

[2019] UKFTT 0376 (PC)

REF/ 2017/1161

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) ERIC JAMES GURNEY
(2) AUDREY ANNE GURNEY
(3) STUART MALCOLM GURNEY

APPLICANTS

and

(1) GRAEME THOMAS HODSON & MELANIE HODSON
(2) RONALD MALCOLM HANCOCK AND Mrs HANCOCK
(3) PAUL ANDREW INNIS HARRISON & KATHERINE HARRISON
(4) PHILIP ROGER PERKINS GOERGE & FINULA GEORGE
(5) GRAHAM EVANS LEE & LOUISE LEE
(6) RODNEY JACK LEETE & MARILYN LEETE
(7) JOHN OSWALD HARE & CAROL HARE

RESPONDENTS

Property Address: Land at the South side of Ashwell Street, Ashwell and Land lying to
the South of Ashwell Street, Ashwell, Baldock

Title Number: HD254149 & HD427283

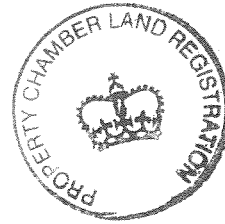
ORDER

The Tribunal orders that the Chief Land Registrar do give effect to the application of the Applicants dated 2nd August 2017 to alter the registers of title numbers HD254149 and HD427283 to include an entry showing land in both titles to have the benefit of a right of way

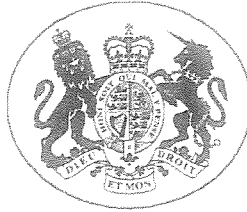
over the adjoining unregistered road known as Ashwell Street as if the objections of the Respondents thereto had not been made.

Dated this 24th day of May 2019

Michael Michell



BY ORDER OF THE TRIBUNAL



[2019] UKFTT 0376 (PC)

REF 2017/1161

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

- (1) ERIC JAMES GURNEY
- (2) AUDREY ANNE GURNEY
- (3) STUART MALCOLM GURNEY

APPLICANT

and

- (1) GRAEME THOMAS HODSON & MELANIE HODSON
- (2) RONALD MALCOLM HANCOCK AND Mrs HANCOCK
- (3) PAUL ANDREW INNIS HARRISON & KATHERINE HARRISON
- (4) PHILIP ROGER PERKINS GOERGE & FINULA GEORGE
- (5) GRAHAM EVANS LEE & LOUISE LEE
- (6) RODNEY JACK LEETE & MARILYN LEETE
- (7) JOHN OSWALD HARE & CAROL HARE

RESPONDENTS

Property Address: Land at the South side of Ashwell Street, Ashwell and Land lying to
the South of Ashwell Street, Ashwell, Baldock

Title Number: HD254149 & HD427283

Before: Judge Michell

Sitting at: 10 Alfred Place, London

On: 29th January 2019

Applicant Representation: Mr Edward Denehan, counsel, instructed by BBW Law LLP
Respondent Representation: In person

DECISION

Cases referred to

Gotobed v. Pridmore (1971) E(G 759

Tehidy Minerals Ltd v. Norman [1971] 2 QB 528

Benn v Hardinge (1992) 66 P&CR 246

Williams and another v. Sandy Lane (Chester) Ltd. [2006] EWCA Civ 1738

Westminster City Council v. Dwyer [2014] 2 EGLR 5

1. The Applicants are the registered proprietors of title number HD254149 and HD427283. They have applied to HM Land Registry to alter the registers of those titles to include an entry showing the land in title HD254149 and part of the land in HD427283 (“the Application Land”) as having the benefit of a right of way over the adjoining unregistered road called Ashwell Street. The Respondents are registered proprietors of titles adjoining Ashwell Street and the nearby Claybush Road. They have objected to the application on the ground that the right of way has been extinguished.

2. I inspected the site on the afternoon before the hearing. I was accompanied by counsel and the solicitor for the Applicants and by a number of the Respondents. The relevant part of Ashwell Street is an unadopted road leading off a highway, also known as Ashwell Street. The unadopted road is a cul-de-sac running west to east and providing access to 45, 47, 51, 53, 55, 57 and 59 Ashwell Street. There is no 49 Ashwell Street. The numbered houses are all on the south side of Ashwell Street. The registered proprietors of numbers 47 to 59 Ashwell Street are

47 – Mr and Mrs Hodson, the First Respondents;

51 – Mr and Mrs Hancock, the Second Respondents;

53 - Mr and Mrs Leete, the Sixth Respondents;

55 – Mr and Mrs Harrison, the Third Respondents;

57 – Mr and Mrs George, the Fourth Respondents; and

59 – Mr and Mrs Lee, the Fifth Respondents.

Between 47 and 51 Ashwell Street there is a strip of land running south from Ashwell Street (“the Track”). The Track provides a physical means of access to both 47 and 51 Ashwell Street. The Track is open to Ashwell Street at its northern end and at its southern end adjoins a field being OS enclosure number 7824 (“the Field”). The Field adjoins the Track and numbers 41 to 57 Ashwell Street to the north and houses numbered 4 to 14 Claybush Road on its eastern side. Part of the Field is a narrow piece of land running between the southern boundary of 14 Claybush Road and the northern boundary of the site of a pumping station.

Adjoining to the north 14 Claybush Road is a house known as 12 Claybush Road, which is owned by the Seventh Respondents, Mr and Mrs Hare. The narrow piece of land adjoins at its eastern end Claybush Road. This area was referred to in proceedings as “the Claybush Road access”. The Track is registered under title number HD254149. The Field is registered under title number HD427283. The only means of getting between the public highway and the Field without going through the gardens of private houses or through other fields are via the Claybush Road access or over the Track and over Ashwell Street.

3. The land in title numbers HD254149 and HD427283 and the sites of the houses in Ashwell Street and in Claybush Road were once part of a common in respect of which an Enclosure Award was made in 1863. By the Award a number of allotments were made. Allotments numbered 249, 250, 253 and 285 were of areas which now together make up part of the Field.

4. The Enclosure Award includes the following provision

“And I further declare that I have set out and appointed and do hereby set out and appoint the following private Carriage and Occupation Roads that is to say

....

One other private Carriage and Occupation Road of the width of Twenty feet and numbered 251 on the said Map commencing at a point marked N in the Ashwell Street way at the North end of allotment numbered 249 and extending thence in a Southwestwardly direction to and terminating at the Northwest corner of old Inclosure numbered 2845 at the point marked O on the said Map which said Road is set out for the use of the persons interested for the time being in the allotments numbered 249, 250, 252 and 253 and the old Inclosure numbered 285

And I direct and appoint that the said private Carriage and Occupation Road shall for ever hereafter be maintained and repaved by the Owners and proprietors of the allotments numbered 249, 250, 252 and 253 and the old Inclosure numbered 285 in the proportions in which such allotments and old Inclosure are rated to the relief of the poor”.

5. The First to Sixth Respondents’ houses have been built on land that was part of allotments 249, 250 and 285. The Track was part of allotment 250.

6. The Enclosure Award contains a schedule setting out in alphabetical order the names of the persons to whom land was allotted and against each name, the allotment numbers allotted to them, the area of the allotment, the fences to be made and maintained by the owner, the tenure under which the allotment was to be held, and details of the lands and rights in respect of which claims were made and allotments allowed, with the areas of those lands and the tenure under which they had been held. The areas in each case are given as acres, roods and perches. The Respondent, Mr Lee mistakenly read these measurements as being monetary amounts in pounds, shillings and pence.

7. (1) Allotment 252 was of an area to the north of Ashwell Road and was allotted to Mr John Bailey junior.
(2) Allotment 253 was allotted to Mr Thomas Chapman senior. It had an area of 24 acres, 2 roods and 2 perches including the area of roadway 251. Tenure was freehold.
(3) Allotments 249 and 250 were both allotted to Mr William Kitchiner. Allotment 250 had an area of 2 acres, 1 rood and 34 perches. Allotment 249 had an area of 3 roods and twenty perches. Mr Kitchiner was required to fence the east and north sides of the allotments. The north side bordered the occupation road 251, now Ashwell Street. The tenure of both allotments was freehold.
(4) Allotment 285 was made to Mr Thomas Langley as purchaser from William Bray. The area was one rood and thirty six perches. Mr Langley was required to fence the north and south boundaries. The tenure was freehold.

8. Allotments 249 and 250 together with an arable field of 5 acres were conveyed to Frederick John Bailey by an Indenture dated 29th September 1900.

9. On 14th August 1939 John William Bailey conveyed to Bertram John Gurney the land which is now the Field, the Track and the sites of 51 to 57 Ashwell Street. By clause 2 of the conveyance and paragraph 2 of the schedule thereto, Mr Gurney, as purchaser covenanted for the benefit of the owners and occupiers from time to time of the adjoining or neighbouring land of Mr Bailey, the vendor, in the following terms
“The Purchaser shall forthwith erect and for ever hereafter maintain a good and substantial fence not less than four feet in height on the side of the said land marked “T” within the boundary on the said plan”.

The only “T” mark within the boundary of the land conveyed is on the boundary between 14 Claybush Road and the Claybush Road access.

10. On 21st May 1947 Bertram John Gurney conveyed to William Searle land adjoining and to the south of 47 Ashwell Street, the Strip and 51 Ashwell Street. The conveyance included a covenant by Mr Searle to “forthwith erect and forever maintain a good and sufficient post and wire fence not less than 4 feet in height along the boundary between ...” the land conveyed and 47 and 51 Ashwell Street and the Track.
11. On 4th February 1975 Gladys May Gurney conveyed to Mr and Mrs Cromey-Hawke 51 Ashwell Street. The purchasers covenanted to fence the north-eastern boundary of 51 Ashwell Street, being the boundary with the Track.
12. 47 Ashwell Street was conveyed by a conveyance dated 16th September 1988 made between Norman John Gurney and Eric James Gurney to Mr and Mrs Embury. By this conveyance there was granted for the benefit of number 47: (1) a right to pass and re-pass over and upon part of the Track with or without vehicles of any description for all purposes connected with the use and enjoyment of number 47, and (2) a right to enter upon part of the Track for the purpose only of tending the hedge or other boundary structure that may from time to time separate the relevant part of the Track from number 47.
13. That part of the Track burdened by the right described in (1) in the preceding paragraph is tinted brown on the title plan of title number HD 252575 and that part burdened by the right described at (2) in the preceding paragraph is tinted blue on the title plan of title number HD 252575.
14. Entry 2 in the property register of title number HD 252575 was made on 10 May 2000 and it records that number 47 has the benefit of “a right of way over the roadway tinted yellow on the filed plan leading into Ashwell Street”. The land tinted yellow on the filed plan of number 47 is that part of Ashwell Street that runs from the public highway to a point at the boundary between the Track and number 51 and a small part of the public highway which adjoins Ashwell Street to the east. It is not noted how this right-of-way was created or otherwise rose.

15. Title to number 51 is unregistered.
16. Mr and Mrs Harrison are the joint proprietors of the freehold land registered under title number HD 296940 being 55 Ashwell Street which is marked 55 on plan one and edged red on the title plan of title number HD 296940. Number 55 was first registered on 27 May 1992 Mr and Mrs Harrison were registered as proprietors on 26 November 2008.
17. Mr and Mrs George are the joint proprietors of the freehold land registered under title number HD 394857 being 57 Ashwell Street. Number 57. Mr and Mrs George were registered as proprietors of number 57 on 28 September 2005.
18. Entry 2 in the property register of number 57 records that number 57 “has the benefit of a right of a right-of-way with or without vehicles over the land tinted brown on the title plan”. The land tinted brown on the title plan is that part of Ashwell Street that runs from the public highway to the western boundary of number 57 and a small part of the public highway.
19. Mr and Mrs Lee are the joint proprietors of the freehold land registered under title number HD 486071 being 59 Ashwell Street. 59 Ashwell Street was first registered on 26 September 2008 Mr and Mrs Lee were registered as proprietors on the same day.
20. Mr and Mrs Leete are the joint proprietors of the freehold land registered under title number HD 408790 being 53 Ashwell Street 53 Ashwell Street was first registered on 14 June 2002 and Mr and Mrs Leete were registered as proprietors on the same day.
21. It is noted at entry 2 in the proprietorship register of number 53 that it was conveyed to Mr Leete by a conveyance dated 13th of May 1974 made between Gladys May Gurney Nintendo and Mr Leete as purchaser.
22. Mr and Mrs Leete are also the joint proprietors of land at the rear of 4951 and 53 Ashwell Street being land registered under title number HD 249901.

23. The seventh respondents, Mr and Mrs Hare are the joint proprietor of the freehold land registered under title number DH to 20705 being 12 Clay Bush Road. They were registered as proprietors on the 16 April 1987.

The Respondents' Case

24. The Respondents accepted in their statement of case that the Enclosure Award created a right way for the benefit of the Application Land. The Respondents submitted that the right of way had been extinguished by abandonment.

Abandonment

25. The Applicants referred me to paragraph 12 – 26 of Gale on Easements where the editors state

“unless the easement is granted for a term of years, the rights conferred by an easement are perpetual and accordingly are actually or potentially valuable rights. Therefore, it is not likely to be inferred that the owner of such a right should give it up for no consideration.”

26. They also refer to *Gotobed v. Pridmore* (1971) EG 759 where Buckley LJ said

“but abandonment was not to be likely inferred. Owners of property did not normally wish to divest themselves of it unless it was to their advantage to do so, notwithstanding that they might have no present use for it.”

27. The Applicants also referred me to *Williams and another v. Sandy Lane (Chester) Ltd.* [2006] EWCA Civ 1738 in which Chadwick LJ said

“It is I think common ground that a right-of-way is not lost by nonuser alone; even if the nonuser has extended over many years. What is required is an intention on the part of the dominant owner to abandon the right.”.

The test as to abandonment of a right-of-way was said to be whether the owner of the dominant tenement had a fixed intention never, at any time in the future, to assert the right to the easement or to transmit it to someone else” – *Tehidy Minerals Ltd v. Norman* [1971] 2 QB 528 at 553.

28. The Applicants also referred me to paragraphs 10 and 11 of the judgement of Briggs LJ in *Westminster City Council v. Dwyer* [2014] 2 EGLR 5 where his Lordship approved the following statement of the law in Gale at paragraph 12 – 104

“(a) whether a person intends an abandonment is not a subjective question; it is always a question of fact to be ascertained from the surrounding circumstances whether the act amounts to an abandonment or was intended as such;

(b) abandonment depends on the intention of the person alleged to be abandoning the right of way as perceived by the reasonable owner of the serving tenement; to establish abandonment of an easement the conduct of the dominant owner must have been such as to make it clear that he had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement;

(c) abandonment is not to be likely inferred; owners of property do not normally wish to divest themselves of it unless it is to their advantage to do so, notwithstanding that they may have no present use for it;

(d) non-user is not by itself conclusive evidence that a private right is abandoned; the non-user must be considered with and may be explained by the surrounding circumstances.

Briggs LJ added

“to those principles it is only necessary to add, as the judge again did, that where the non-user is explicable by reference to the absence of any need of the owner of the dominant land to use the right of way for the time being, this will fortify a conclusion that there has been no abandonment of the right for all time: see *Benn v Hardinge* (1992) 66 P&CR 246 per Dillon LJ at 257”.

User of the Track

29. There is a dispute upon the evidence as to whether the Applicants have used the Track to access the Field and therefore whether they have used Ashwell Street to access the Track and the Field.

30. Mr Eric Gurney lived at 47 Ashwell Street from his birth in 1934 until 1953. He continued to live in Ashwell until 2000 and he returned to live in Ashwell from 2003 until the present day. His evidence was that his family used both the Clay Bush access and the Track to access the Field. He said that the Track was used as access to the Field on

numerous occasions between the 1950s and 2018. Mr Eric Gurney said that he and his family together with employees and visitors had used Ashwell Street to access the Application Land since he and his wife acquired the Application Land by a conveyance dated 27 January 1975 from Gladys May Gurney. He had made a particular point of using the Track and Ashwell Street as an access to the Field.

31. Evidence as to user of the Track was given by Mr Hodson. He said that he had never seen Mr Gurney walk or drive between Ashwell Street and the Field over the Track and that he had never seen signs of vehicles going over the northern part of the Track which was covered with grass. He accepted that since he worked in London mostly it was entirely possible that the Track had been used to access the Field when he was not there to see this happen.
32. Mrs Hodson said that she had never seen Mr Gurney go over the Track and through a gate into the Field. She had seen Mr Gurney use Ashwell Street to get to the Track
33. The Respondents also relied on what they said was a hedge between the Track and the Field. Mr Gurney said that there was no hedge. He said that an aerial photograph taken in 1999 did not show a hedge across the Track but some overgrowth.

Decision

34. I accept the evidence of Mr Eric Gurney that he used Ashwell Street to access both the Track and the Field. Mrs Hodson had seen Mr Eric Gurney access the Track from Ashwell Street. If Mr Eric Gurney was on the Track from time to time, it is highly probable that he would have on some occasions gone from the Track into the Field. I accept Mr Gurney's evidence that there was no hedge between the Track and the Field so as to prevent him from passing between the Track and the Field. The photographic evidence does not contradict what Mr Gurney said. I accept Mr Gurney's evidence that the aerial photograph shows a strip of vegetation between the Track and the Field and not a hedge. Whilst I accept that Mr Hodson has not seen Mr Gurney walk or drive between Ashwell Street and the Field over the Track, that does not mean that Mr Gurney has not done so. As Mr Hodson accepted, Mr Gurney could have done so while Mr Hodson was out of his

house at work or for some other reason. He could also have done so when Mr Hodson was in his house but not looking out of a window.

35. The Respondents have not established that the right of way to the Track over Ashwell Street has been abandoned. The right of way has been used and there is no evidence of an intention on the part of the owners of the Track that neither they nor their successors should ever use the right of way over Ashwell Street.

36. The Respondents have not established that the right of way over Ashwell Street to the Field has been abandoned. The facts do not show that any of the owners from time to time of the Field and/or of the Track intended that neither he nor any successor in title should ever use the right of way over Ashwell Street. The covenants on the part of Mr Searle to erect a fence does not show that he intended that neither he nor any of his successors in title should ever use Ashwell Street and the Track to access the Field. A fence can be taken down without too much difficulty. Furthermore, the covenant on the part of Mr Searle was a positive covenant the burden of which would not run with the land. This means that any purchaser from Mr Searle would not be bound by the covenant and had a fence been erected, they could have taken it down.

37. I have found that Mr Gurney did use Ashwell Street to access the Field. However, even if I had found he had not used it, I would not have found that the right of way over Ashwell Street to the Field had been abandoned. Non-user of Ashwell Street to access the Field via the Track would not be enough to show an intention to abandon the right of way. The existence of the Claybush Road Access provides an explanation as to why the Ashwell Street route may not have been used often. It therefore provides an explanation for non-user other than an intention never to use the right of way again.

38. I shall direct the Chief Land Registrar to give effect to the application of the Applicants as if the objection of the Respondents had not been made.

Costs

39. My preliminary view is that the Respondents should be ordered to pay the Applicants' costs to be assessed. The Respondents have failed in their objection to the application. I

know of no reason why the usual order, namely that the losing party should pay the costs of the winning party, should not apply in this case. Any party who wishes to submit that some different order ought to be made as to costs should serve written submissions on the tribunal and on the other party by 4 PM on 12th June 2019.

BY ORDER OF THE TRIBUNAL

Michael Mitchell

DATED 24th MAY 2019

