REF/2016/0074/0075

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

MICHAEL ANTHONY OLDAK
ANN ELIZABETH OLDAK

APPLICANTS

and

(1) SETH DOUGLAS PUNCHARD
(2) MARTIN JOHN BREESE

RESPONDENTS

Property Address: Ratchwood, Rise End, Middleton, Matlock DE4 4LS

Title Number: DY492388

Before: Judge Owen Rhys

Sitting at: Derby Magistrates Court

On: 18th October 2016

Applicant representation: In Person (Mr Oldak)
1st Respondent representation: In Person (Mrs Punchard)
2nd Respondent representation: In Person

D E C I S I O N

THE APPLICATION

1. The Applicants are the owners of property known as Ratchwood, Rise End, Middleton, Matlock, Derbyshire DE4 4LS ("the Applicants' Land"). On 27th April 2015 they applied in form FR1 for first registration of the Applicants' Land, together

with the benefit and burden of an alleged easement over two adjoining titles. The first of these is registered in the First Respondent's name under title number DY305130 and is known as Middlepeak Wharf, Middleton Road, Wirksworth, Matlock DE4 4PJ ("the Wharf"). The second of these is registered in the Second Respondent's name under title number DY435850 and is known as *"land on the west side of Old Lane, Wirksworth, Matlock"*. Both sets of Respondents have objected to the application insofar as it relates to the registration of an easement over their respective titles. The Land Registry referred these disputes to the Tribunal on 2nd February 2016. Mr Oldak represented himself and his wife. Mrs Punchard represented her husband, and Mr Breese represented himself. Mr Oldak and, to a lesser extent Mr Breese, have carried out a great deal of research into the history of the site, which is of considerable interest from an industrial historian's point of view. There is a disused lead mine situated within the Applicants' Land which is of historical importance, and indeed the entire area has been heavily mined and quarried for minerals. I am very grateful to all three parties for their assistance in deciding this matter. For obvious reasons I have not been able to refer to each and every item of documentary evidence placed before me, but I have referred to what I regard as the most important.

2. All three titles lie to the east of the B5023 which runs between Wirksworth and Middleton ("the Main Road"). The Applicants' Land consists of land and buildings formerly known as Ireland Farm, and an area of rough land to the south formerly known as Ravenstor Pasture (OS 2621). Ravenstor Pasture lies on the north side of a stretch of disused railway, known locally as the Middleton Incline since it rises from east to west and is elevated at this point. The railway now forms part of a long-distance leisure route known as the High Peak Trail, which is owned by Derbyshire County Council. The Respondents' land lies immediately to the south of this disused railway. The First Respondent's land consists of commercial premises currently in use as a road haulage yard. The Second Respondent's title surrounds the First Respondent's land on all sides. It thus includes all the land adjacent and to the south of the disused railway. The Wharf has no direct access to the Main Road, but there is an entrance owned by the Second Respondent (and forming part of his title) over which there is a right of way, and this road or track runs through the yard and passes through a gate on the north-western corner of the Second Respondent's land.

3. The dispute between the parties arises as follows. There is a substantial stone-built archway ("the Archway") which runs through and under the elevated section of the disused railway, giving access to Ravenstor Pasture from the Second Respondent's land to the south. The Applicants claim that they have a legal right of way through the Archway, across the Respondents' land and thence to the Main Road. They are able to access Ravenstor Pasture from their other land to the north – the former Ireland Farm – but it is their case that they have a legal right to access the land from the south. They claim both an express easement and an easement acquired by long user, as I shall explain.

THE APPLICANTS' CASE – EXPRESS GRANT

4. The Applicant's principal case, as I understand it, is that Ravenstor Pasture has the benefit of an express right of way granted by an Indenture dated 27th March 1858 and made between David Wheatcroft (1) and William Wheatcroft (2) ("the 1858 Indenture"). The Indenture operates to convey the following land and easement: "*ALL THAT close piece or parcel of land situate ..... on the North side of the Cromford and High Peak Railway commonly called or known by the name of Ravenstor Pasture heretofore stated to contain by estimation Three acres two roods and twenty-two perches (more or less) .... TOGETHER with full and free liberty power and authority for the said William Wheatcroft his heirs and assigns owner or owners for the time being of the said .... Ravenstor Pasture ..... and for all purposes to go return pass and repass with horses cattle and other beasts carts waggons and other carriages (laden or unladen) or without to and from the same close piece or parcel of land hereby appointed and granted and intended so to be through the Archway under the Middleton inclined Plane of the said Cromford and High Peak Railway through over and across certain other land of the said David Wheatcroft on the South side of the said Railway lately contracted to be sold by him to the Hopton Wood Stone Company (Limited) .... unto and towards the Road leading to Wirksworth....*" The Applicants argue that this is a known grant of a full vehicular right of way through the Archway for the benefit of Ravenstor Pasture, which has never been abandoned or surrendered, and once attached to the land remains attached to it in perpetuity. They argue that, on the true construction of the 1858 Indenture, the route of the express right of way must be through the Wharf (the First Respondent's

title) since that is the shortest route to the "*Road leading to Wirksworth*", which they say means the Main Road. There is and for many years has been a road or track leading from the Main Road, through the Wharf and thence into the Second Respondent's land, running past the Archway, and the Applicants claim that this is the route of the right of way. They accept that the route was blocked in 1996, when locked gates were installed at the entrances to the Wharf, and that they have not used the route since that time. However, they argue that there remains a legal right of way granted by the 1858 Indenture.

5. As a matter of law and fact, the position is not as simple as the Applicants contend. First, they are unable to prove a title to the easement. A right of way is a species of property known as an "incorporeal hereditament" – not a tangible piece of real estate but nevertheless a legal right equivalent to an interest in land. Just as they must prove a title to Ravenstor Pasture itself – which they have done by virtue of the Conveyance of 4th January 1979 made between Derrick Rice and Dorothy Ada Rice (1) and the Applicants (2) ("the 1979 Conveyance") – they must also prove that the benefit of the right of way has passed to them. A right of way granted in 1858 does not automatically subsist in 2016. It might have been abandoned, or surrendered, or exchanged for some other right. The dominant and servient lands may have come into common ownership. There are many reasons why an easement may come to an end.

6. In my view, the Applicants have been unable to establish title to the right of way. This is quite apparent from the terms of the 1979 Conveyance itself. There is no mention of any right of way attached to the land conveyed. This can only suggest that there is no mention of any right of way in the documents of title offered by the vendors. If the benefit of the right of way was passed down from owner to owner of Ravenstor Pasture, it is inconceivable that it would not have been referred to in the title documents. Indeed, this very point was raised with the vendor's solicitors. The Applicants have produced correspondence from their solicitor's conveyancing file at the time of their purchase. Their solicitors asked the vendor's solicitors whether a right of way existed. The response was as follows: *"As you know, there is no mention of this right of way in the Contract. We did not act for our clients when they bought, but can confirm that there is no mention of the right of way on the deeds."* The Rices

purchased the property in 1971 and would have required at least a 15-year old root of title. It would appear, therefore, that there has been no mention of the right of way in the title deeds since the 1960s at the latest. The Applicants base their claim on the 1858 Indenture. I asked Mr Oldak where this document came from, and he told me that his present solicitors had found it. Clearly, it was not a document which was held with, or referred to in, the Rices' title deeds, since their solicitors would obviously have mentioned it when the enquiry about the right of way was raised. It is possible that the 1858 Conveyance has been obtained from the County or some other archive. Manifestly, it is not a current document of title. The absence of any mention of the alleged right of way in the title deeds either of the allegedly dominant land, or the allegedly servient land (i.e the Respondents' land), is highly significant.

7. Furthermore, the route of the right of way granted by the 1858 Indenture cannot be identified with any degree of certainty. The following description is given: "*.....through over and across certain other land of the said David Wheatcroft on the South side of the said Railway lately contracted to be sold by him to the Hopton Wood Stone Company (Limited) .... unto and towards the Road leading to Wirksworth...*" Two points emerge. First, the right of way crosses land owned by David Wheatcroft to the south of the railway, which had been contracted to be sold to Hopton Wood Stone Company Limited. Secondly, it leads to the road leading to Wirksworth. Mr Oldak has carried out some considerable research into the history of the site, and he has been able to supply a Tithe map and Schedule dating back to 1848. From this document it is apparent that the Wharf and the road running through it were at that time in the ownership of the Cromford and High Peak Railway Company. This is scarcely surprising, since the entire area was in use as a siding and loading wharf. This is agreed between the parties. Furthermore, it is also apparent that David Wheatcroft owned land to the north and south of the railway. The land which he owned to the south (parcels 1151, 1156 and 1158) lies to the east of the Wharf. He did not appear to own any land that abutted directly onto the road to the west now known as the B5023 – and certainly not in the vicinity of the Wharf. To this extent, I simply do not understand Mr Oldak's argument based on the Tithe Map, since it is manifest that the retained Wheatcroft land did <u>not</u> include the Wharf. He argues that the road through the Wharf was once a public highway until stopped up – but his claim is based on an alleged private right of way.

8. It is clear, therefore, that the right of way granted in 1858 ran south and east towards Wirksworth. Mr Breese has drawn my attention to an Ordnance Survey map of 1880 which shows a track leading south-east from the railway towards Old Lane, which was (as its name suggests) an ancient way leading to Wirksworth. This is entirely consistent with the existence of a right of way over this track, part of which would have been across land in the ownership of David Wheatcroft in 1848. It may be noted that the description of the Second Respondent's land (no doubt taken from the pre-registration deeds) is "*land to the west of Old Lane*". Mr Oldak has also produced a very interesting photograph of the Wharf taken in or about 1890. It is taken from the west, looking towards the Second Respondent's land, with the Middleton Incline on the left and the site of the Archway hidden from site. What is abundantly clear from this photograph, however, is that the Wharf is a fully operational railway siding. The road leading from Middleton Lane runs alongside the rail tracks themselves, and it is narrow, with goods stacked on one side and equipment on the other. It would be practically impossible to use this area as a right of way for agricultural purposes, certainly for bringing cattle or other animals to and from Ravenstor Pasture. It might just be possible to use a right of way for agricultural purposes farther west, but that would also involve taking vehicles and animals across the railway line and alongside the railway wagons which are stationed all along this stretch of railway. It may be that a right of way was feasible when granted in 1858, but by 1890 it does not seem a very practical proposition.

9. For all these reasons, therefore, I am unable to accept that the Applicants have established a right of way by express grant over the Wharf as they claim.

THE APPLICANT'S CASE – A PRESCRIPTIVE EASEMENT

10. The Applicants claim, in the alternative, that they have acquired a right of way by prescription, That is, a right acquired through user, as of right, for a period exceeding 20 years. User "as of right" means user which is open, without force and without permission. It is essentially a legal fiction, designed to legitimise regular acts of trespass by presuming that they have a lawful origin. The Applicants' case is that they and their predecessors in title have obtained access to and from the main road across the Respondents' land, for a period exceeding 20 years. In fact, the route of the claimed right of way changed in 1996. Prior to that date, the Applicants say that

they accessed the Archway into Ravenstor Pasture along the road through the Wharf. They also rely on the Statutory Declaration of Mrs Rice. In 1996 they accept that the entrance from the Wharf into the Second Respondent's land was gated, and the gate locked. They have not used the route since that date, but have instead used the alternative route, which runs entirely through the Second Respondent's land, and along the drive that he constructed.

11. As regards the claimed route through the Wharf, the Applicants themselves do not have 20 years' user, even if for the purposes of argument I were to accept that they have used it sufficiently to acquire an easement. They acquired Ravenstor Pasture in 1979, and the access was blocked in 1996. They are bound, therefore, to rely on the Statutory Declaration of Mrs Rice. By this declaration, delineates on a plan (by a green dotted line) a track through the Wharf. Mrs Rice declares that: *"Since the purchase of the said property .... In 1971 the aforesaid track has been used by us and those persons grazing or mowing* [Ravenstor Pasture] *as a right of way with or without vehicles and animals for all purposes as appurtenant to* [Ravenstor Pasture]". In other words, this claims a specifically agricultural use for a period of some 7½ years. Perhaps unsurprisingly, Mrs Rice was not available to give evidence. For his part, the First Respondent relied on a witness statement from Mr Peter Blake, who since 1972 had been a partner in the business carried on at the Wharf known as Middlepeak Marble, his partner Mr Isaac Spencer being the owner of the Wharf. Mr Blake acquired the Wharf and the business in 1997 and sold up in 2007. He could not recollect any access into the Wharf from the north side of the High Peak trail – i.e through the Archway. Mr Oldak says that this statement cannot be true, since a Statutory Declaration from a Mr Roy Else has been produced by Mr Breese. This indicates that a right of way was enjoyed through the Wharf in favour of Mr Else, who owned and resided at Wharf House, a cottage situated on the Second Respondent's land to the eat of the Archway. However, Mr Blake's statement refers specifically to access from the north of the railway – i.e from Ravenstor Pasture – and the criticism of the statement is not therefore valid. In my judgment, where there is some dispute over the extent of historic user, I should not accept the contents of the Statutory Declaration in the absence of further corroborative material or actual oral evidence from the person making the declaration. In any event, I do not think that the declaration assists the Applicants. The specific claimed user was for the purposes of

grazing and mowing Ravenstor Pasture. They accept that they have never used their land for this purpose, it being left in effect as a nature reserve. Mr Oldak himself accepted that his and his wife's use of the access had been extremely rare – his word – which makes it insufficient to amount to sufficiently regular user to support an easement,

12. There is also evidence of access to the land being obtained through the Wharf by members of the Peak District Mines Historical Society. They were carrying out an inspection of the mine shaft within Ravenstor Pasture. It seems that pedestrian access was obtained in 1975, and vehicular access over a period of several weeks in 1981. Clearly, these acts of user are insufficient in duration and regularity to satisfy the test for prescription.

13. It follows, therefore, that the Applicants are unable to satisfy me that they and their predecessors in title have enjoyed sufficient user of the road through the Wharf as of right such as to create a prescriptive easement.

THE APPLICANT'S CASE – THE ALTERNATIVE ROUTE

14. The Applicants accept that the route through the Wharf was obstructed in 1996 by the installation of locked gates giving access to and from the Wharf. It seems that Mr Oldak considered challenging this act at the time, and there is some correspondence in evidence between him and the local authority. However, there was no formal challenge and the Applicants simply ceased to make any use of the access through the Wharf. From this time on, however, they say that they made use of an alternative access – namely, over the land registered to the Second Respondent. As is made clear in their Statement of Case (see pages 9-10 in particular under the heading "*2008 to date*") their use of the alterative access – at least from 2008 – was permissive. *"Initially in this period any access through the Archway was by polite request and polite accession which, though not "free and easy" and not ideal from our point of view, was still basically sufficient for our limited use. We have never insisted on our right of way but never abandoned this right, verbally or otherwise. The mining group used the track and the Archway to further explore Ratchwood Founder Mine, always most careful to ask permissions from Mr Breese and ourselves to use "Ravenstor Pastures" and its most favourable access for our activities. The track through Mr*

Breese's land was becoming more a bone of contention as it became clear that we felt we had a right of passage..... " It should be noted that Mr Breese and his neighbour at Ravenstor Cottage have spent a great deal of money creating hard surfaced drives giving access from the Main Road, and it is over these drives that the Applicants claim the alternative right of way.

15. It is apparent from this passage that the Applicants have never made use of the alternative access *"as of right"* such as to qualify as prescriptive user. On the probably very rare occasions that they walked over the Second Respondent's land they initially did so with express permission, as did the mining group when accessing Ravenstor Pasture, according to the Applicants. I cannot see therefore that they are able to establish the minimum 20 years' user of the alternative access such as to give rise to a legal right of way, even if they had "free and easy" access over the land for the period 1996 to 2008.

CONCLUSION

16. Accordingly, the Applicants are unable to satisfy the Tribunal (a) that they have an express easement by grant over the Wharf or the Second Respondent's land, or (b) a prescriptive easement over the Wharf, or (c) a prescriptive easement over the Second Respondent's land. I appreciate that Mr Oldak feels strongly about the matter, and has placed a great deal of reliance both on the 1858 Indenture, and the physical fact that the Archway exists and provides an entrance to Ravenstor Pasture. I have already explained my reasons for rejecting his claim based on the 1858 Indenture. It is perhaps regrettable that this document seems to have been provided to Mr Oldak without any apparent health warnings. The fact that his predecessors in title were unaware of any express grant, and unaware of any document creating such a grant, is far more significant than the contents of an Indenture now some 150 years old. Equally, the absence of any reference to an express right of way in the Respondent's titles is significant. By the same token, the Applicants were warned, in terms, by their solicitors when they purchased their land that there was no legal right of way. They were also warned, in terms, that the period of user referred to by Mrs Rice was too short to amount to a prescriptive easement. Mr Oldak did not appear to accept that these warnings were give – not that this is material to the resolution of the dispute – but it seems to me that the solicitors' advice is clear. As to the existence of the

Archway itself, clearly at some point in the past it did perform a useful function, providing access under the railway for the benefit of the farming operations carried on in Ravenstor Pasture. However, the fact that it once had a function does not mean that it continues to do so.

17. I shall therefore direct the Chief Land Registrar to cancel the Applicants' application dated 27th April 2015 to the extent that it requires the Land Registry to note on the register the benefit and burden of the right of way claimed by the Applicants.

Dated this 21st day of November 2016

Owen Rhys

BY ORDER OF THE TRIBUNAL

PROPERTY CHAMBER LAND REGISTRATION