



[2018] UKFTT 321 (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 2017/0109  
BETWEEN**

**ZAFAR MAJID**

**Applicant**

**and**

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**Respondent**

**Property Address: Land to the northwest side of Adderley Street, Birmingham**

**Title number: MM46049**

**Before: Judge McAllister  
Sitting at Alfred Place, London  
23 February 2018**

**Representation: The Applicant appeared in person; Rahul Varma of Counsel instructed by Addleshaw Goddard appeared for the Respondent.**

## **DECISION**

### **Introduction**

1. The Respondent ('Network Rail') is the registered proprietor of an area of land ('the Land') which lies between railway arches to the north ('the Arches'), also owned by Network Rail, and property owned by the Applicant, Mr Majid, (namely, 162-164 High Street, Deritend, Birmingham ('162-164')). 162-164 is now known as the

Digbeth Court Business Centre. Mr Majid became the registered owner of 162-164 on 6 April 2009. His property is registered with title number WM309383.

2. The Land is roughly rectangular in shape, with an additional 'spur' running westwards, parallel to the railway. The Land measures approximately 77 square metres. To the west of the Land is a car park, owned by Alphataik, (a company also owned, I am told, by Mr Majid) which was formerly a petrol station. This area of land is open to the High Street. To the rear of 164 is an area of land which forms part of title WM950800. Access to the Land is from the west, through gates onto the car park, (enclosing also part of WM950800) and from the side entrance to 162-164. For the remainder of this judgment, I will refer to the Land without the western 'spur' as the Yard.
3. The Land was first registered on 24 December 2014 with title MM46049 in Network Rail's name. The dispute between the parties as to the ownership of the Land had already arisen, and Mr Majid feels aggrieved that National Rail stated in their application for first registration that they knew of no other rights, interests or claims to the Land and that they alone were in actual possession of the Land. This latter assertion, on any basis, is incorrect. Mr Majid was plainly in occupation of the Land by 2014 and had already instructed, he says, his solicitors to claim title to it.
4. The Arches have been let for a number of years to Contract Powder Coating Limited ('CPCL') by Railtrack and then by Network Rail. The first lease to CPCL is dated 4 July 2001. CPCL have occupied the same arches since that date. Before CPCL the Arches were occupied by Hunter Brothers who used the premises for the same purposes, and had done so since the 1970s.
5. The area demised by the leases to CPCL includes the Land. There is a factual dispute as to whether it has ever been possible to gain access to the Land from the Arches. The main access to the Arches is from Adderley Street.
6. By an application dated 7 July 2016 Mr Majid applied to close the title to the Land on the ground that he and his predecessors in title were and had been in adverse possession of the Land for more than 12 years before the application (by Network

Rail) for first registration. The registration of the Land in the name of Network Rail is accordingly, on his case, a mistake for the purposes of paragraph 5 of Schedule 4. Network Rail objected to this application on a number of grounds set out in a detailed letter dated 14 October 2016.

7. For the reasons set out below I find that:

- (1) Mr Majid's predecessors in title acquired title by adverse possession of the Yard (there is no evidence that adverse possession was taken of 'the spur');
- (2) On Mr Ajaib's bankruptcy the Yard vested in his trustee;
- (2) However, by operation of section 11(4) of the Land Registration Act 2002, on first registration, Network Rail would have taken free of the trustee's interest, as Network Rail had no notice of the trustee's interest (if, indeed, the trustee himself was aware of such an interest);
- (3) Mr Majid cannot show that he has acquired title by adverse possession in his own right;
- (4) The application by Mr Majid will therefore be cancelled.

### **The topography of the Land**

8. Access to the Land, and the physical features surrounding the Land, have changed over the years. I will deal with the evidence in more detail below, but the following is of significance. First, between 1904 and 1979 Great Western Railway and their successors enjoyed a right of way ('the Right of Way') from the High Street through 162-3 to the railway (and therefore to the Yard); secondly, it remained possible to use the Right of Way (which was wide enough for cars and some lorries) until 2009; thirdly, until probably 2006, there was a wall adjacent to the railway arch, which joined another, perpendicular, wall dividing the Yard from the land to the west, creating a passageway (or spur, as I have described it) which gave access on foot to the Land; fourthly, the perpendicular wall was demolished and the wall adjacent to the railway was extended eastwards to meet the rear of Number 161. Gates were erected enclosing both the land to the rear of Number 164 and the Yard. At this point the Yard became wholly enclosed, with access from the west through the gates, and by means of the Right of Way, albeit that the exit point was narrowed to a door only.

9. Finally, a new fire door was created in the wall of the Arches in 2010. There is an issue as to whether the tenants of the Arches had access to the Land or any part of it before a new fire exit door was created in 2010.

### **Conveyancing history and evidence**

10. Network Rail derives its title to the Land from a conveyance dated 22 July 1904 whereby land, including the Land, was conveyed to Great Western Railway Company.
11. The 1904 Conveyance granted GWRC *'full free right of access for the Company their workmen servants and tenants with or without horses and carts at all times hereafter and for all purposes to pass and repass over the pieces of land marked 'Right of Way' on the said Plan from and to the High Street, Deridend to and from the pieces of land herein before described...'*
12. The plan shows the Right of Way between 164 and what became the Post Office at 163.
13. The charges register of title WM309383 (Mr Majid's title) includes an entry referring to a conveyance dated 24 March 1927 between the Lycett Saddle and Motor Accessories Company Limited and Frank Henry Poutney which included a reference to the Right of Way, describing this as going from the High Street to the railway at the rear of the property.
14. By a deed of release dated 1 March 1979 British Railway Board, as successors in title to GWRC, released the Right of Way in consideration of the sum of £450. There are two plans attached to the deed of release. One is the plan attached to a conveyance dated 24 March 1927. The other is a British Rail Board plan dated 4 December 1978. This plan shows the Right of Way running to the Land, and shows the wall to the west of the Land, and the further wall at right angles running westwards. Vehicular access to the Yard at this point could only have been by means of the Right of Way, although access on foot was possible. Google Earth photographs taken in December 2001 (and in the following years, though not so clearly, until 2006) shows the same walls in the

same position, and indeed the line of the walls is also noted on the ordnance survey map used for the title plan to 162-164.

15. I am satisfied that the physical right of way between the High Street and the Land was still in place in 2009 and was removed by Mr Majid in the course of carrying out extensive works of renovation to 162-16. By 2009 the access onto the Land from the back of 162-164 had been reduced to the width of a door. The new brickwork on both sides of the door, visible in the photographs, seems to me to represent the width of the original Right of Way. I have seen a photograph of the right of way taken shortly before Mr Majid undertook extensive works of renovation to his property. It is plainly wide enough to allow vehicular access to the Land. It was a covered access way. What appears to be a covered area can also be seen in the Google Earth photograph taken in December 2001 and other photographs.
16. There is no written evidence regarding the ownership or use of 162-164 beyond what I have referred to above, and the only oral evidence was from Mr Majid. I have however seen statutory declarations from the occupiers of 162-164 between 1987 to 2004.
17. Tariq Khan ran his business, Midland Catering Co, from 162-164, between 1987 and 1993 as the tenant, it seems, of a Mr Wiseman. Mr Khan made two statutory declarations. In the first, dated March 2012, he stated that he used the 'rear courtyard' for loading and unloading catering equipment and parking of vehicles. Access to the 'rear courtyard' was from the western side on foot and with vehicles and from the rear of 162-164. He had exclusive use of this land, and believed that it formed part of 162-164.
18. In April 2017 he made a further statutory declaration in which he repeated that during his tenure he had full possession, occupation and exclusive use of the rear courtyard without any permission or interference from Network Rail. He also stated that there was a door from the rear gable wall on the ground floor of the building opening directly onto this land which gave him constant exclusive access. He did not attend the hearing because, I was told, he has restricted mobility and too ill.

19. Mr Mazher Hussain Qureshi occupied 162-164 as a tenant from 1993 to 2004, running a business known as A-Z Catering. He also made two statutory declarations. In the first, also dated March 2012, he deposed to the fact that he drove over the open land to the west, used as a petrol forecourt, to gain access to the rear courtyard both to load and unload and to park their vehicles. In addition, there was a side door giving onto the open land, and a door at the rear of 162-164 which gave directly onto this land. Mr Quareshi also confirmed that he had exclusive use of the rear courtyard. In his second statutory declaration, dated April 2017, he repeated his earlier evidence, and also referred to the access from the back of the ground floor at 162-164. I am told that he is in his 90s and too old to attend court.
  
20. The two statutory declarations dated March 2012 were obtained, I am told, in connection with an earlier dispute between Mr Majid and Esso Petroleum. I have referred above to the area of land behind No 164 where vehicles could have parked (part of title WM950800). (Esso also provided, I am told, Mr Majid with some of the photographs. Other photographs, and particularly the one showing a shed with a corrugated roof (referred to below) were obtained from Birmingham City Council.)
  
21. In so far as Mr Khan and Mr Quareshi claim to have had vehicular access to and from the Yard for loading, unloading and parking from the land to the west, this evidence cannot stand, in my judgment, with the 1978 plan or the 2001 and other Google Earth photographs. I also do not see that they would have had any reason to use the 'spur' running westwards which, at one stage, was part of a passageway leading to Adderley Street, a road running at right angles to the High Street. But both deposed to the fact that they also gained access from the rear of 162-164 and thereby gave them, together with the other means of access, constant exclusive access to all the land at the rear, including the Yard.
  
22. In November 2003 Mr Mohammed Ajaib became the registered owner of 162-164. He remained there until 2008. It is Network Rail's case that it was (only) in 2006/2007 that Mr Ajaib erected gates giving vehicular access to the Yard. Mr Majid accepts that the gates were erected by Mr Ajaib.

23. Mr Ajaib was declared bankrupt in November 2008. On 19 March 2009 Clydesdale Bank Limited (Mr Ajaib's mortgagee) sold 162-164 to Mr Majid. The sale was made, in the usual way, in exercise of the power of sale conferred by the charge.
24. Mr Majid's evidence is that, when he took over 162-164, the Yard was enclosed and was exclusively used by him. Shortly having buying his property Mr Majid began a programme of extensive refurbishment to the property and to the Land. The wall running parallel to the Arches was removed and block paving laid over the Land and the area behind No 164. There are a number of photographs showing the work in progress. It seems to me clear, from these photographs, that the eastern part of the wall parallel to the Arches, which is made of breeze blocks, was of more recent origin than the western part. It is also clear that the passageway had been blocked off at the eastern end of the Land for a number of years.
25. It was at this point, on Mr Majid's evidence, that the tenants of the Arches asked for and were granted permission to create a fire escape from their premises to the Yard. There is now a door in the southern wall of the Arches. Up to that date, on his case, there was no access from the Arches onto the Land. Mr Majid's evidence is that there were three openings in the Arches wall, all of which were blocked up and inaccessible, and all in any event too small to be used as a fire exit. He relied on a number of photographs to this effect, also pointing out the presence of a gas pipe (now partially removed) which would have made it impossible for a door to be along that wall.
26. Mr Majid also removed the door from the rear of 162-164 which gave onto the Yard and replaced this with a side door.
27. Another photograph relied on by Mr Majid shows what appears to be a tin roofed structure behind 162-164 occupying part of the Yard: on his case this was demolished and replaced with the breeze block wall. There is no date on this photograph.
28. CPLC is owned by Clem Emdeade who previously worked for Hunter Brothers, the then tenants of the Arches. The first lease of the Arches which I have seen is dated 4 July 2001, as stated above. The main access to the Arches is from Adderley Street, although this is not shown on the lease plan. I have also seen an undated factory floor

plan (headed Hunter Bros) which shows a 'main rear fire exit'. This exit, on the plan, gives onto the Land in the north west corner. Mr Majid's evidence, by reference to the photographic evidence, is that this exit was in fact a caged up vent.

29. I heard evidence from Mr Emdeade's daughter, Faye. She began working in the Arches in 2001 when she was 16, as a packer. Her evidence is that the workers in CPCL used the Land as a place to smoke by going through the emergency door. She also stated that the wall separating the Yard from the open area to the west was in place until 2006 when, presumably, Mr Aijab replaced the wall with gates.
30. Pressed on the position of the fire exit she located it by reference to one of the photographs as being one of the three openings, the one further to the east. This location does not appear to match the location of the emergency door on the Hunter's plan, and Ms Emdeade's evidence as to the location of the door was not entirely clear. Her evidence was that fire door was opened at the beginning of the day to allow some air into the building. There are three ovens working at 190 degrees. The exit was used as a quick way to get to the High Street. The door, she said, was not a normal height door, but was more like a stable door. It could only be opened from the inside, and there was a block to step down.
31. Ms Emdeade's evidence is that it was also possible to step over the wall running parallel to the Arches. The wall was increased in height in about 2007, and a new breeze block section built. Her evidence on this point clearly conflicts with the Google Earth photographs. It seems to me plain that the wall adjacent to the Arches was never low enough to be climbed over. I also do not accept her evidence as to the existence of a door prior to 2010: this evidence is entirely at odds with the photographic evidence. The wall of the Arches has not, plainly, been altered for many years. At most, it may have been possible to open one of the vents to allow air to enter, and it may, just, have been possible to escape from one of these in the case of an emergency.

### **Adverse possession**



32. As is well known in order to establish title by adverse possession the squatter must be able to establish that he or she has been in possession for the requisite period of time. There are two elements necessary for legal possession: first, a sufficient degree of physical custody and control, and second an intention to exercise such custody and control on one's own behalf and for one's own benefit (see *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.)
33. If a squatter takes effective occupation or control, the fact that the owner (or the owner's tenant) enters on the land but does not deprive the squatter of such control, the squatter remains in possession. The same applies if the true owner makes some use based on a statutory or limited right. The test for factual possession is whether, in all the circumstances of the case, and having regard in particular to the nature of the land and the way in which such land is commonly used or enjoyed, the person claiming possession has used it in the way an owner would have done, and no one else has done so.
34. The necessary intention is an intention, in one's name and one's behalf, to exclude the world at large, including the paper owner, so as far as practicable. It is not necessary to show an intention to own, but merely to possess ( see *Powell v McFarlane* (1977) 38 P&CR 452 at 471-2). Again, it is important to note that the intention is to exclude the whole world from control of the land, not from use. There are a number of cases where the true owner has some limited use of the land, but the squatter has been held to have been in possession (see *Adverse Possession*, 2nd Ed, Jordan and Radley-Gardner, at 7-51ff).

### **Conclusions on the evidence**

35. In my judgments, the following facts emerge from the totality of the evidence:
- (1) The Right of Way for very many years led to the Land and no where else;
  - (2) Until probably 2006 or thereabouts, the only vehicular access to the Yard was through the Right of Way;
  - (3) Although it is regrettable that no oral evidence was given by the previous occupiers of 162-164, and although their first statutory declarations dealt

mainly with the area of land behind 164, I am satisfied, having regard in particular to the nature of the Yard and access to it, that the Yard was exclusively occupied by the various occupiers of 162-164 from at least 1987 onwards, if not from 1979 (when Network Rail's predecessor entered into the deed of release), or even earlier. The perpendicular wall formed a natural boundary wall.

- (4) The only other means of access to the Land (before the erection of the gates and the extension of the wall adjacent to the Arches) was through the pedestrian passageway parallel to the Arches. This passageway was blocked off at some point at the eastern end.
- (5) None of the photographic evidence supports the existence of a fire door in the wall of the Arches. To the contrary, it is plain that no such door existed when any of the photographs were taken, and given various other factors (such as the existence of the gas pipe on the wall) it is very hard indeed to see when such a door could have been in use. At most, there may have been an opening which could, in an emergency, have been used as a means of escape.
- (6) The wall adjacent to the wall of the Arches was never low enough, in my judgment, for someone to have stepped over it;
- (7) In any event, even if some limited access was possible from the Arches onto the Land, this occasional use would not have been sufficient, in my judgment to prevent adverse possession of the Yard being taken;
- (8) The fact that the Land is part of the land demised to CPLC does not in any way prevent adverse possession being acquired of the Yard;
- (9) The Yard formed a convenient extension to 162-164. This can be plainly seen in the photographs. No-one, other than the occupiers of 162-164, would have made any use of this land. For the reasons stated above, I do not accept that the tenants of the Arches ever made any use of the Yard. Different considerations apply to the western 'spur'. This small area of land would have been of little use to the occupiers of 162-164, and at most pedestrian access was gained through this passageway to the Yard.

### **The effect of Mr Ajaib's bankruptcy.**

36. Mr Ajaib was declared bankrupt in November 2008. There is no dispute but that his estate vested in the trustee in bankruptcy (see section 306 of the Insolvency Act 1986). If, as I find, the paper owner's title to the Yard was barred by 2008, the Yard vested in the trustee. It is the Yard which vests, not, as Mr Varma submitted, the cause of action to enable the trustee to make a claim for adverse possession.
37. The Yard remained vested in the trustee. It was not sold to Mr Majid by Clydesdale Bank since they could only sell that which was comprised in their security. Mr Majid cannot make a claim to adverse possession in his own right, since he has not been in possession for 12 or even 10 years.
38. On this analysis, M Majid's application to close Network Rail's title would have succeeded, albeit that he could not have claimed title in his own right by adverse possession.

### **The effect of first registration**

39. Section 11(4) of the Land Registration Act 2002 provides that, on first registration of a freehold estate, the estate is vested in the proprietor subject only to certain specified interests affecting the estate at the time of the registration. Section 11(4) (c) provides that one of these interests is an interest acquired under the Limitation Act 1980 of which the proprietor had notice.
40. There is no doubt that Network Rail were aware of Mr Majid's occupation, and his claim to be entitled to the Land. I have seen correspondence between Network Rail's solicitors in 2014 asking for evidence of Mr Majid's claim to ownership. But Mr Majid had not acquired any rights under the Limitation Act 1980, even though he was in possession at the time of first registration. Network Rail were not on notice of any claim to adverse possession by Mr Ajaib's trustee, since none was made. The net effect is that, by virtue of section 11(4), Network Rail take free of any claim for adverse possession.

41. Notwithstanding some criticism of section 11(4(c) (see Law Com CP No 227, para 17.58 and see *New Perspectives on Land Registration*, Goymor, Watterson and Dixon 2018, pages 79-82 and 327-328) and the argument advanced that Schedule 4 might nonetheless be available to a squatter who has barred title and is in possession at the time of first registration, the section clearly applies in a case such as this, where, as I have said, the Yard vested in someone other than the applicant, and the proprietor was not on notice of any claim. Title to the Land remains vested, by virtue of this provision, in Network Rail.

### Conclusion

42. I will accordingly order the Chief Land Registrar to cancel the application. Network Rail, as the successful party, are entitled in principle to their costs. A schedule in Form N260 or the like is to be filed with the Tribunal and served on Mr Majid by 20 April 2018. Mr Majid may respond within 14 days. I will thereafter consider what order to make.

BY ORDER OF THE TRIBUNAL

*Ann McAllister*

Dated this 6<sup>th</sup> day of April 2018.

