



[2018] UKFTT 214 (PC)

**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
LAND REGISTRATION DIVISION**

REF/2017/0264

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

B E T W E E N:

DAVID NOAKES

Applicant

and

ALBERIC LLP

Respondent

**Property Address: 17 Church Hill, Earls Colne, Colchester, Essex CO6 2RG
Title Number: EX934995 EX899833**

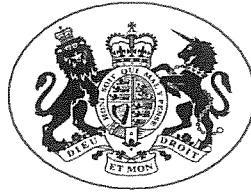
Applicant's representation: In person

Respondent's representation: David Smith FRICS

DECISION

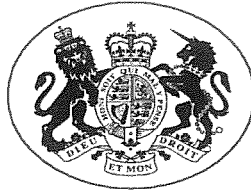
1. Introduction

- 1.1. This reference arises out of the Applicant, Mr David Noakes's, application dated 29th March 2016 for first registration of his title to his home, the property which is now known as 17 Church Hill, Earls Colne, Colchester.
- 1.2. That application is now supported by a further application for alteration of the register in respect of the Respondent's title number EX899833 which includes the area of land the title to which is in dispute ("the Disputed Land").
- 1.3. The Disputed Land is shown hatched on the plan annexed hereto and which was page 72 of the hearing bundle ("the Plan").



2. Conveyancing history

- 2.1. On 1st March 1949 the Applicant's father, Mr Robert Noakes, completed the purchase of the land which is now comprised within title numbers EX635914, EX730599 and provisional title number EX934995 from the Executors of Dr T. E. Pallett. At that time it seems the land was in use as an orchard and had no buildings on it.
- 2.2. There is no question that along the majority of its length the land purchased by Mr Noakes was bordered to the north by the stream which runs from west to east under the road known as Church Hill and then past Mr Noakes's property. The Disputed Land is at the western end of that boundary where it meets Church Hill and where the streams turns a little to the north. It is a small undistinguished piece of land which consists for the most part in a steep bank down to the stream. I was able to see, in the course of my inspection of the site the day before the hearing, that to the south eastern face of the brick parapet of the bridge which carries Church Hill over the stream that there are steps formed into the bank for the apparent purpose of facilitating access to the stream. It was suggested by Mr Smith for the Respondent (and accepted by the Applicant) that these steps had been used in former days by the drivers of steam engines to get down to the stream to get water for their engines.
- 2.3. The plan to the 1949 conveyance which is referred to in the parcels clause for the purpose of identification only, appears to make it clear that the Disputed Land was intended to be included within the land conveyed. Far from simply including the land as a part of the whole, the plan indicated that there was some form of feature between the Disputed Land and the rest of the orchard and nevertheless clearly shows the Disputed Land within that conveyed.
- 2.4. There is nothing intrinsically surprising in this given that the stream is an obvious geographical feature by reference to which to mark the boundary. It is also worthy of note that the transferors to Mr Noakes included Dr Pallett's widow, whose address is given as, Dovers, Earls Colne, that being the property adjoining the land conveyed. There is therefore no particular reason to think that the inclusion of the Disputed Land was an error borne of the fact that the executors were unfamiliar with the property and every reason to think that the executors believed the title to the Disputed Land to be vested in them.
- 2.5. However, it is equally clear from the plan to the conveyance of the lands, estates, rights and lordship of Colne Priory to Mr P. H. Carwardine dated 29th September 1911 that the paper title to the Disputed Land (at least) formed part of the title to Colne Priory thus conveyed and that that land was similarly conveyed to Sir Reuben Hunt by a conveyance dated 21st October 1935 and has since passed by descent and purchase to the Respondent. The title was registered on 23rd December 2013, presumably as a pre-cursor to the sale to the Respondent.
- 2.6. To complete this review of the conveyancing history, it is necessary merely to say that following his purchase of the land described above in 1949 Mr Noakes caused a property to be built upon the eastern portion of it and that on 28th August

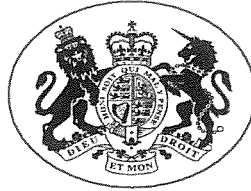


1952 conveyed the western portion of it into the joint names of his wife and himself.

- 2.7. In due course, following Mr Noakes Snr's death and shortly following the Applicant's marriage, on 11th October 1973 Mrs Noakes Snr conveyed the same western portion of the land into the names of her son, the Applicant, and his wife by way of gift.

3. Factual evidence

- 3.1. I only heard evidence from Mr Noakes and, save in one limited respect, his evidence was not substantially contested by Mr Smith.
- 3.2. Mr Noakes told me that he had lived at the property acquired by his father in 1949 his entire life.
- 3.3. Unsurprisingly, he was unable to recall precisely the nature of the feature apparently depicted on the 1949 conveyance plan, and for that matter the plan to the 1973 conveyance to him. He said that there had at one time been a bank in that area and that there was a hedge on top of it but he was vague as to its precise location. I think it is likely that there was a hedge followed the line of the feature mapped on the plans and joined up with the hedge which now begins at the point the stream turns to head east past Mr Noakes's property.
- 3.4. Be that as it may, Mr Noakes was clear that when, after the property was conveyed to him in 1973, he and his wife constructed a new home for themselves the bank was flattened out and the hedge in that area grubbed up in order to facilitate the access from Church Hill. Since that time, he said that he had cultivated that area, in particular by planting various shrubs and other plants and that it had been treated by him and everyone else as a part of his garden.
- 3.5. It is clear from correspondence passing between Sir Reuben Hunt and Mr Noakes Senior between December 1962 and February 1963 that the Colne Priory estate was experiencing problems with encroachment upon the field to the north of the stream. In the course of the correspondence Sir Reuben Hunt apparently referred to the hedge to the north of the stream as, "Mr Noakes's hedge," and the Applicant sought to draw out of that an admission that the boundary of his land was in fact the northern bank of the stream. That is certainly a possible construction of the letter dated 12th February 1963, although Mr Smith suggested to the Applicant that it really amounted to no more than an act of 'good-neighbourliness,' something which the Applicant did not accept. Whatever the true construction of the letter, in order for any assurance given by Sir Reuben Hunt to be binding upon the Respondent, it would be necessary for the Applicant to show that either he or his father had acted in reliance to his detriment upon it. That he was unable to do.
- 3.6. Furthermore, the only matter referred by the Land Registry to the Tribunal concerns the Disputed Land, not the northern boundary generally. Any dispute



concerning the northern boundary of Mr Noakes's land generally is therefore outside my jurisdiction.

- 3.7. That said, I think it was legitimate for the Applicant to try to draw from this correspondence the inference that Sir Reuben Hunt did not challenge his father's possession of or title to the Disputed Land. The clear purpose of the correspondence in 1962-3 from Sir Reuben Hunt's point of view was to try to draw 'a line in the sand' as regards the boundary with the field so as to hold the position against further encroachments. It was, therefore, the perfect opportunity, had he wished to do so, to draw attention to the fact that the Disputed Land belonged to him, but he did not.
- 3.8. That chain of reasoning assumes, however, that Mr Noakes Senior was manifestly in adverse possession of the Disputed Land at the time of the correspondence. I consider that unlikely in view of the Applicant's description of the physical boundary between the orchard and the Disputed Land. I think it is much more likely that Sir Reuben Hunt had forgotten, if he ever knew, that he owned the paper title to the Disputed Land and would not have been terribly concerned about it if he had remembered. His object was to keep control of the land on the northern bank of the stream. That does not mean, however, that he had abandoned his land or that Mr Noakes Senior was in possession of the Disputed Land at that time. The reality I believe is that the land was of no practical use or concern either to Sir Reuben Hunt or Mr Noakes. Neither of them would have had any reason to do anything on it and that explains Mr Noakes's inability to offer any evidence of possession other than the plans to the 1949 and 1973 conveyances prior to the transfer of the land to him in 1973.
- 3.9. That position changed in 1973, shortly after the Applicant acquired the property from his mother, because the Disputed Land (or the significant part of it at the top of the bank) suddenly became useful for the purpose of forming a flower bed around the access and I am satisfied that Mr Noakes treated it as part of his garden from that point on, albeit so far as the bank down to the stream is concerned a peripheral part. It would have been quite natural to him that he should do so because the land was included within the title conveyed to him by his mother and I find that it was his intention to possess the land.
- 3.10. That is the position as I witnessed it in the course of my view of the site. It was Mr Noakes' evidence to me that the area was in fact relatively barren by comparison with earlier times in his ownership. I accept that evidence which Mr Smith realistically and fairly did not attempt to contradict. He was unable to point to any evidence to suggest that Mr Noakes's possession was ever challenged by the owners of the Colne Estate until Mr Noakes sought to register his title.

4. Legal analysis

- 4.1. It is a fundamental principle of English law (encapsulated in the Latin tag *nemo dat quod non habet*) that a person cannot pass a greater title to land or anything else than he himself possesses. That principle is abrogated in certain important respects by the Land Registration Acts 1925 and 2002 but those acts do not apply

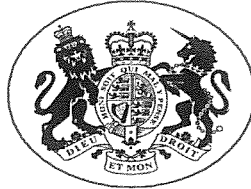


to transfers of unregistered land which took effect before the introduction of the compulsory registration regime. It follows that the fact that Dr Pallett's executors purported to convey the Disputed Land to the Applicant's father does not mean that the conveyance was effective in law to achieve its purported effect. Likewise the transfer by Mrs Noakes Senior to the Applicant. Those conveyances could only arguably have had that effect if Dr Pallett's executors or Mrs Noakes had been in possession of the Disputed Land at the time of the conveyances, which I have concluded that they were not.

- 4.2. Equally, it is the effect of sections 15 and 17 Limitation Act 1980 that any continuous period of adverse possession in excess of 12 years before the issue of proceedings for possession would extinguish the unregistered title of the Respondent's predecessors to the Disputed Land. Thus, the *nemo dat* would apply equally to Sir Reuben Hunt's successors.
- 4.3. What then, if anything, was the effect of the registration of the 'Colne Priory Estate's' title to the Disputed Land in 2013 ? Section 11 of the Land Registration Act 2002 provides as follows in relation to the interests in land which will continue to bind previously unregistered land upon first registration:

"11 Freehold estates

- (1) This section is concerned with the registration of a person under this Chapter as the proprietor of a freehold estate.
- (2) Registration with absolute title has the effect described in subsections (3) to (5).
- (3) The estate is vested in the proprietor together with all interests subsisting for the benefit of the estate.
- (4) The estate is vested in the proprietor *subject only to the following interests affecting the estate at the time of registration*—
 - (a) interests which are the subject of an entry in the register in relation to the estate,
 - (b) *unregistered interests which fall within any of the paragraphs of Schedule 1*, and
 - (c) interests acquired under the Limitation Act 1980 (c 58) of which the proprietor has notice.
- (5) If the proprietor is not entitled to the estate for his own benefit, or not entitled solely for his own benefit, then, as between himself and the persons beneficially entitled to the estate, the estate is vested in him subject to such of their interests as he has notice of.
- (6) Registration with qualified title has the same effect as registration with absolute title, except that it does not affect the enforcement of any estate,



right or interest which appears from the register to be excepted from the effect of registration.

(7) Registration with possessory title has the same effect as registration with absolute title, except that it does not affect the enforcement of any estate, right or interest adverse to, or in derogation of, the proprietor's title subsisting at the time of registration or then capable of arising.”

The unregistered interests identified in Schedule 1 include:

“2 Interests of persons in actual occupation

An interest belonging to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for an interest under a settlement under the Settled Land Act 1925 (c 18).”

- 4.4. I have already stated my conclusion that the Applicant has since 1973 been in adverse possession of the Disputed Land. That possession amounts also to ‘actual occupation’ for the purposes of paragraph 2 of Schedule 1. I need now to set out the legal test which I have applied in reaching that conclusion.
- 4.5. That test is set out in the decision of the House of Lords in *J.A. Pye (Oxford) Limited v Graham* [2003] 1 AC 419 approving the decision of Slade J in *Powell v MacFarlane* (1977) 38 P & CR 452. There are two elements to the dispossession of the owner of a paper title by an adverse possessor, first, factual possession and, second, an intention on the part of the dispossessor to possess the land. As to factual possession Lord Browne-Wilkinson approved this statement of Slade J:

“Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. *The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.*”

The necessary intention to possess, he said, again approving the formulation of Slade J, was:



“... an “intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.”

However, unless and until the owner of the paper title is dispossessed by an adverse possessor he continues by default to be in possession and the title remains vested in him.

- 4.6. The final relevant aspect of the law for the purposes concerns the extent to which acts of possession on one part of a parcel of land may be taken to evidence adverse possession of the whole parcel. The leading modern case on the point is *Roberts v Swangrove Estates Ltd* [2007] 2 P. & C.R. 17 where Lindsay J explained the position as follows:

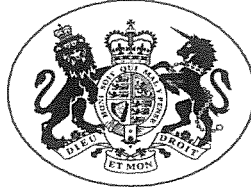
“63 There is thus ample authority for the proposition that acts on one part of an area may be treated as constituting possession of the whole area provided that there is “such a common character of locality as would raise a reasonable inference” that, if a person were possessed of one part of it as owner then he would so possess the whole of it.”

- 4.7. Although, as I have said, the Disputed Land and the bank in particular are not, by any means, the focal points of the Applicant’s garden, it was evident to me upon my inspection on the day before the hearing that they have been integrated into the Applicant’s property over a substantial period and that an objective observer would have concluded that the whole of the Disputed Land formed part of his property.

5. Conclusions

- 5.1. My conclusions are therefore as follows:

- 5.1.1. Until the work to form the access and build Mr and Mrs Noakes’ new home in 1973 began, the Disputed Land remained, by default, in the possession of the owner of the paper title, Sir Reuben Hunt.
- 5.1.2. At that point, however, the Applicant dispossessed Sir Reuben Hunt by flattening out the bank, grubbing up the hedge, planting a new hedge, creating a flower bed and thus incorporating the area at the top of the bank into his garden.



- 5.1.3. These acts to the level area above the steep bank down to the stream are sufficient in my judgment to warrant the conclusion that the Applicant was in the possession of the whole of the Disputed Land.
 - 5.1.4. After a continuous period of adverse possession of the Disputed Land by the Applicant, the Respondent's predecessors on title's title to the Disputed Land was extinguished.
 - 5.1.5. The first registration of the title to the land in 2013 was subject to the interest of the Applicant as a person in actual occupation of the Disputed Land.
 - 5.1.6. The Applicant is accordingly entitled, unless there are exceptional circumstances, to have the register altered so as to correct the mistaken inclusion of the Disputed Land within the Respondent's title and so to permit its inclusion within his title to 17 Church Hill.
 - 5.1.7. It has not been suggested that there are any exception circumstances in this case and I have no hesitation in concluding that there are not.
- 5.2. I shall therefore direct the Chief Land Registrar to give effect to the Applicant's applications as if the Respondent's objection had not been made.
- 5.3. So far as the costs of the reference are concerned, it is the usual order in Land Registration cases that the unsuccessful party should pay the successful party's costs and expenses associated with the reference. I shall therefore direct that if the parties cannot agree the matter between themselves, the Applicant should file and serve an itemised account of his costs and expenses, together with copies of the supporting vouchers, by 5 pm on 13 April 2018. If the Respondent wishes to contest its liability to pay costs in principle and/or the amount of the costs claimed I shall direct that it files and serves representations in that regard by 5 pm on 6 April 2018 thereafter.

ORDER

IT IS ORDERED THAT:

1. The Chief Land Registrar give effect to the Applicant's applications dated 29th March 2016 and 21st October 2016 as if the Respondent's objection had not been made.
2. The Applicant shall file and serve any application which he wishes to make for an order that the Respondent pay his costs and expenses of this reference, together with a detailed schedule of those costs and expenses and copies of the supporting vouchers by 5 pm on 13 April 2018.



3. If the Respondent wishes to contest its liability to pay the Applicant's costs and expenses and/or the amount of those costs and expenses it shall file and serve a statement of its reasons for doing so by 5 pm on 4 May 2018.
4. Thereafter, the Tribunal will proceed to determine the parties' entitlement to costs and expenses and to assess the amount of those costs and expenses.

Dated this Friday 16 March 2018

Max Thorowgood

BY ORDER OF THE TRIBUNAL



