

[2019] UKFTT 0154 (PC)

**PROPERTY CHAMBER**  
**FIRST – TIER TRIBUNAL**  
**LAND REGISTRATION DIVISION**

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

**2017/1141**

**BETWEEN:**

**(1) DAREN JOHN ROGERS**  
**(2) ALISON JANE HALLIFIELD**

**APPLICANTS**

**and**

**(1) MARK JEREMY BROWNE**  
**(2) CHRISTINE LYNNE BUFFAM**

**RESPONDENTS**

**Property Address: 33 Sun Street, Woodville, Swadincote, Derbyshire DE11 7DP**

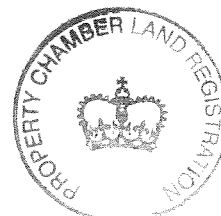
**Title Number: DY80308**

**Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the  
First-tier Tribunal**

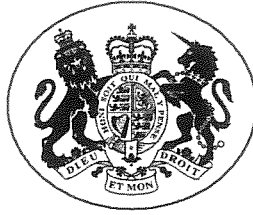
The Chief Land Registrar is directed to give effect to the applicants' original application dated 26 July 2017.

**Dated 25 February 2019**

*S. Anon B. L. L. L. L. L.*



**BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST –  
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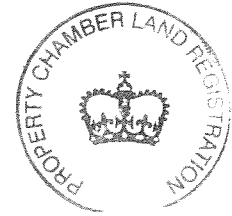
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**Title Number: DY80308**

**Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the  
First-tier Tribunal**

**Sitting at: Birmingham Employment Tribunals, Centre City Tower, 57 Hill  
Street, Birmingham B5 4UU.**

**On: 10 and 11 December 2018**

**Site view: 4 December 2018**

**Applicants' Representation:**                      **Mr Din of counsel.**

**Respondents' Representation:**                      **In person.**

## **DECISION**

*Easement - terraced row of houses - respondents' house at the end of the row - passage leading from the street to the rear of the respondents' house underneath the first floor of the house - passage leading to a further passage giving access to the rear of adjoining houses in the terrace - issue as to whether the respondents' house one of the neighbours has the burden of an express easement, alternatively one arising under s62 Law Property Act 1925, alternatively by prescription.*

### Introduction

1. These proceedings concern a row of five terraced houses, nos 33-41 Sun Street, Woodville, Swadincote, Derbyshire DE11 7DP ("the row").
2. Mr Browne and Ms Buffam ("the respondents") have lived at no 33 since 2015. They are the registered proprietors under title no DY80308.
3. Mr Rogers and Ms Hallifield ("the applicants") have lived at no 37 since 2005. They are the registered proprietors under title no DY394037.
4. Looking at the row from the street, no 33 is at the left hand end. No 37 is two houses to the right of no 33.
5. There are large gardens to the rear of the row. There are situated in the gardens behind nos 35 and 37 a number of old structures, such as outside toilets and coal sheds. These houses have elaborate rights from their respective backdoors over the gardens to give access to these various facilities.

6. There is a ground floor passage (“the front passage”) running from Sun Street to the right of no 33 which gives access (1) to the garden of no 33 to the left of the passage and (2) to the large gardens behind nos 35 and 39 to the right of the passage.

7. The front passage runs beneath part of the first floor of no 33.

8. As I have said, access is available from the right of the far end of the front passage to the rear of nos 35-39 (“the rear passage”).

9. Entry A3 in the property register of the applicants’ title is the following entry:

*The land has the benefit of but is subject to the rights contained in a Conveyance of the land in this title number and other land dated 5 May 1948 made between (1) Eva Elizabeth Stevens (Vendor) and (2) George Willie Whyatt (Purchaser) (“the 1948 conveyance”).*

10. The 1948 conveyance was of nos 35 and 37. The land conveyed is described as having a frontage of 25 feet or thereabouts to the street<sup>1</sup>. The First Part of the First Schedule to the 1948 conveyance provides as follows:

*The property hereby conveyed is sold together with the following easements and rights for the benefit of the Purchaser his successors in title owners or occupiers for the time being of the property hereby conveyed and all persons authorised by him or them*

*1. A right of way as now used and enjoyed in common with the owners for the time being of the adjoining properties Numbers 33 and 39 Street aforesaid through and over the entry or passageway coloured brown on the said plan from and to Sun Street aforesaid to and from that portion of the yard coloured blue on the said plan<sup>2</sup>.*

11. On the plan attached to the 1948 conveyance the front passage is coloured brown.

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<sup>1</sup> See paragraph 22(4) below.

<sup>2</sup> The land coloured blue on the plan is the land to the rear of nos 35 and 37.

12. I shall refer to the right of way contained in the 1948 and reflected in entry A3 in the property register of the applicants' title "the disputed right away".

13. However the burden of the disputed easement is not noted in the registered title of no 33.

#### The application

14. On 26 July 2017, the applicants applied to Land Registry to have the burden of the disputed easement noted on the registered title of no 33 ("the original application"). The application was made on the basis that the disputed easement had been expressly granted by the 1948 conveyance.

15. On 24 August 2017, the respondents objected to the original application. This was on the basis that the vendor under the 1948 conveyance had no title to the front passage, so the disputed easement could not in turn have been granted to the respondents' predecessors in title.

16. On 11 December 2017, Land Registry referred the dispute to the Tribunal under s.73(7) of the Land Registration Act 2002.

17. In their statement of case, the applicants put their case in three ways. First, an express grant under the 1948 conveyance. Secondly, they relied upon s.62 Law of Property Act 1925. Thirdly, they relied upon prescription (a) at common law, (b) under the doctrine of lost modern grant and (c) under the Prescription Act 1832.

18. The respondents accept that the applicants do at least have a right of way over the front passage by prescription.

19. However, they forcibly argued that since the application to Land Registry was made only on the basis of the express words in the 1948 conveyance, the applicants were not entitled in these proceedings to rely on either s.62 or prescription.

20. Understandable though that argument is, it does not represent the Tribunal's policy over



many years in a right of way case not to limit the applicant to the basis upon which the original application was made.

21. If the respondents are correct in their concession that a prescriptive right away exists in favour of no 37, the burden of that prescriptive right of way will have to be noted on the register of the respondents' title.

The witnesses

22. Mr Rogers gave oral evidence. He called as witnesses:

(1) Mr Wilkinson. He is 73 years old. He has lived at no 39 for 25 years. The front and rear passages have been used by him throughout. He told me that no 41 used to be a pub, but it closed down about 60 years ago. He also told me that his grandmother had remembered when no 33 was a butcher's shop on the ground floor.

(2) Ms Moss. Her parents had lived at no 35 for 30 years until they died in 2016 and 27 respectively. The front and rear passages had been used by them throughout. She has tried to sell no 35, but the sale was thwarted by the respondents telling the estate agents that no 35 did not have the benefit of the disputed right of way.

(3) Mr Webber. He had lived at number 33 for 26 years before selling it to the respondents. He always believed that whilst the front passage was owned by him he had no right to object to the owners of nos 35-39 using the disputed right of way. He had disclosed his neighbours' rights of way on the Property Information Form when he sold no 33 to the respondents.

(4) Mr Popley. He is a paralegal employed by those instructing Mr Din. Following my site visit he measured the front of no 35 and no 37, together with Mr Browne. It was agreed that the measurement was 25 feet. He also measured the whole row as being between 34 and 35 yards long.

23. Mr Browne gave oral evidence.

## The conveyancing history

24. The 1948 conveyance was concerned with the sale of nos 35 and 37. The land sold was measured as having a frontage to Sun Street of 25 feet. It was also shown *for the purpose of identification only more particularly delineated and described on the plan annexed hereto*. As I have said, the frontage of nos 35 and 37 was measured at the site visit at 25 feet. The plan to the 1948 conveyance shows nos 35 and 37 edged in green.

25. The land conveyed in 1948 was still unregistered. The 1948 Abstract of Title has been produced. It records the following matters.

26. On 15 March 1866, Mr Dooley sold to Mr James Harvey a parcel of land with a frontage of 35 yards to a new road made or intended to be made. As I have said, Mr Popley and Mr Browne measured from the left hand side of no 33 to the right-hand side of no 41. The measurement was between 34 and 35 yards. I am satisfied that the 1866 conveyance constituted the sale of the row to Mr James Harvey.

27. On 9 March 1897, Mr James Harvey made his will. He had already sold the public house (no 41). He bequeathed a life interest in the three cottages (nos 35-39) to his grandson, Mr Godfrey. He bequeathed a cottage and shop to his daughter, Mrs Buck. Before the hearing this property was unidentified. However, as a result of Mr Wilkinson's oral evidence, it is clear that this was a reference to no 33<sup>3</sup>.

28. On 6 June 1898, Mr James Harvey died. Following Mr James Harvey's death, Mrs Buck became the owner of no 33 and Mr Godfrey became the life tenant of nos 35-39. It is not known who the remaindermen under the trust were. Thus the ownership of (1) no 33 and (2) nos 35-39 became separated.

29. In December 1911, Mrs Buck sold no 33 to Mr Betteridge.

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<sup>3</sup> This evidence was corroborated by the oral evidence of Mr Browne. There was a suggestion that the entire front of no 33 was a shopfront. Mr Browne explained that there is evidence of a door, now covered over with breeze block and plaster, leading from the left hand side of the front passage to the upper part of no 33.

30. On 1 January 1926, the legal estate in nos 35-39 became vested in Mr Godfrey under the provisions of the Settled Land Act 1925.

31. Mr Godfrey died on 23 March 1954 intestate. Letters of administration of his estate were granted to Mrs Stevens on 10 September 1947.

32. It was as the administratrix of Mr Godfrey's estate that Mrs Stevens conveyed by the 1948 conveyance nos 35-37 to Mr Whyatt. This conveyance did not include no 39. A member of the Whyatt family, Mr Raymond Whyatt, still owns no 35 until this day. In 2005, Mr Raymond Whyatt, who then also owned no 37, transferred no 37 to the applicants.

33. The 1948 conveyance did not purport to grant for the first time an express right of way over the front passage. It conveyed a right of way *as now used and enjoyed in common with the owners for the time being of the adjoining properties Numbers 33 and 39 Street aforesaid...* This suggests that these properties already had a right of way over the front passage, and it was that existing right which was being sold with nos 35-37.

#### The applicants' case

34. Mr Din says that it is inconceivable that when Mrs Buck sold no 33 to Mr Betteridge in 1911 she would also have sold off the passageway, thereby preventing access to nos 35-39. No 33 therefore included a flying freehold over the front passage from 1911 onwards. When Mrs Stevens became administratrix of Mr Godfrey's estate in 1947 she became the owner not just of nos 35-39, but of the front passage as well. Accordingly, she retained good title to the front passage at the time of the 1948 conveyance, and was well equipped to grant the disputed right of way over it.

35. If Mrs Stevens did own the front passage in 1948, it would appear that she never disposed of it. She sold off nos 35-37 on 5 May 1948. The day before, 4 May 1948, she sold no 39 to Mr Sherratt. Mr Din was unable to say who now owns the front passage.

#### The respondents' case

36. Mr Browne argued forcibly that Mrs Stevens did not own the front passage in 1948. Accordingly, she did not have the power to grant the disputed easement over it.

37. Mr Browne was also firmly of the view that it was not open to the applicants to rely upon any ground in support of their application, other than an express easement granted by the 1948 conveyance. This had been the basis of the original application. There had been no application to Land Registry for the noting of an easement by prescription or one which arose by what is now s.62 Law of Property act 1925 (at the relevant time s.6 Conveyancing Act 1881).

38. The respondents has suffered a considerable degree of opprobrium because of the stance they have taken. Mr Browne approached the estate agents instructed by Mrs Moss to sell no 35, and told them that no one had a right of way over the front passage. This prevented a potential sale from going ahead.

39. The respondents explain why they wanted a measure of control over the front passage, including the installation of a lock gate. They wanted to deter (1) drug users who smoke cannabis in the front passageway, (2) people who use the front passageway in order to look at the back of the houses in the row (presumably with an eye to breaking in) and (3) the dumping of food rubbish in the front passageway. The respondents have been at pains to point out that any reasonable request to deliver a bulky items through the front passageway for the convenience of the various householders would be granted.

### Discussion

40. As I have said above, it was only after Mr Wilkinson gave evidence about no 33 having been a butcher's shop that it was possible for anyone really to understand the conveyancing history of the row.

41. At the time of his death, on 6 June 1898, Mr James Harvey was the owner of the butcher's shop at no 33 as well as the cottages at nos 35–39<sup>4</sup>.

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<sup>4</sup> Mr James Harvey had conveyed nos 35-39 to Mr Thornley in 1869, but this was by way of a pre-1925 mortgage, and Mr Thornley re-conveyed the properties in 1874.

42. It was on his death that ownership of no 33 was separated from the ownership of nos 35-39.

43. In 1898, no 33 and nos 35-39 were in different occupation. The occupants of 35-39 were described in the abstract as Messrs Parker, Stones and Talbot.

44. I consider it more likely than not that the bequest of no 33 to Mrs Buck included the front passage. Access to the living accommodation above the shop was at that time situated in the front passage, and it would have made little sense in not including the front passage as part of no 33. I have no doubt that ever since the cottages were built the occupants had used the front passage in order to gain access to the rear of their homes. It is not known, however, whether or not such user was precarious or had been permitted by Mr James Harvey.

45. In 1948, the front passage was not vested in Mrs Stevens. Even it were, I can see no reason why she would have retained the front passage when selling off nos 35-39. Mr Din frankly admitted that, on his case, it was not known who the present owner of the front passage was.

46. In my judgment, on the division of (1) no 33 and (2) nos 35-39 following the death of Mr James Harvey, the quasi-rights enjoyed by the occupants of nos 35-39 over the front passage ripened into easements under s.6 Conveyancing Act 1881 (the predecessor to s.62 Law of Property act 1925). The 1948 conveyance did not grant these rights, but expressed them to be conveyed together with nos 35-37.

### Conclusion

47. The result is that the applicants have established that no 37 has the benefit of the disputed right of way, and that no 33 is subject to the burden of this right of way.

48. I shall therefore direct Land Registry to give effect to the original application as if it is not been opposed.

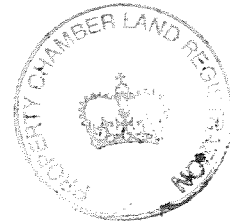
49. It is unfortunate that these proceedings had to go to trial, when it was common ground that a prescriptive right of way existed. The applicants have failed in their primary case, the one presented to Land Registry, but have succeeded in an alternative one. The respondents have succeeded on the applicants' primary case, but have failed on an alternative one.

50. The normal rule is for costs to follow the event. However, in view of the applicants failing on their primary case my provisional view is that they should recover 50% of their costs. If either side wishes to argue that there should be a different order for costs, that party must serve written reasons on the other party and the Tribunal within 14 days. Any response to those submissions must be sent to the other party and the Tribunal within 14 days thereafter.

50. The applicants must in any event serve on the respondents and the Tribunal a statement of costs in form N261 within 14 days. The respondents must serve any objections or representations regarding the amount of costs to the applicants on the Tribunal within 14 days thereafter.

**Dated this 25th day of February 2019**

*Simon Bultman*



BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL