access, which is not required for either of the two premises facing the Yard, and the *terminus ad quem* – the rear of No. 4 and the Top Land – is different. In other words, the quality and nature of the user differ in each case, albeit that crossing the Yard from the main road is, for the initial part of the Route, common to all.

Implied grant

19. Strictly, having found a prescriptive easement, it is unnecessary for me to consider the case for an implied grant. I will do so however, in case I am wrong on such finding.

20. The initial issue is whether I should allow the case for an implied grant to be advanced at all. In my view, this involves consideration of the following. Mr. Maddison relies on passages from *Atkin's Court Forms*, Volume 23(3), paragraph 13 and *Practical Guide to Land Registration Proceedings*, by Simon Brilliant and Michael Mitchell (both Judges of this Tribunal). The latter provides at paragraph 7.4 as follows:

> *"Moreover, in presenting the case on the underlying dispute, the parties are not restricted to the arguments previously put forward to the Registrar in respect of the application or objection, as the case may be. That there is such a restriction has been argued on more than one occasion, but there is no authority for such a proposition. So where an application for the entry of notice of an implied easement has been made to Land Registry based on the rule in Wheeldon v Burrows (1879) 12 Ch D 31, CA, the case could be argued, instead or additionally, on the basis of the LPA 1925, s 62...*
>
> *...But if on a reference concerning an implied easement the Applicant raised the issue of an express grant of an easement over registered land, the Tribunal could not make a direction to the Registrar based on an express grant as that would be outside the scope of the original application... However, the parties might agree that the Tribunal should determine any issues of fact and law relating to an express grant so as to bind them on any future application to Land Registry to register the grant."* (emphasis added)

21. It is argued that because the application is for a prescriptive easement, the Tribunal cannot direct that effect be given to the application on the basis of an implied easement, as the two are fundamentally different – a prescriptive easement cannot arise by way of implied grant. In my view, this is correct, but that is not the end of the matter. It is the practice of this Tribunal, where appropriate, to make findings which support the same or similar rights on an alternative basis to avoid the point being relitigated on essentially the same evidence. As noted by Morgan J. in *Rita Inhenagwa v. Rose Onyeneho* [2017] EWHC 1971 at paragraph 62:

> *"The jurisdiction of the adjudicator (and now the First-tier Tribunal) is to determine the issues which go to the merits of the dispute in relation to the matter referred for determination. Prima facie, therefore, the*

adjudicator or the tribunal should not determine the merits of other disputes between the same parties, even disputes relating to the same registered title, if those disputes are different from the dispute in relation to the matter referred for determination. However, I would qualify that statement as follows. The adjudicator or tribunal may consider that it would be helpful to make findings on certain points where such findings would throw light on the findings which are necessary to determine the dispute in relation to the matter referred for determination."

22. I consider that the arguments for an implied grant arise out of the same factual matrix as provided concerning prescription – no new evidence is required – and in both cases, the Route is the same. Had I not found a prescriptive easement, or if I am wrong as to that, and should have ordered that Mr. Kitching's application should be cancelled, a finding concerning the existence of an easement by implied grant will assist the parties and avoid the need for further litigation over that issue should there be a further application for registration of an easement by implied grant.

23. There is also the matter of the issue of an implied grant being raised late in the day. I consider that this has been accommodated by allowing counsel to make written representations on the point, and it may have a bearing on costs. Nevertheless, for the reasons I have given, I think it appropriate that I should proceed and consider whether an implied grant can be established. There are two possible grounds: the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31, and the provisions of s. 62 of the Law of Property Act 1925.

24. I do not consider that the rule in *Wheeldon v. Burrows* can apply as one of the requirements is that the land must have been in single ownership and occupation immediately prior to the relevant transaction. Since it was Mr. Kitching's father who was in occupation as a tenant of No. 4 in 1979 and the Top land in 1985, rather than the Respondent, such diversity of occupation between the dominant and servient tenements prevents the rule from applying.

25. There is no such bar under s. 62, and it is recognised that when a tenant acquires the freehold, s. 62 may operate to convey easements over the landlord's adjoining land with the freehold. The point is issue concerning s. 62 is the requirement that the right must have been "enjoyed" at the time leading up to the conveyance. Taking each

parcel of land in turn, I am satisfied that there was access on foot to the rear of No. 4 prior to 1979. I also find that although vehicles were parked in various locations – the main road, the Yard and behind No. 4, adjoining the Track – the latter was a sufficiently regular occurrence over a very lengthy period that it amounted to sufficient use to be regarded as "enjoyed" with No. 4.

26. In respect of the Top Land, again, prior to the 1985 conveyance, I find that access by foot was on a sufficiently regular basis by the Route, albeit that other ways of access on foot will have been used. I cannot make a similar finding in respect of vehicular access however, since the evidence was that the Top Land was not used for such purposes until after purchase of the freehold, so that when the freehold was purchased in 1985, there was only an implied grant of a pedestrian way over the Route, and it did not extend to vehicles.

Conclusion

27. Accordingly, I will direct that effect be given to the Applicant's application.

Costs

28. At present, I can see no reason why I should not order that the Respondent pay the Applicant's costs, as he has been the successful party. I direct that by 4.00 pm on 26 February, the Applicant's solicitors should send to the Tribunal and the Respondent details of their legal fees and counsel's fees since the date of the reference from the Land Registry, (21 November 2016) together with copies of supporting invoices and counsel's fee notes. The Respondent's solicitors will then have the opportunity to provide written submissions in response, presenting any reasons on which they rely as to why the Respondent should not pay the Applicant's costs, and any issues with the details provided by the Applicant's solicitors. Such submissions should be sent to the Tribunal and Applicant's solicitors by 4.00 pm on 12 March. Should the Applicant's solicitors wish to serve a short reply, they may do so by 4.00 pm on 26 March. I will then deal with a final determination on the issue of costs and the amount to be paid should I remain of the view that the Respondent should make payment.

Colin Green

Dated this 8th day of February 2018