

[2019] UKFTT 0165 (PC)

REF/ 2018 /0067

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

RAJ PROPERTIES LIMITED

APPLICANT

and

(1) HARJIVAN SAUJANI

(2) MANJULA SAUJANI

RESPONDENTS

Property Address: 2 and 2B Serbert Road, London E7 0NQ and Land on the East side
of Woodgrange Road, Forest Gate

Title Numbers: EGL222924 and EGL260455

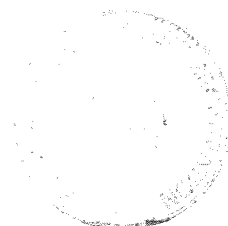
ORDER

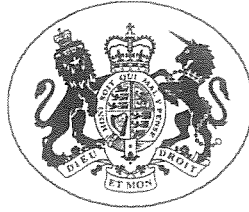
The Tribunal orders that the Chief Land Registrar do cancel the application of the Applicant, Raj Properties Limited for the registration of the benefit of and noting of the burden of a right of way in favour of 2 and 2B Serbert Road, Forest Gate, London E7 0NQ registered under title number EGL222924 over the yard at 70A Woodgrange Road, Forest Gate, London registered under title number EGL260455.

Dated this 5th February 2019

Michael Mitchell

BY ORDER OF THE TRIBUNAL





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Property Address: 2 and 2B Serbert Road, London E7 0NQ and Land on the East side
of Woodgrange Road, Forest Gate

Title Number: (1) EGL222924 and (2) EGL260455

Before: Judge Michell

Sitting at: Alfred Place, London

On: 25th October 2018

Applicant Representation: Mr Richard Bottomley, counsel
Respondent Representation: Miss Settler, counsel

DECISION

Cases referred to

Dunn v. Blackdown Properties [1961] Ch 433

Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896

1. The Applicant is the registered proprietor of 2 and 2B Serbert Road, Forest Gate in east London (“the Building”). At the rear of the property is a yard (“the Yard”) to which there is vehicular access from Woodgrange Road. The address of the Yard is 70A Woodgrange Road. The Applicant has applied to HM Land Registry for the registration of the benefit of and noting of the burden of a right of way with or without vehicles over the Yard. The Applicant claimed in its application that the right of way had been created by prescription. The Respondents are the registered proprietors of the Yard. They denied that the right of way had arisen by prescription. The matter was then referred to the Tribunal for determination.

2. The Applicant in its Statement of Case alleged that easements (including a right of way with vehicles) were granted for the benefit of the Building over the Yard by a Transfer dated 6th July 1988 (“the 1988 Transfer”). In paragraph 17 of the Statement of Case, the Applicant pleaded as follows

“The Applicant does not claim or rely on any rights that may have been acquired by prescription or the statutory declaration of Mr Siddique but reserves the right to argue such matters in the alternative if the Tribunal does not accept the Building benefits from rights of access with or without vehicles over the Yard, as granted by the July 1988 Transfer”.

The Applicant did not plead any facts that, if proved, would have given rise to a right of way by prescription. The Applicant’s case as set out in the skeleton argument prepared by counsel for the Applicant was that the Applicant was entitled to a right of way because a right of way had been granted in favour of the Building on the true construction of the 1988 Transfer. No case based on prescription was argued at the hearing.

3. The Yard is an area of land that lies behind 70, 72, 74, 76 and 78 Woodgrange Road and 2

and 4 Serbert Road. 2 Serbert Road is attached to 78 Woodgrange Road on its south side and to 4 Serbert Road on its north side. The Yard adjoins to the south the main railway line into Liverpool Street station. The entrance to the Yard from the highway is to the south side of 70 Woodgrange Road. There is a brick wall along the eastern boundary of the Yard. There used to be a two-storey building in the Yard adjoining this wall. That building was called 70A Woodgrange Road. It was demolished in about April 2004. The Building has a small back yard the southern part of which is now separated from the Yard by a concrete block wall in which there is a gate. It is common ground that the wall and gate were constructed by the Applicant after it purchased the Building in 2017.

4. The Yard, the Building and 70 to 78 (inclusive) Woodgrange Road were formerly in the ownership of Landed Estate Trustees (“LET”). On 6th July 1988 by the 1988 Transfer LET transferred the Building to Mohammad Shakil Siddique. At the date of the 1988 Transfer LET owned the Yard and 72 and 74 Woodgrange Road. They may then have also owned 76 and 78 Woodgrange Road, though this is not clear from the evidence. The Building was registered under title number EGL222924. The Property Register of the title includes the following extract from the 1988 Transfer:

“EXCEPT AND RESERVED unto the Transferors and their successors in title the owners from time to time of 70, 70A, 74, 76 and 78 Woodgrange Road, Forest Gate (hereinafter called “the adjoining property”) all such rights privileges easements and quasi-easements as are now enjoyed or are capable of being enjoyed by the adjoining property over and against the property hereby transferred and as if there had never been unity of seisin of the property hereby transferred and the adjoining property.

The property hereby transferred is transferred TOGETHER WITH such rights privileges easements and quasi easements as are now enjoyed or are capable of being enjoyed by the property hereby transferred over and against the adjoining property as if there had never been unity of seisin of the property hereby transferred and the adjoining property (in so far as the Transferors are able to grant the same)”.

5. By a transfer dated 31st August 1988 LET transferred 70 Woodgrange Road to Constantine David Kay and others. The Charges Register of the title to 70 Woodgrange Road (being EGL226202) sets out the following extract from that transfer:

“Subject to a right of way in favour of the Transferor (and all persons who may have or hereafter may have a like right) at all times with or without vehicles for the purpose of access to and from 72, 74, 76 and 78 Woodgrange Road aforesaid (hereinafter called “the adjoining property”) but for no other purpose whatsoever over such part only of the passageway forming part of the property hereby transferred leading from the rear of the adjoining property into Woodgrange Road aforesaid as shall afford access to the adjoining property EXCEPT AND RESERVING unto the Transferor and his successors in title the owners from time to time of the adjoining property and every part thereof all such privileges easements and quasi easements as are now enjoyed or are capable of being enjoyed by the adjoining property over the property hereby transferred as if there had never been unity of seisin of the property hereby transferred and the adjoining property”.

6. By a transfer dated 22nd December 1989 LET transferred the Yard to the Respondents. The Yard was registered under title number EGL260455. The Charges Register of the title to the Yard includes the following extract from the transfer of 22nd December 1989:

“Subject to a right of way in favour of the Transferor (and all persons who may have or hereafter may have a like right) at all times with or without vehicles for the purpose of access to and from 72, 74, 76 and 78 Woodgrange Road aforesaid (hereinafter called “the adjoining property”) but for no other purpose whatsoever over such part only of the passageway forming part of the property hereby transferred leading from the rear of the adjoining property into Woodgrange Road aforesaid as shall afford access to the adjoining property EXCEPT AND RESERVING unto the Transferor and his successors in title the owners from time to time of the adjoining property and every part thereof all such privileges easements and quasi easements as are now enjoyed or are capable of being enjoyed by the adjoining property over the property hereby transferred as if there had never been unity of seisin of the property hereby transferred and the adjoining property”.

7. By a transfer also dated 22nd December 1989 LET transferred to Springheights Ltd. 72 Woodgrange Road. The transfer included the following clauses:

“ TOGETHER WITH a right of way (in common with the Transferor and all other persons who may have or hereafter may have a like right) at all times with or without vehicles for the purpose of access to and from the property hereby transferred or any

part thereof but for no other purpose whatsoever over such part only of the passageway leading from the rear of the property hereby transferred into Woodgrange Road aforesaid as shall afford access to the property hereby transferred and the Transferee shall pay the Transferor or the owner from time to time of the said passageway a due or rateable proportion of the cost of maintaining the said passageway in a serviceable condition EXCEPT AND RESERVED unto the Transferor and his successors in title the owners from time to time of the properties numbers 70A, 74, 76 and 78 Woodgrange Road aforesaid (hereinafter called “the adjoining property”) all such rights privileges easements and quasi easements as are now enjoyed or are capable of being enjoyed by the adjoining property over and against the property hereby transferred as if there had never been unity of seisin of the property hereby transferred and the adjoining property above mentioned”.

8. Evidence that 70, 70A, 72, 74, 76 and 78 Woodgrange Road and 2 Selbert Road were in common ownership in June 1972 is provided by a written agreement dated 20th June 1972 whereby Messrs Pattison and Herrington, as owners of that land (which included the Yard) granted to West Ham Laundrette Company Limited a licence to use the Yard to gain access to the rear entrance of 4 Serbert Road. The agreement recited that the owner of 4 Serbert Road had used the Yard for the purposes of gaining access to the rear entrance of 4 Serbert Road during the past several years.

9. There is a dispute between the parties as to whether there was an existing means of access from the Building into the Yard at the date of the 1988 Transfer. The Applicant relies on a statutory declaration dated 9th August 2017 made by Mohammad Shakil Siddique. Mr Mohammad Siddique was the transferee of the Building under the 1988 Transfer and remained the owner of the Building until he sold it to the Applicant in August 2017. In paragraph 3 of the Statutory Declaration Mr Mohammad Siddique stated

“I confirm during the ownership of [the Building] access to and egress from [the Building] to and over the [Yard] with or without vehicles has always been from what I believed a right privilege and easement [the Building] enjoyed”.

The statutory declaration was drafted by Mr Ajay Arora, who is the in-house solicitor for the Applicant. He acted for the Applicant on the purchase of the Building from Mr Mohammad Siddique. The declaration was drafted on 28th June 2017 and completion of the purchase took place in August 2017. Mr Arora said that the statutory declaration was drafted based on a

conversation he had with Mr Mohammad Siddique. He did not have a note of that conversation. Mr Mohammad Siddique was not called to give evidence and Mr Arora said that he had not made any attempt to contact Mr Siddique. Mr Arora produced at the hearing the Property Information Form completed by Mr Siddique's solicitors at the time of the purchase of the Building by the Applicant. On that form in answer to the question, "Does the property benefit from any rights or arrangements", the "No" box had been ticked. It was that answer that led Mr Arora to write to Mr Siddique's solicitors asking them to "confirm that the rear of the property did have an access to the rear before your client unilaterally took the decision to block that for security reasons". There was no letter in answer to that question in the hearing bundle. The statutory declaration was then drafted by Mr Arora.

10. Mr Muhammad Anwar is the owner of a confectionary shop at 72 Woodgrange Road, which he has had for the last 13 years. He gave evidence that since he has been at 72 Woodgrange Road (i.e. in since 2005) there has been a wall at the back of the Building preventing access to and from the Yard.

11. Mr Shahid Siddiqui gave evidence. He is in the estate agency and property development business and has known Mr Saujani since they were at college. He recommended that Mr Saujani buy the Yard. He went into the Yard at the time Mr Saujani bought it. In his witness statement, Mr Siddiqui said that to the best of his knowledge there had always been a dividing brick wall which divided the Building from the Yard. He said, "To my recollection this dividing wall was an extension to the old building that existed there many years ago prior to the fire". He went on to say, "The structure of the building would have previously been such that the walls of the building would have blocked any possibility for the previous or current owners of [the Building] to have any possible way of using [the Yard]". Mr Siddiqui accepted that Mr Saujani would have a better recollection than he would of the Yard and the Building.

12. Mr Biren Saujani is the son of the Applicants. His evidence was that he had the authority of the Applicants relating to all matters concerning the Yard and had been the main person dealing with all the matters relating to the Yard since the Applicants purchased it. He said that there was a brick boundary wall between the Building and the Yard, which he first saw at the time of the sale by auction of the Yard in 1989. It was of the same form of construction as the former building that stood in the Yard. He said that the area adjacent to

the boundary wall was used by the tenants occupying the building in the Yard, as a bin storage area. He recalled the wall as being built of old bricks.

13. Mr Harjivan Saujani gave evidence. In his witness statement, Mr Harjivan Saujani said that there was an area adjacent to 70A Woodgrange Road where the tenants of 70A Woodgrange Road stored their bins. That was an area at the north end of the building at 70A Woodgrange Road. In 2005 architects acting on his behalf submitted a planning application to build a new building on the site of the former building at 70A Woodgrange Road but also incorporating the area that had been used for the storage of bins. That development proposal would have involved the demolition and replacement of the boundary wall. That boundary wall was in place before the Respondents bought the Yard and Mr Harjivan Saujani thought it was over a hundred years old. Mr Harjivan Saujani said that the Applicant had demolished the original boundary wall and extended the back yard of the Building into the Yard and constructed a gate in it. Mr Harjivan Saujani is elderly and in cross-examination, his evidence appeared somewhat confused. I do not consider it safe to place reliance on his evidence.

14. If the Applicant wished to rely on there having been an accessway between the Building and the Yard at the time of the 1988 Transfer then it was for them to prove the existence of that entrance on the balance of probabilities. They have not done so. I accept the evidence of Mr Biren Saujani that in 1989 there was an old brick wall along the boundary between the Yard and the Building. His father had bought the Yard and Mr Biren Saujani was helping his father. It is wholly probable that Mr Biren Saujani would have inspected the boundaries of the Yard and noted what the boundary features were and whether they included any gates. Mr Shahid Siddiqui's evidence supports the existence of the wall in 1988. If he could not remember clearly whether the wall was a continuation of the structure of 70A Woodbridge Road or an independent structure that is not surprising. The existence of a licence granted on 20th June 1972 giving the occupants of 4 Serbert Road a right to access Number 4 Serbert Road by passing over the Yard does indicate that there was a gap beside the end flank wall of 70A Woodgrange Road and the boundary of the Building through which access to 4 Serbert Road was possible. However, it does not indicate that there was at the date of the licence, let alone in 1988, a means of access from the Yard to the Building.

15. It is utterly improbable that a wall made of old bricks would have been built between the date of the 1988 Transfer and 1989. The evidence of Mr Anwar is that there was a wall in

place in 2005. Set against the oral evidence of Mr Biren Saujani, Mr Shahid Siddiqui and Mr Anwar, I cannot accept the untested evidence in the form of the statutory declaration of Mr Siddique. It is particularly unsafe to place reliance on the statutory declaration because it was drafted by Mr Arora for the benefit of the Applicant and without there being any attendance note or other record in evidence of what (if anything) Mr Arora was told by Mr Siddique before Mr Arora drafted the statutory declaration. I find that at the date of the 1988 Transfer there was a wall between the Yard and the Building, preventing access between the two.

16. As there was a wall between the Yard and the Building in 1988, access to the Building cannot have been enjoyed at the date of the 1988 Transfer. Therefore, the 1988 Transfer did not grant a right of way to and from the Building over the Yard by the use of the words “such rights, privileges, easements, and quasis-easements as are now enjoyed by the property transferred over and against the adjoining property”.

17. Counsel for the Applicant submitted that a right of way was granted by the 1988 Transfer for the benefit of the Building over the Yard even if there was a brick wall between the Building and the Yard at the date of the 1988 Transfer. He submitted that such a right of way was granted by the use of the words “capable of being enjoyed by the property hereby transferred over the adjoining property”. I do not accept that submission. In construing the words of the 1988 Transfer I have to apply the general principles of interpretation set out by Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 at 912F. These can be summarised as follows (so far as is relevant to this case):

- (1). Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of execution of the 1988 Transfer.
- (2) The background includes all facts which would have been reasonably available to the parties.
- (3) The admissible background does not include the previous negotiations of the parties and declaration of subjective intent.
- (4) The meaning of the document to be construed is the meaning that the parties using the words of the document against the relevant background would reasonably have been understood to mean.

In this case the only evidence of relevant background is the evidence of the physical characteristics of the Yard and the Building at the time the 1988 Transfer was executed. Against that background, it seems to me to be clear that the phrase “now enjoyed or capable of being enjoyed” means being enjoyed at the date of execution of the 1988 Transfer or capable of being transferred as at that date. Thus, for example, if there had been an access way from the Building to the Yard at the date of the 1988 Transfer but that access was not then being used, a right of way over the Yard to use that access would arise because access from the Yard was at that date capable of being enjoyed. There is nothing in the circumstances to indicate that the parties intended that the transferee or their successors in title should be able to make whatever physical alterations they might choose to make to the Building and thereby bring into existence rights over the Yard that were not enjoyed or capable of being enjoyed if the Building had remained in the physical condition in which it was at the date of the 1988 Transfer.

18. I would further note that if the 1988 transfer is to be construed as granting easements to arise at a future date (e.g. when an access way was made between the property transferred and the adjoining property) such a grant would be subject to the rule against perpetuities – see *Dunn v. Blackdown Properties* [1961] Ch 433. As the transfer was executed in 1988 and no access between the transferred property and the Yard was made within 21 years of the date of the transfer (i.e. by 2009), any future right granted by the transfer over the Yard would have expired under the rule against perpetuities.

Conclusions

19. The Applicant has not established that he is entitled to a right of way over the Yard. I shall direct the Chief Land Registrar to cancel the application to register the benefit and note the burden of such a right of way.

20. My preliminary view is that the Applicant should pay the Respondent’s costs of the proceedings. Practice Direction 9 of the Land Registration Division Practice Directions states that if the Tribunal decides to make an order about costs, ordinarily the unsuccessful party will be ordered to pay the costs of the successful party. I am not aware of any reason in this case why the Tribunal should not make an order as to costs or should not follow the usual course. 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 5pm on 22nd February 2019.

Dated this 5th day of February 2019

Michael Mitchell



BY ORDER OF THE TRIBUNAL