

[2018] UKFTT 168 (PC)

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF/2017/0305

BETWEEN

1. Olatunde Ayodele Ladejobi
2. Matilda Iyabo Ladejobi

Applicants

and

1. Rafal Mamica
2. Katararzyna Zofie Mamica

Respondents

Property address: 5 and 7 Daleside Road, London SW16 6SN

Title numbers: SGL311070

Alfred Place

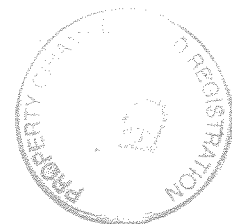
18th January 2018

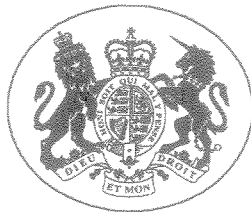
ORDER

The Tribunal directs the Chief land Registrar to give effect to the Applicants' DB application made on 21st October 2016.

BY ORDER OF THE TRIBUNAL

Sara Hargrave
1st February 2018





[2018] UKFTT 0168 (PC)

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18th January 2018

Before: Judge Hargreaves

Applicants' representation: Ben Doyle, direct access

Respondents' representation: in person

DECISION

Keywords – determined boundary dispute – differences between key transfer plans – transfer plans small scale – relevance and significance of topographical features at time of respective transfers – real dispute over line of boundary splitting passageway between houses – differences between experts

Cases cited

Pennock v Hodgson [2010] EWCA Civ 873

Kuligowski v Kenward [2003] EWCA Civ 1896

Gillon v Baxter [2003] EWCA Civ 1591

Cameron v Boggiano [2012] EWCA Civ 157

1. For the following reasons I am directing the Chief Land Registrar to give effect to the Applicants' DB application and therefore to determine the line of the boundary in accordance with the DB plan drawn by Woodalls on 2nd November 2016, which is at p34 of the trial bundle. That is to be preferred to the Respondent's plan prepared by 3sixty measurement in June 2017 at p84 of the bundle.

2. The properties at the heart of this dispute were originally owned by Wandsworth BC. The Applicants have owned 7 Daleside Road since August 1984 (p15-24). No. 5 was transferred by Wandsworth a few years earlier in 1980 (p25-30). They were originally modest 2 storey semi-detached properties, both of which have been extended, the Respondents' considerably so. No.5 and no.7 were and are separated by a passageway which has always provided access to the respective back gardens. It is comparatively narrow. It has never been split by any physical boundary because of that. Both properties had side passage access door and no.5 still does. Each property has a right of way to the rear garden over that part of the passage which they do not own.

3. I had the advantage of attending a site visit the afternoon before the hearing with Mr Ladejobi, his surveyor Mr Power, counsel Mr Doyle, and Mr Mamica. Having explained to Mr Mamica the potential difficulties if his surveyor Mr Jackson did not attend the hearing, he promptly telephoned him and arranged for him to attend. I wish to record my personal thanks to Mr Jackson for doing so at the very last minute, as his report was disclosed by Mr Mamica's previous solicitors in draft form, and he had not been asked to comment on Mr Power's report which he saw for the first time when giving evidence. So he was put in difficult position which he dealt with most professionally.

4. Similarly I am indebted to Mr Doyle; though I suspect he was instructed late in the day, he produced a helpful and reasoned skeleton argument which underlined the salient points of the Applicants' case in a constructive manner.
5. There are plenty of photographs in the trial bundles and there is no real need to describe the properties in any detail if those are taken into account: see for example p35-50, 181-187, 198, 200-204, 226-232, 246-256, 283-286, 319-342. Mr Ladejobi was an assiduous photographer during the more recent period of the boundary dispute, while the Respondents' building works were in progress. Were it not for the recent building works at no.5, the application might not have been made. Whilst I can understand Mr Mamica's wish to sort things out sensibly, and the fact that the DB line is rather closer to his house and rear extension and patio than he might have wished, the DB line trumps the new building works rather than the other way round. It is not possible to "retrofit" a legal boundary to suit physical changes.
6. The factual background is adequately set out in Mr Ladejobi's witness statement (p160), as amplified in his oral evidence, which was carefully given and which I accept. The critical part of his evidence (paragraph 7) is that the original boundary (posts still in existence, somewhat unusually: see further below) had disintegrated and after nearly 20 years of trying to persuade the owners and occupiers of no.5 to comply with their fence repairing covenants, had finally re-erected his own rear garden fence: see paragraphs 10-14. In oral evidence he clarified that he erected the garden fence which is plotted as existing on the DB plan, in 2003: after he had done so he spoke to Mr Shields, the Respondents' then landlord and predecessor in title and informed him and Mr Mamica that the fence had been erected within the boundary of no.7 to take into account the vigorous foliage on the Respondents' side. There is common ground that the vegetation at no.5 affected the line of the fence built by Mr Ladejobi and that is why he built the fence where he did. It is clear to me that from 1984 Mr Ladejobi made clear to all owners and occupiers of no.5 where he considered the correct boundary to be and that he had built his fence to keep out foxes, and to replace a boundary feature which had disintegrated to the point of ineffectiveness years previously. Moreover, he made it clear from 2003 that his fence was within the boundary line due to the practical difficulties of

erecting it on what he maintains is the boundary. Mr Mamica agrees that the fence is within the Applicants' boundary in the back garden, and more or less agrees with the DB line until it reaches the passageway. Where relevant, the oral evidence supports the Applicants' case.

7. The documents also support the Applicants' case. Starting with the file plan for SGL136077, Wandsworth's freehold title, (p151), the outline of no.7 includes, to the eye, the passageway. The transfer of no. 5 in 1980 (p25) refers to no.5 being "the property described above and edged red on the accompanying plan". Turning to the plan on p30 it again indicates that the boundary does not split the passageway in half. The plan is drawn to scale (1:1250) and the junction of the passageway with the access to the rear gardens of nos.5-7 is magnified. That magnified plan has been drawn carefully: it takes into account differences between the rear walls of the two properties depicted, and where the access actually was. The boundary line is clearly shown virtually against the wall of no.5. It is clearly of weighty and determinative evidential value as a matter of construction of the transfer. It undermines Mr Mamica's claim to own half the passageway.

8. It is notable that the plan attached to the transfer of no.7 in August 1984 is less than compelling on the face of it. Again the Applicants purchased the property "edged red on the accompanying plan". But the magnification of the part between nos.5-7 is inaccurate: the boundary features and access to the rear gardens as drawn are not the same as the 1980 drawing, factually incorrect on the basis of the description given by the Applicants and furthermore marked "not to scale". There is no "red" edging and therefore it is questionable whether (in contrast to the 1980 drawing) it was intended to demarcate the boundary. The two plans are different. The 1984 plan is carelessly prepared. Further, the 1984 magnification conflicts with the SGL136077 plan, which I consider is useful evidence, even if to a large scale and depicting general boundaries. The inclusion of the passageway within no.7 is clear on that plan. What the 1984 magnification does is (roughly) split the ownership of the passage down the middle, which supports Mr Mamica's case. What should have been done is to re-use the magnified section on the 1980 transfer.

9. As Mr Doyle submits, further, the DB line is based on critically important boundary features which existed in 1984. Mr Power's approach (and I agree) takes the plans and then considers, correctly, the weight of certain physical features.
10. Mr Doyle cited *Pennock v Hodgson*, *Kuligowski v Kenward*, *Gillon v Baxter* and *Cameron v Boggiano* in support of his case resting on Mr Power's report and DB line, ie taking the documentary evidence first, then supporting it with reference to important physical features to supplement small scale plans. His submissions are not contentious and in my judgment correct. It is not necessary in this case to explore the authorities in any detail, given the fact that the case really turns on identifiable differences in approach between the experts, and I prefer, for reasons set out below, Mr Power's conclusions.
11. That takes me to the respective expert reports. Mr Power for the Applicants (p233) had the distinct advantage in this case of having discovered point A on the DB plan ie the post at the rear of the garden, which lines up with the other original concrete posts at D and E, and runs through B-C. It is significant that Mr Jackson did not know about point A and his plan does not take it into account. Point A, together with the fact that Mr Mamica's predecessors erected a piece of fencing between B-C¹ which is on the straight line from A-E provides a solid start point for the DB line as drawn by Mr Power. The crux of his evidence is in his summary, paragraph 6 at p57. Taking a straight line to point G is not wildly inaccurate as argued by Mr Mamica and Mr Jackson: the evidence to support a split of the passageway does not exist, and if the passageway is included with the title to no.7, then point G makes perfect sense. It does not, as Mr Mamica sought to argue, have to exist as a physical point. To the eye, point G on site makes perfect sense in any event, were that strictly relevant. The DB line is consistent with the freehold title plan and the 1980 plan which is to be preferred to the 1984 plan.
12. Mr Jackson's report is at p277. He relied on the 1984 plan, not (in any detail) the 1980 plan or the freehold title plan. He says there are "no discrepancies" but that

¹ They appear to have given up replacing the fencing after installing one panel, but its location is significant for the Applicants' case

overlooks the differences to which I have alluded and the further fact that he did not know about point A, though he concluded that “it is essential that the remaining concrete posts within the garden of no.5 are not removed or disturbed and are used as the reference for any new or re-aligned fencing.” That would therefore include point A on his own analysis. But his rear garden point is not point A (as he confirmed) and that creates a difficulty for him: by selecting points C-D-E as determinative (equating to Mr Power’s E-D-C) he has drawn a line which bi-sects the passageway. That cannot be done using point A, which in my judgment should form part of the exercise. Furthermore, to achieve his line, he adopts some flexibility in relation to distances (albeit small) from his C-D-E points, and the existing fence panel (B-C on Mr Power’s plan) is not separately drawn on Mr Jackson’s plan. His exercise was really a “best fit” with a starting point being the middle of the passageway, a position which is inconsistent with some of the plans as outlined above. I bear in mind, further, that his report was heavily qualified as a draft which might require revision (p277) and as he said in evidence, he was really being asked to deal with issues arising from the building works. These points reflect some of Mr Doyle’s submissions at paragraph 21 of his skeleton argument which contains a correct summary of the issues with Mr Jackson’s evidence as they emerged in the experts’ oral evidence.

13. The experts gave evidence together, which was useful. It was a good example of professional courtesy working well and assisting the Tribunal. It is clear to me that Mr Jackson was proceeding to start with a presumption that the boundary split the passageway, and to find a line which fitted that. That is not actually necessary given the rights of way regime which applies. That was emphasised several times in his evidence, but of course is not evidenced by the 1980 transfer plan, which – in fact – contradicts a split as a starting point. Mr Power took point A and ran his DB line through the other original posts and produced a line which reflects the transfer plans as described.
14. Mr Mamica, who represented himself with confidence and clarity, rather based his approach on what was sensible now. But of course, the problem with his position, which is broadly to leave the back garden DB as drawn by Mr Power (though with a steer away from his new build extension), then jig to split the passageway

equally, is that absolutely nothing in any of the plans justifies anything other than a straight line between no.5 and no.7. Moreover, given that he has a right of way over the passage, the location of the boundary is not critical – one would hope that the arguments about protruding pipes do not develop further. His submissions were really a wish list, and the difficulties caused by Mr Power’s DB line being very close to no.5 are not a matter I can take into account – the boundary line was always closer to no.5 than no.7.

15. It follows that the Applicants succeed. The presumption in this Tribunal is that the successful party is awarded costs. If they wish to apply for the costs of the reference (those incurred since 20th March 2017 only), they should apply with an outline of the costs claimed in Form N260 by 5pm 20th February. The Respondents have until 5pm 9th March to file and serve a response. I will deal with costs after that.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves
Dated 1st February 2018

