



[2019] UKFTT 0724 (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 2018/1091
BETWEEN

ISCA INVESTMENTS LTD

Applicant

and

SUBRAMANIAM UTHAYAKUMAR

Respondent

Property: Land at 23 Sudbury Avenue, Wembley

Title number: AGL440395

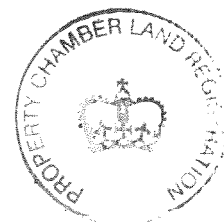
ORDER

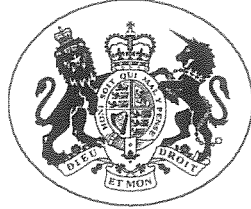
The Chief Land Registrar is ordered to give effect to the application dated 3 April 2018

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 25th day of November 2019





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**REF No 2018/1091
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ISCA INVESTMENTS LIMITED

Applicant

and

SUBRAMANIAM UTHAYAKUMAR

Respondent

Property: Land at 43 Sudbury Avenue, Wembley

Title number: AGL440395

**Before: Judge McAllister
Alfred Place, London
15th and 16th October 2019**

Representation: The Applicant was represented by Mukhtiar Otwal of Counsel instructed by Starck Uberoi Solicitors Ltd; the Respondent was represented by Alastair Panton of Counsel instructed by HCB Solicitors

DECISION

Introduction

1. The Applicant ('the Company') is the owner of a property known as Bramley Lodge, Sudbury Avenue, Wembley, which is registered with title number NGL621589. The property occupies land which was formerly Nos 19 and 21 Sudbury Avenue. The sole shareholder and director of the Company is Mr Jayesh Savani.

2. The Respondent, Mr Subramaniam Uthayakumar, is the registered owner of, and lives at, 27 Sudbury Avenue, a property he purchased in 1984/1985. He also owns No 25 Sudbury Avenue. In May 2007 he purchased land to the rear of No 23 Sudbury Avenue, which is registered with title number P61067. Taken together, the back gardens of Nos 25 and 23 have the potential of being used as a building plot.
3. The dispute relates to part of title P61067 ('the disputed land'). This is a rectangular strip of land running the length of the back garden of Number 23 which, on the ground, is incorporated into the grounds of Bramley Lodge by a fence, and is laid to lawn.
4. By an application dated 3 April 2018 the Company applied under paragraph 18(1) of Schedule 12 to the Land Registration Act 2002 to be registered as owner of the disputed land on the grounds that it had acquired title to the disputed land by adverse possession. In essence, the Company's case is that at least from March 1989 the disputed land has formed part of Bramley Lodge by reason of the fence separating the disputed land from No 23, and because the disputed land was used exclusively by the occupiers of Bramley Lodge.
5. The Company had made an earlier application under Schedule 6 to the 2002 Act. This was objected to by Mr Uthayakumar in a letter dated 12 January 2018. This letter stated that since he had purchased the rear of No 23 he had gained access to the disputed land through a gap in the fence at the western end, and that he or his gardener had mowed the disputed land every month or six weeks.
6. In its supporting Statement of Truth the Company stated that the fence dividing the disputed land from the garden of No 23 has been in the same position since at least 1989, and that no access was possible from No 23.
7. Mr Uthayakumar objected to the second application (the subject of the reference) on the grounds that the fence was not in place until, at the earliest, 2006. No fence was in place before that, so that it was, as he put it, open land. In a further letter dated 29 November 2018 from his solicitors, Mr Uthayakumar claimed that the fence was not erected until 2003, or in any event the early 2000s and that, as stated above, access through the fence had been possible.
8. I had the benefit of a site view on 15 October 2019.
9. For the reasons set out below, I am satisfied that the Company has acquired title to the disputed land by adverse possession, and will accordingly order the Chief Land Registrar to give effect to its application.

Background and evidence

10. By a transfer dated 5 August 1988, ('the 1988 Transfer') Lodgehill Properties Limited transferred the property described as Flats 1-6 Bramley Lodge, Sudbury Avenue to Pravin Kanji Savani (Mr Savani's father), David Richard Head and Rashmi Jani. The parcel clause described the property by reference to the land edged red on the plan annexed. The plan is entitled 'conveyance plan' was prepared by chartered architects. The plan is to scale.
11. On 25 March 1988 Lodgehill Properties had sold the house and a small part of the back garden of No 23 Sudbury Avenue to a Mr and Mrs Patel,
12. It is common ground between the parties that the fence dividing Bramley Lodge from the garden of No 23 is not on the boundary as shown on the plan. On the title plan of P61067 the boundary is shown as being in line with the southern wall of the garage on No 23. The fence appears to run in line with the northern end of the garage so that there is a discrepancy of some 3 metres. This title plan is based on the 1966 OS plan. However, no expert evidence was obtained by either party as to the position of the boundary shown on the 1988 Transfer plan.
13. The Ordnance Survey plan dated March 1989 (which is the title plan of title number NGL621589, Bramley Lodge) shows the fence in its position on the ground, but Bramley Lodge itself extending no further, on the north side, than the footprint of the building. The Ordnance Survey plan dated 1995 also shows the fence in its present position.
14. Bramley Lodge was let to Paddington Churches Housing Association who in turn let out the individual flats, presumably on assured shorthold tenancies. On 18 December 1989 Mr Savani's father died. Following his death receivers were appointed under a mortgage secured against Bromley Lodge.
15. On 16 May 1991 the Company was incorporated. I have seen a memorandum of sale dated 30 July 1991 between the receivers and Mr Savani. The price agreed for Bromley Lodge was £325,000. The estate agents' particulars described Bramley Lodge as a detached block of six self contained gardens surrounded by communal gardens, mainly laid to lawn, and car parking areas.
16. Both sides rely, to some extent, on an aerial photograph dated 2003 of Bramley Lodge and the surrounding areas. The Company submits that it is possible to see the

fence; Mr Uthayakumar argues that it is not. In my judgment it is often very difficult to discern with any clarity whether or not a fence can be seen in an aerial photograph: a great deal depends on the time of the year, the time of the day, and the extent to which foliage obscures any possible boundary feature. That said, the fence is clearly visible in photographs taken in 2008, 2012, 2014 and 2018.

17. Mr Uthayakumar's case is not entirely consistent as to the date when the fence was erected in its present position. In his witness statement he stated that the fence was erected in 2005 when the owner of No 23, Mr Keane, approached him with a view to selling him the land at the rear of his property. It is his case that the Company, on realising this land was for sale, decided to move or place a new fence further north, into the rear of No 23. In doing so all the materials stored in the back garden of No 23 by Mr Keane were moved on the other side of the fence. In cross examination he stated that the fence appeared in the early 2000s. I have referred to his objection to the application and the letter dated 29 November 2018 above.
18. On 4 May 2007 Mr Uthayakumar purchased the rear of No 23 for the sum of £32,000. As stated above he was registered as owner on 22 May 2007. The title plan to this property is the 1966 OS plan which shows the boundary between No 23 and the adjoining property to the south (not shown on the plan as Bramley Lodge) in a straight line going east to west from the south western corner of the No 23. The fence, of course, is set back from this line.
19. Mr Savani is now 54, and moved to 123 Sudbury Avenue with his family when he was 11. He was aware of the purchase by his father, and others, of Bramley Lodge. The fence which is there now between Bramley Lodge and No 23 was in the same position in 1988, and was there at the time of purchase. Bramley Lodge was bought from the developer. A manhole cover, serving the drains to the Lodge, has always been in the same position on the disputed land. The disputed land has always, on his evidence, been used by the tenants and their families, either as a play area, or for barbecues or for hanging washing. It was part of the communal gardens of Bramley Lodge. A shed was on the disputed land until about 1999.
20. Mr Savani was a little unclear as to whether Paddington Church Housing Association had one lease of the Lodge, and in turn sub let or whether they had six separate leases. In any event, the Company bought the Lodge subject to the lease or leases. He believes, and I suspect it is more likely, that there was one lease only. No copy of the lease or leases has been made available. In any event, the Company took back the

Lodge from the Housing Association in 1994 and since then the flats have been let on assured shorthold tenancies. As the landlord the Company maintains the exterior, the grounds, the common parts and the boiler. As I have said, Mr Savani was clear that the fence was there when the Company bought the lodge. There were no gaps in the fence. The fence was repaired on a few occasions, and in the last couple of years part was knocked down from the No 23 side, and again replaced.

21. Mr Savani stated that the Housing Association would not have taken a lease of the building unless all the fenced property formed part of the Lodge. He always assumed that the boundary was marked by the fence. Had there been any gap in the fence, or had any part of it blown down, the Housing Association would have insisted on the fence being repaired.
22. He also remembered a conversation with Mr Uthayakumar in about 2005 about creating an access to the back of No 23 from Bramley Lodge. Mr Savani pointed out that he would lose 2 car spaces, and asked for compensation. It was at this time that Mr Uthayakumar mentioned, for the first time, that the boundary was not the fence, but was much closer to the northern wall of the building.
23. Mr Dilip Shah is an estate agent with Philip Shaw Estate Agents. He stated in evidence that he began dealing with Bramley Lodge in 1995. This date differs from the evidence given in his witness statement where he stated that he began dealing with the Lodge approximately ten years ago, ie 2009. He stated that he visited the Lodge on a number of occasions when the flats were let out, to check the gas meters, and generally. The fence was always in the same place.
24. On behalf of the Company I also heard evidence from Mr Paul McCarthy, an electrician and maintenance man, who has done work at the Lodge on numerous occasions since 1999. He stated that the fence has always been in the same position. He recalls fixing one of the panels in or around 1999. He has never seen anyone other than persons connected with or employed by the Company doing any work or maintaining the disputed land in any way.
25. On behalf of Mr Uthayakumar I heard first from Armit Shah, who has lived at 17 Sudbury Avenue since 1983. This property is immediately adjacent to the Lodge on the south side. With no disrespect to Mr Shah, I found his evidence confusing. He stated that he recalled the fence being erected in 2000 or thereabouts, but then stated that so far as he recalled the disputed land was always open: it was an overgrown area, full of brambles, bushes and apple trees. Pressed on this, he stated that he was in fact

talking about the back garden of No 23. The disputed land has been used for religious gatherings, attended by, amongst others, his parents.

26. Mr Ali Sinjay is a gardener who works for Mr Uthayakumar. In his witness statement he stated that, when he began working in 2001, there was no fence between No 23 and Bramley Lodge. The fence appeared in 2005 or 2007. He stated that the land behind No 23 was a 'land bank' full of rubbish. Again, I found his evidence unclear and confusing. He also stated that, on occasion, he walked around to Bramley Lodge to clear the bushes which were overhanging the fence. He did not say that he had ever mowed the disputed land.
27. Mr Uthayakumar's written evidence states clearly that he maintained the disputed land since he purchased No 23 in 2007. This was not what he said under cross examination. The only work done on the disputed land was, he said, to trim overhanging bushes. He accepted that it was not correct to say, as he had done in his written evidence, that Mr Sinjay was allowed access to the disputed land through the fence and that he was instructed to maintain the disputed land every couple of months. In the same way he accepted that the statements made in the letter dated 12 January 2018 were incorrect. Nothing was ever done by him on the disputed land, other than, it is said, the occasional cutting of overhanging bushes. Confusingly, he then stated that he mowed the disputed land in 2007 three or four times.
28. At some point, and recently, a gap in the fence was created by the fence falling. Mr Uthayakumar denied knocking down the fence or any part of it. He asked in 2015 to take down the fence so that he could erect a marquee for his daughter's wedding, but Mr Savani did not agree. It is common ground that a new fence was erected in 2017.
29. Mr Uthayakumar accepted there was a fence in place when he bought back land. But he says he was aware at the time that the fence was in the wrong place.
30. Although none of his evidence is entirely consistent, the impression given by his written evidence is that the fence was first erected in 2005/2006, that is to say that the land between Bramley Lodge and the rear of No 23 was open before that date. In evidence he accepted that there was always a fence between these properties, but that the fence had been moved in order to increase the land to the north of Bramley Lodge. He concluded his evidence by saying that the original fence, at the time of the development of Bramley Lodge, was about a metre away from the northern wall of the building, but accepted that he never saw the fence in its alleged original position.

Issues

31. The first issue which arises is a factual one: namely whether, as Mr Savani alleges, the position of the fence has remained the same since August 1988 or whether, as Mr Uthayakumar alleges, the fence as it now is was moved further to the north (thus enclosing the disputed land within the curtilage of Bramley Lodge) at a later date or, alternatively, placed in its current position for the first time well after 1988.
32. Mr Otwal submitted that the weight of the evidence, both oral and documentary, supports the conclusion that the fence has always been in the same place. He relied on the 1989 and 1995 plans, and contrasted these with the earlier plan dated 1966.
33. Mr Savani was clear and unequivocal in his evidence. He knew Bramley Lodge well before the Company purchased it. There was no reason for him to move the fence which had been erected by the time of the 1988 transfer. So far as he was concerned there was no issue with the position of the fence until very much more recently. The disputed land has, since that date, been part of the garden area around Bramley Lodge, and has been maintained as such. The manhole for the drain has always been within Bramley Lodge land.
34. Mr Panton submitted that in order to make sense of the somewhat confusing evidence given on behalf of, and by Mr Uthayarkumar on this point, I should find that there was no fence between the back garden of No 23 and Bramley Lodge until 2000. The developer of Bramley Lodge also owned No 23, and saw no reason to divide the properties with a fence.
35. I have no hesitation in accepting Mr Savani's evidence, and that of his witnesses, on this point and rejecting what can only be described as the speculative theory advanced by Mr Panton. In my judgment the fence has at all material times been in the same position. It was there at the time of the 1988 transfer. It seems to me inconceivable that the developer would not have erected a fence dividing Bramley Lodge from No 23. It is also inconceivable that Paddington Churches Housing Association would have taken a lease of the Lodge unless it was so fenced. The 1989 OS plan clearly shows the boundary in the position of the fence where it is now.
36. I also do not accept the suggestion that Mr Savani at some point moved the fence so as to increase the size of the land around Bramley Lodge.
37. The second issues is whether the fence marked the legal northern boundary of Bramley Lodge at the time of the 1988 Transfer. I raised this issue with Counsel. I am aware that the plan attached to the transfer is not for identification purposes only.

There is therefore no ambiguity in the parcels clause. However the parties all accepted that the legal boundary is not marked by the fence. Mr Otwal did not raise the possibility of a boundary agreement. I will therefore proceed on the basis that the legal boundary is not marked by the fence, but is to the south of the fence, albeit that the exact position has not been determined.

38. The third issue which therefore arises is whether the Company can establish that it has acquired title to the disputed land (or so much of it as falls outside its legal boundary) by adverse possession.
39. As I understand Mr Panton's case on the basis of the evidence given at trial he does not dispute that the Company, and its predecessor in title, have been in exclusive occupation of the disputed land with the necessary intention to possess. In the event that this point is in issue, and subject to the points below, I again have no hesitation in finding that adverse possession of the disputed land began in August 1988 and continued until the date of the application.
40. The principles which determine whether conduct amounts to adverse possession were affirmed by the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, and are well known. The person claiming adverse possession must establish an appropriate degree of physical control of the land; the possession must be single (but there can be single possession of several squatters jointly) and exclusive, and the squatter must have dealt with the land as an occupying owner would have done.
41. In addition, the squatter must demonstrate the necessary intention to possess (not necessarily to own), that is to say an intention to exclude the world at large, so far as reasonably practicable. The intention must be manifested clearly so that it is apparent that the squatter is not merely a persistent trespasser.
42. The enclosure of land by fencing is, in most cases, an unequivocal act of possession, as it excludes others. In this case, as I have found, the fence has always been in the same position, and plainly excluded others from entering the disputed land from No 23. It is true that at some point, in recent years, a panel of the fence was knocked down or blew down, but in any event, on my findings, adverse possession had been obtained by 12 years after the 1988 Transfer, so that recent and limited access to the disputed land is irrelevant.
43. The disputed land has at all times been used by the Company and its predecessor as an occupying owner would use it. It is part of the gardens of Bramley Lodge and maintained as such. Various activities take place on the land.

44. The fourth issue is this. The Company purchased Bramley Lodge from the receivers of the previous owners. Mr Panton submits that there is no evidence of any assignment of their possessory title. The Company was registered as the legal owner of Bramley Lodge on 13 December 1991, that is to say 11 years and 10 months before the coming into effect of the 2003 Act. On this basis, the Company cannot demonstrate 12 years exclusive occupation of the disputed land. Although Bramley Lodge was transferred to the Company before that date, the Company was not the legal owner before registration.
45. Mr Otwal responded by saying that the receivers were the agents for the previous owners. It is clear that they conveyed the disputed land together with Bramley Lodge. He referred me to *Tower Hamlets LBC v Barrett* [2006] 1 P&CR 9, at paragraph 36 where Neuberger LJ (as he then was) stated as follows: ... '*Unless there is a hiatus between periods of possession of successive squatters... the second squatter, whether he has purchased from the first squatter or dispossessed him in some other way, can rely on the first squatter's period of adverse possession*'.
46. The point is dealt with in more detail in *Adverse Possession* by Stephen Jourdan QC and Oliver Radley-Gardner at para 34-29 onwards. An informal transfer of possessory land (or the inchoate right to claim adverse possession) occurs when it is clear, on the facts, that the first squatter or squatters have abandoned their title or claim when they part with possession in favour of the next squatter: see *Site Developments (Ferndown) Ltd v Cuthbury Ltd* [2010] EWHC 10.
47. I agree with the submissions made by Mr Otwal. It is clearly possible to have an informal transfer of possessory land where, as here, the previous owners abandoned the intention to possess. The last squatter can rely on the aggregate period of possession of the previous squatter, providing the previous squatter abandoned possession. This is clearly what happened here.
48. Two further issues were raised by Mr Panton. The first is that, as Bramley Lodge was and is occupied by tenants, the Company cannot establish that it has been in exclusive possession of the disputed land. This point can be dealt with shortly. A landlord can rely on the possession of his tenants and employees: see, for instance, *Opanubi v Daley* [2002] EWHC 1596.
49. Moreover, where land is occupied by tenants it is presumed to be in addition to the land demised to the tenant so that it is given up to the landlord at the end of the

tenancy unless the tenant or tenants occupied the land for their own benefit: see *Towers Hamles v Barrett* .

50. In this case, the disputed land formed part of the communal gardens of Bramley Lodge and I accept that it has always been used as such, for a variety of activities by the tenants. The land was also maintained by employees of the Company. The Company therefore had exclusive possession either through its tenants or employees. I do not consider that this is a case where it can be said that tenants have occupied additional land for the benefit of the Company: rather this is a case where the occupation of tenants and employees was on the Company's behalf.
51. The final point relates to the provisions set out in section 29(2)(a)(iii) and paragraphs 2 and 2A of Schedule 3 to the 2002 Act, and paragraph 15 of Schedule 1.
52. A number of points need to be noted. The first is that, as the disposition to Mr Uthayakumar took place 3 years after the coming into effect of the 2002 Act, the Company cannot rely on the transitional provision set out in paragraph 15 of Schedule 1. The second point is that paragraph 2 of Schedule 3 protects the unregistered interest of persons in actual occupation by providing that they over-ride a registered disposition unless the interest belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition and is an interest of which the person to whom the disposition is made does not have actual knowledge at the time.
53. In this case, the evidence appears to be that there were discussions between Mr Uthayakumar and Mr Savani before the purchase of the land at the rear of No 23 regarding the possibility of gaining access from Bramley Lodge and thereby removing part of the fence (and losing 2 car spaces for the Lodge). No inquiry was made regarding the disputed land of Mr Savani, nor does it seem to me that Mr Savani should have disclosed his claim to the disputed land. He believed, at the time, that the land formed part of the Lodge. Conversely, it must have been obvious to Mr Uthayakumar that the Company was in occupation of the disputed land. It is Mr Uthayakumar's case that he realised before the purchase that the fence was in the wrong place, and he nonetheless completed the purchase.
54. Finally, the provision relating to the receipts of rents and profits does not assist the Respondent. Transitional provisions preserve the over-riding status of a person whose unregistered interest was protected by the receipt of rents and profits immediately before the 2002 Act came into force (see paragraph 8 of Schedule 12) (except for an

interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so).

55. In this case the Company was in receipt of rents and profits before the coming into effect of the Act. But more relevantly, an employee or tenant can occupy on behalf of his employer or landlord, as is the case here, so that the Company does not need to rely on paragraph 2A of Schedule 3. The Company's interest is not excluded by any of the provisions in paragraph 2.
56. For all the above reasons I will order the Chief Land Registrar to give effect to the Company's application.
57. As the successful party the Company is in principle entitled to its costs from the date of the reference, namely 19 December 2018. A schedule in Form N260 or the like is to be filed and served within 214 days of receipt of this decision. The Respondent may raise such objections as he deems appropriate or make any representations within 2 days of receiving the Company's schedule. I will then decide what order to make.

BY ORDER OF THE TRIBUNAL

Dated this 25th day of November 2019