[2019] UKFTT 0163 (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 2017/0902
BETWEEN

BARRY JOHN FACEY
ANN PRUNELLA FACEY

Applicants

and

PAUL GERALD SMITH
JULIE ANN SMITH
PAULA ANNE PAGE

Respondents

Propertyies: 74 Hamble Road, Bedford MK41 7XW; Land adjoining 74 Hamble Road; 76 Hamble Road, Bedford MK41 7XW and 78 Hamble Road, Bedford MK41 7XW

Title numbers: BD82188, BD82353, BD82717 and BD288898

ORDER

The Chief Land Registrar is ordered to give effect to the applications dated 31 January 2017

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 12th day of February 2018

PROPERTY CHAMBER LAND REGISTRATION

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Title numbers: BD82188, BD82353,BD82717 and BD288898

Before: Judge McAllister
Cambridge Magistrates Court
7 January 2019

Representation: The Applicants appeared in person; the Respondents were represented by Iain Bain of Counsel instructed by Palmers Solicitors
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DECISION

Introduction

1. The Applicants, Mr and Mrs Facey, purchased their home, 74 Hamble Road, Bedford ('Number 74') in October 1990. The First and Second Respondents, Mr and Mrs Smith, purchased the adjacent property, 76 Hamble Road, in March 1992 ('Number

76'). Mrs Page purchased 78 Hamble Road in June 2003 ('Number 78'). All three sets of neighbours have lived in their properties since the date of purchase.

2. Number 74 is the property furthest from Hamble Road in a crescent shaped row of properties. Access to Number 74 is over a driveway ('the Access Way') which forms part of the titles of Numbers 74, 76 and 78. The Access Way affords the three properties a measure of privacy from the road. Express rights of way over the relevant part or parts of the Access Way were granted and reserved in the original conveyances in the summer 1980 made between Bryant Homes Limited and the original purchasers. The benefit and burden of these express rights are noted on the titles of the three properties.

3. In earlier proceedings in this Tribunal Mr and Mrs Facey obtained title by adverse possession of an area of land to the north east of Number 74 ('the Additional Land'). Bedford Borough Council claimed to have paper title to the Additional Land. The background to the dispute and the relevant findings of fact are set out in a decision of Judge Mark dated 7 August 2014 and 17 November 2014 whereby he held that the Council did not have paper title to this land and that Mr and Mrs Facey had acquired title by adverse possession.

4. The Additional Land is registered with title number BD288898. The Respondents did not object to their application and, as I understand it, assisted by providing written statements. The Additional Land has become, in effect, an extension of the garden of Number 74. I do not have the measurements of the Additional Land. It is certainly large enough for a further dwelling, and perhaps more than one, to be built on it.

5. By an application dated 31 January 2017 Mr and Mrs Facey applied for the registration of the benefit and noting the burden of a right of way with and without vehicles over the Access Way for the benefit of the Additional Land.

6. On 16 January 2017 Mr and Mrs Facey applied for planning permission to erect a dwelling on the Additional Land. Permission was granted on 2 May 2017.

7. The Respondents objected on a number of grounds and denied that any prescriptive right had arisen in favour of the Additional Land. At the hearing the issues were these: were Mr and Mrs Facey able to establish that the Access Way was used in connection with the Additional Land and, if so, what is the extent of the user? More specifically, can the right of way, if established, be used to gain access to and from any dwelling which might be built on the Additional Land?

8. The Respondents' case is that, at best, the prescriptive right of way which might be found to have arisen in favour of the Additional Land is a right to pass and repass over the Access Way with or without vehicles for the purpose of maintaining, gardening or recreational use of the Additional Land but not for any other use.

9. I had the benefit of a site visit on 23 July 2018 the day before the first hearing was due to take place. It was adjourned due to the ill health of Mr Facey.

Background and evidence

10. Mr and Mrs Facey's Statement of Truth in support of their application dated 24 January 2017 states that for a period of 26 years they used the 'Shared Driveway' on a daily basis on foot and with vehicles to gain access to the Additional Land. This land would be landlocked in the event that no right existed. Further and fuller details were given in their Statement of Case. I summarise the key points below.

11. Mr and Mrs Facey began to take possession of the Additional Land in 1991. A brook ran along the south west of the Additional Land. The brook was re-aligned to run along the north of the Additional Land. The brook was some 2 metres deep and varied in width between 2.5 and 5 metres. Over 400 tons of soil were transported along the Access Way by lorry and by car to allow the brook to be filled with soil. The entrance gate to the patio at the side of Number 74 was widened to allow lorries to enter. Before the brook was diverted the only way to cross it was over a plank. The last consignment of soil was delivered in 2011. As the land settled it was necessary to keep replenishing it.

12. Further work was done on the Additional Land, including building a shed/workshop, and connecting an electricity supply, building a greenhouse, a tree house, laying drainage pipes and paving slabs, erecting fencing, putting down compost, creating bee hives etc. Most, if not all, of these activities required vehicular access. Parties were hosted on the Additional Land. All these activities, on Mr and Mrs Facey's case, were known to, and in some cases carried out with the assistance of, the Respondents. Mr and Mrs Smith, and their children, were frequent visitors to Number 74 and the Additional Land and were close friends of Mr and Mrs Facey.

13. In 1999 Mr and Mrs Facey bought a large caravan which, when not in use, was stored on the patio. The patio had been extended onto the Additional Land to allow the caravan to be parked almost at right angles to the house. Mr Facey's evidence was that at least three quarters of the caravan was parked on the Additional Land. Some of the items listed above were lifted over the hedge onto the Additional Land from the hoists of delivery vehicles, others taken to the Additional Land from the patio at the side of Number 74.

14. Compostable material was brought from other people's houses and deposited on the Additional Land. Again, the only means of access was over the Access Way. More recently mature trees were cut down on the Additional Land using Mr Facey's car as an anchor.

15. Much of the evidence given before me is the same as the evidence given in the earlier proceedings. I do not agree with the suggestion that the evidence given before me differs in any material respect from the evidence given before Judge Mark.

16. Difficulties between the neighbours arose in 2016 when it became apparent that Mr and Mrs Facey were considering building a bungalow on the Additional Land. The purpose of so doing was to provide a wheel chair friendly bungalow for Mrs Facey who is suffering from a severe spine disorder. The details of these difficulties and the discussions between Mr and Mrs Facey are not relevant to the issue I have to decide, and I did not understand Counsel to argue the contrary. In particular, the fact that Mr and Mrs Facey asked for an express deed of an easement from the Respondents is not

relevant to the question whether they had obtained such a right by prescription in any event.

17. Mr Smith accepted in his evidence that all the soil necessary to fill the brook came over his part of the Access Way, then over Mr and Mrs Facey's land, and then onto the Additional Land. He described the Additional Land as amenity land maintained by Mr and Mrs Facey, which had been cleared and cultivated (for example, by growing vegetables and keeping bees). Mr Smith's principal point was that the use of the Additional Land over the years did not in any way affect the way in which the Access Way was used. Matters changed when Mr and Mrs Facey applied for planning permission. As he put it in his witness statement, his concern, and that of the other Respondents, was that the effect of granting a right of way for all purposes would in effect be to increase the size the original housing development and which would be outside the scope of that development.

18. I also heard from Mrs Smith and Mrs Page but it seems to me, with no disrespect to them, that they added little to the evidence already given.

Conclusion on the evidence

19. I have no hesitation in concluding that access was gained, on foot and with vehicles, since 1990 or thereabouts over the Access Way to gain access to the Additional Land for various purposes, including the filling up and diverting the brook, constructing a workshop and greenhouse, cutting trees, planting vegetables, erecting bee hives, offloading compost, and so on. I also accept that the patio area to the side of Number 74 was extended to allow the caravan to be parked. In particular, I do not accept the submission that vehicular access stopped in the early 1990s when the brook was filled in.

20. I found Mr and Mrs Facey to be a straightforward and honest witnesses. The evidence of user of the Access Way to gain access to the Additional Land on foot and with vehicles is consistent and unarguable. It also seems clear to me that Mr and Mrs Smith, and Mrs Page, were aware of the use to which the Additional Land was being

put, and aware of the fact that access was gained to the Land on foot and with vehicles over the Access Way. In fairness to them, the catalyst for the dispute was the suggestion that the Additional Land might be used for the erection of a new dwelling.

Legal Principles

21. It seems to me clear that if, as a matter of fact, vehicular access had been gained over the Access Way for the purposes set out above, it does not matter that no vehicular access was gained onto the Additional Land itself. This is self evidently correct: a drive leading to a house provides access to that house by car and on foot, even if it is only possible to enter the house on foot. The distinction drawn by Counsel between vehicles using the Access Way *in connection* with the Additional Land, and vehicles gaining *access to* the Additional Land is not, in my judgement, a sound one. So, if a track was to be constructed across the Additional Land, I can see no reason why access should not be gained over the Access Way and into the Additional Land.

22. The real point in issue in this case is whether it is open to the owners of the dominant tenement (currently Mr and Mrs Facey) to use the Access Way if and when the character of the dominant tenement changes, and in particular if one or more dwellings are erected on this land. In short, the question is whether building a house (and by definition more than one) is a significant change in the purpose for which the Additional Land is used so that there will be an increase in or alteration of the burden on the servient land: see the judgement of Neuberger LJ , as he was, in *McAdams Homes Ltd Robinson* [2004] EWCA Civ 214. That was a case concerned with excessive user. But there is a clear overlap between cases where the issue is whether user is excessive, and where the issue is the extent of the rights obtained by prescription (or, indeed, by necessity, although this point was not argued before me).

23. The leading case on extent of the grant is *R.P.C Holdings v Rogers* [1953] 1 All E.R 1029. In that case the facts established that a right of way over a track had been acquired for all purposes connected with agriculture. The issue was whether the track could also be used by caravans and vehicles in connection with camping. The court held that the answer was no. The judge cited *Williams v James* (1867) L.R. 2 C.P 577 (a case about excessive user). The test set out in that case was: *' In all cases of this*

kind which depend upon user the right acquired must be measured by the extent of the enjoyment which is proved... when a right of way to a piece of land is proved that is... a right of way for all purposes connected to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it an additional burden.'

24. The same point was made in the case of *Wimbledon & Putney Commons Conservators v Dixon* (1875) 1 Ch D 362 in which James L.J said this: *...' I am satisfied that the true principle is the principle laid down ... that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property might be changed..'*

25. It seems to me therefore that whilst a right of way exists with or without vehicles to gain access to and from the Additional Land, the Access Way cannot, on the basis of prescription, be used to gain access to one or more houses to be built on the Additional land.

Conclusion

26. I was invited by Counsel, in the event that I found that a prescriptive right of way has arisen, to define the right as follows: *' A right for the proprietors of the Additional Land and their visitors to pass and repass along the Access Way with or without vehicles for the purpose of maintaining, gardening, or recreational use of the Additional Land but not for any purposes of vehicular access onto or egress from the Additional Land.'*

27. By letter dated 7 March 2017 Land Registry wrote to the Respondents advising them of the application, and setting out the form of wording which would be entered on the respective registers. This is to the effect that the land in question has the benefit of a right of way with or without vehicles over parts of the shared driveway included in 76 and 78 Hamble Road which lead into Hamble Road and, importantly, provided further: *'the extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen.'*

28. I can see no reason to depart from this, conventional, form of wording. I have found, on the evidence before me, that the right does not extend to using the Access Way for the purpose of gaining access to or egress from a residential building on the Additional Land which was, at one point, proposed. But I do not need to go beyond this finding for the purpose of this judgment. If issues arise in the future connected with the user of the Additional Land and any possible additional burden being placed on the Access Way, these issues can be dealt with if and when they arise.

29. This leaves the question of costs. Mr and Mrs Facey have succeeded in their application, but I have held that the Access Way cannot be used to gain access to any dwelling built on the Additional Land. I therefore invite submissions as to the appropriate cost order to be made within 14 days of receipt of this decision.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 12th day of February 2019.