



[2019] UKFTT 0115 (PC)

REF/2018/0498

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

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

BETWEEN

(1) BERNARD BARTON
(2) CHRISTINE BARTON

Applicants

- and -

DAVID MICHAEL FOX

Respondent

Property Addresses:

- (1) 5/9 Hadfield Place, Glossop, Derbyshire SK13 8JE
- (2) 11 Hadfield Place, Glossop, Derbyshire SK13 8JE

Title Numbers:

- (1) DY271598 - Freehold
- (2) DY513346 - Leasehold

Site visit: 15 January 2019

Hearing date: 16 January 2019

Hearing venue: Alexandra House, The Parsonage, Manchester

SUBSTANTIVE ORDER
with reasons

UPON HEARING Mr David Gilchrist, counsel for the Applicants, and Mr Sean McNally, lay representative for the Respondent

IT IS ORDERED THAT

1. The Chief Land Registrar is directed to allow the Applicants' application to the following extent:

- a. The Applicants' leasehold title (number DY513346) shall be altered so as to include, within the demise of the lease dated 29 April 1854, so much of the Pink Land which is above the roofing over the passageway constructed pursuant to the terms of the said lease. The Pink Land is the land coloured pink on the plan attached to the Form B95 Notice of Application sent by HM Land Registry to the Respondent.
 - b. It shall be noted on the Respondent's freehold title (number DY271598) that the Respondent's title is subject to the said lease dated 29 April 1854, to the extent of so much of the Pink Land which is above the roofing over the passageway constructed pursuant to the terms of the said lease.
 - c. For the avoidance of doubt, no alteration shall be made in respect of this application, to the Applicants' freehold title (number DY513259).
2. There shall be no order as to costs.

REASONS FOR ORDER

3. I gave detailed reasons for the above order orally at the hearing before the parties and their representatives. My reasons were as follows.

Substantive Order

4. It became clear from the opening statements of the parties' representatives that one of the positions taken by the Applicants' and the essence of the Respondent's position were the same in principle: namely, it was common ground between the parties that the Applicant's leasehold interest included the extension space above the passageway and that it would be right for that to be noted on the register appropriately. It was also common ground that the Applicants had no claim to a leasehold or freehold interest in the passageway itself. The only differences between the parties seemed to be that:
5. The Applicants were proposing an alternative case that a flying freehold interest in the extension space had accrued to their title by adverse possession, in the event that the extension space was not part of the demise on a true construction of the 1854 lease.

6. The Respondent was seeking an order that any note on the register of the Applicants' leasehold interest to the extension space would also state that the leasehold was subject to a number of specified conditions and covenants.
7. In addition, up to the date of the hearing, the Respondent said that he opposed any claim by the Applicants for a flying freehold by adverse possession and was still unsure whether the Applicants were trying to obtain some kind of title to the passageway itself.
8. Shortly after the start of the hearing the parties agreed in open court that:
 - a. the extension space fell within the demise of the 1854 Lease (and therefore the adverse possession claim to a flying freehold did not arise)
 - b. the Applicants had no claim to the passageway below the extension space; and
 - c. the register did not need to specify any covenants of the 1854 lease.
9. Following that, it became clear that there was no live dispute between the parties on any relevant issue and it was simply a matter of drafting an order which would have the effect of accurately recording the parties' common position on the register. The parties agreed that the substantive order made above would achieve that. I therefore decided to make that order

Costs

10. The Applicants applied for an order for payment of all of their costs (in the sum of about £18,000) by summary assessment on the grounds that the Applicants' application had been allowed (at least in part) and that the Respondent's unreasonable conduct of the litigation had caused the Applicants unreasonably to incur costs.
11. The Respondent's submission was that there should be no order as to costs to reflect the fact that the Respondent could not take a position until receiving a copy of the 1854 Lease for the first time in July 2018 and that there should be no apportionment of blame between the parties for the failure to settle the matter any earlier.
12. There were potentially three matters for me to decide under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"):
 - 1.1. Whether to make a costs order at all, and if so in what proportion;

1.2. If so, on what basis and by what method to assess any such costs;

1.3. If summary assessment is appropriate, then in what amount.

In the event, it was not necessary for me to address the second and third of those questions.

13. I decided that each party should bear their own costs for the following reasons. The conclusion reached at the hearing should have been reached by the parties themselves many months earlier and possibly even before the matter was referred to this Tribunal. This was a case in which it was not necessary for either of the parties to make any actual concessions in order to reach a solution. All it took was for them to apply their minds to the primary issue to realise that they were essentially saying the same thing. The reason why they did not do so was a combination of the following features of the case:
14. The Applicants' original application to HM Land Registry was for the removal of all of the pink land (including the passageway itself) from the Respondent's freehold title. No part of that application has succeeded in that form and (to the extent that it was seeking any kind of title to the passageway) that application was entirely unjustifiable. The Respondent was therefore entitled to object to the original application.
15. Despite the fact that the Applicants appear to have been willing to withdraw their claim to title of the passageway, the Applicants correspondence between December 2017 and July 2018 on that issue was confusing and ambiguous. At no point did the Applicants' solicitors clearly and prominently state that the claim to land below the extension space was unconditionally withdrawn. This would have been especially important in a case, such as here, where the Respondent is not legally represented and so it is all the more important that the Applicants' solicitors spell out their position clearly and in jargon-free language.
16. The Applicants' Statement of Case of July 2018, at paragraph 17, made a clearer statement that the Applicants were not seeking title to the ground-level passageway, but raised for the first time a claim based on adverse possession to a flying freehold of the extension space. The Respondent was entitled to defend that claim.
17. The Applicants finally made an open offer to the Respondent on 5 October 2018 which invited consent to an entry noting the Applicants' leasehold title to the Pink Land. Unfortunately that offer did not make it clear that it was only the part of the

pink land above the passageway which would be the subject of the proposed registration.

18. The Respondent's representative said that he thought that this signalled the return of the Applicants' claim to the whole of the pink land. It was that offer which prompted the Respondent's request (mentioned above) for the insertion of a list of covenants and conditions. The Respondent's representative said in open court that the request for a list of covenants was merely a bargaining ploy.
19. The Applicants clarified their offer by a without prejudice offer in November 2018, restricting their claim only to the extension space above the passageway, but this time asking for a sum of £2,995 in respect of their costs. The Respondent did not accept that offer and the matter did not progress until the hearing of the case before me.
20. The Respondent's conduct of this matter has also not been helpful towards resolving the dispute. At no point did the Respondent simply and realistically set out what he was prepared to have registered against his title. He was engaged in a lot of aggressive point scoring in correspondence.
21. In my judgment, both parties are to blame for this catalogue of missed opportunities failure to apply their minds to the core issues in this case which were easily resolvable. In the exercise of my discretion and balancing up as best I can the criteria set out in the Costs Practice Direction for this Tribunal, I have decided that the most appropriate order would be for each side to bear their own costs and I therefore make no order as to costs.

Dated this 16th day of January 2019

Timothy Cowen

BY ORDER OF THE TRIBUNAL

