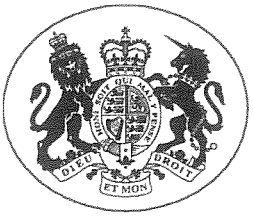

[2019] UKFTT 0719 (PC)

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2019/0021
BETWEEN

BRIAN BERNARD ARRIGONI

Applicant

and

BARBARA EDGARDA MAUDE HAWKINS

Respondent

Property: The ground floor flat to the rear of 50 High Street Falmouth, Cornwall TR11 2AF

Title number: CL330968

Before: Judge McAllister
Bodmin Magistrates Court
25 September 2019

Representation: The Applicant appeared in person; the Respondent was represented by Julia Petrenko of Counsel instructed by Hart Law LLP

DECISION

Introduction

1. By an application dated 24 April 2018 the Applicant, Mr Arrigoni, applied under Schedule 6 to the Land Registration Act 2002 to be registered as the freehold owner of the ground floor premises at 50 High Street, Falmouth ('the Property'). The application was objected to by the Respondent, Mrs Hawkins. The form NAP also required the registrar to deal with the application under paragraph 5 of Schedule 6. Mr

Arrigoni had stated in his application that he was relying on paragraph 5(2) of that Schedule.

2. The matter was referred to the Tribunal on 3 January 2019 and I heard the case on 25 September 2019, having had a site visit the Property on 24 September.
3. It is common ground that the Property was let to Mr Arrigoni on an oral periodic tenancy in or about 1986 by Mr Hawkins. Mr Hawkins died on 28 April 2016. The Property, it seems, was to be used for commercial purposes and the tenancy was protected by Part II of the Landlord and Tenant Act 1954. It is also common ground that Mr Arrigoni has lived in the Property since that date, and, further, that he has not paid any rent since (on his case) 1986, and (on Mrs Hawkins' case) since 1993. It appears that on 8 February 2001 the local authority certified that the Property could lawfully be used as a single dwelling house.
4. 50 High Street Falmouth was registered in the names of Mr and Mrs Hawkins on 29 January 2002.

Background and evidence

5. On 11 May 2001 Mr Arrigoni issued proceedings in the Truro County Court against Mr and Mrs Hawkins in which he sought a declaration that he was the freehold owner of the Property by reason of adverse possession.
6. In his Particulars of Claim Mr Arrigoni claimed that the owners were dispossessed on 1 March 1986 (when he stopped paying rent). The agreement had been that Mr Arrigoni was to pay an initial deposit of £1,000 and £20 a week thereafter. On his case he stopped paying rent because Mr Hawkins had not, as had been agreed, carried out works of repair to the Property. The Defence denied the claim, and asserted that the last rent was paid on 1 September 1993.
7. On 15 January 2002 the parties entered into a Tomlin order. I will set this out in full. The order reads as follows:

BY CONSENT
IT IS ORDERED THAT

1. **The further proceedings in this action, except for the purpose of carrying the said terms into effect be stayed and for that purpose the parties are at liberty to apply.**
2. **There be no order as to costs**

SCHEDULE

1. **The Defendants will apply forthwith to register their freehold interest in all that property situate at and known as Hawkins House 50 High Street Falmouth in the County of Cornwall TR11 2AF at HM Land Registry.**
2. **The parties will use their reasonable endeavours to execute a lease in favour of the Claimant in respect of that property subject of the proceedings herein being the Flat at the Rear of Hawkins House, 50 High Street....The term of the said lease being for a term of not less than 90 years at a rent of £20 per week and drafted in compliance with the requirements of the Council of Mortgage Lenders standard instruction to solicitors.**
3. **Upon execution of the lease referred to in paragraph 2 above the Claimant will fortwith apply to HM Land Registry for the registration of his title and the Defendants will use their reasonable endeavours to assist the Claimant's said application by deducing title to the freehold and answering any reasonable requisitions raised by the Land Registry leading to the registration**

8. As stated above, the freehold title was registered on 29 January 2002.
9. On 14 July 2004 Mr Arrigoni made an application to HM Land Registry to be registered as freehold owner of the Property. Mr and Mrs Hawkins objected and the matter was referred to the Adjudicator (as he then was). On 13 April 2005 the Adjudicator made a direction under s 110 of the Land Registration Act 2002 requiring Mr Arrigoni to commence proceedings in the court to determine whether or not he was entitled to be registered as freehold owner of the Property.
10. Mr Arrigoni made three applications to Truro County Court, all of which were dismissed with costs. These applications came before the court on 2 August 2005, 23 September 2005, and 3 November 2005. In each case, as I understand it, the judges

took the view that the 2001 action cannot be further litigated: it is stayed pursuant to the court order dated 15 January 2002. The court also refused to set aside the Tomlin order.

11. On 14 February 2006 Simon Brilliant, then a Deputy Adjudicator, held that court proceedings had been concluded by the Tomlin order. The consent order remained in place, and it was up to the parties to act in accordance with it. The proceedings before the Adjudicator were closed.
12. Mr Brilliant also noted that by letter dated 15 November 2005 Mr Arrigoni wrote to the Adjudicator stating that, so far as he was concerned, the matter had been resolved by the Court and that he was entitled to a lease pursuant to the Tomlin order.
13. There is some correspondence (but, I suspect not all) between the parties following the decision made by Mr Brilliant. By letter dated 16 September 2008 Mr Howarth wrote to Mr Arrigoni (clearly in response to a letter from Mr Arrigoni) stating that Mr Arrigoni occupied with consent and adding *'the Lease is acceptable. Whose legitimate interests? Why is a claim for mesne profits bogus?'* On 18 March 2012 Mr Arrigoni wrote to Mrs Hawkins' solicitors stating that he had received an offer from them which he was considering and reminding them that Mr and Mrs Hawkins were bound by the Tomlin order to provide a *'negotiated fully alienable lease in marketable form'*, and adding *'Can you please advise if they are now able to negotiate such?'*.
14. Mr Howarth replied on 20 March 2012 stating his clients have and are always willing to put in place a lease. Mr Arrigoni in turn replied stating that he would employ a solicitor to draft a suitable lease according to current rules, CML advice and conditions regarding residential leases.
15. Following Mr Hawkins' death, title to 50 High Street passed to Mrs Hawkins by survivorship.
16. Shortly before the hearing Mr Arrigoni wrote to the Tribunal stating that a reasonable compromise would be possible and to this end he suggested that the services of the Leasehold Advisory Service could be a source of help and advice on any disputed terms (presumably of the 90 year lease).
17. Mr Howarth did not give evidence but made a witness statement. He acted for the Hawkins family from the late 1990s until 2018. Following the Tomlin order, and on Mr Hawkins' instructions, every effort, he stated, was made by him to execute a lease in favour of Mr Arrigoni but this proved impossible. He put forward a standard lease

which complied with the Council of Mortgage Lenders standard instructions. I was also told at the hearing that Mrs Hawkins remains willing to grant a lease.

18. Mr Arrigoni's evidence, at the hearing, was not entirely easy to follow. He stated that in his view paragraph 2 of the schedule to the Tomlin order is not enforceable; that there had been no negotiations as to the terms and conditions of the proposed lease; that Mr Howarth would not negotiate a draft lease until mesne profits were paid; but then stated that he had received a draft lease which was not acceptable because it was a business lease. He then added that he was still willing to keep his part of the bargain and concluded by saying that he wanted Mrs Hawkins to let him stay with a lease.

Conclusion

19. The first issue which arises is whether Mr Arrigoni can establish that he has been in adverse possession of the Property for a period of at least 10 years prior to the application dated 24 April 2018.
20. I have no hesitation in concluding that his occupation, though undoubtedly exclusive, was not adverse. The effect of the Tomlin order was that, in my judgement, Mr Arrigoni remained in occupation pending the grant of the lease as a licensee or tenant at will (see *Javad v Aquil* [1991] 1WLR 1007). His occupation was not 'adverse' but with permission.
21. Both parties are still treating the contractual agreement reached in January 2002 as valid and effective, even though more than 17 years have passed since that date. The fact that they have not yet been able to agree terms does not mean that Mr Arrigoni's occupation has ceased to be permissive. This is clearly not a satisfactory state of affairs but the answer lies in reaching agreement as to the lease (or concluding that such an agreement is not possible) rather than relying on the law of adverse possession. It is not enough to say, as Mr Arrigoni has done in his Statement of Case, that no possession proceedings or applications for specific performance have been made against him.
22. Moreover I also agree with the submission made by Counsel for Mrs Hawkins that Mr Arrigoni cannot, in any event, bring himself within paragraph 5(2) of Schedule 6 to the 2002 Act (or any of the three conditions). There is no evidence that Mr or Mrs Hawkins have encouraged Mr Arrigoni to believe that he would have a future interest in the Property or that Mr Arrigoni acted to his detriment. The contractual agreement

to grant and take a lease does not, clearly, fall within this paragraph since it is that very agreement which makes Mr Arrigoni's continued occupation permissive.

23. Finally, I should mention a point raised by Mr Arrigoni. He appears to maintain that Mrs Hawkins is not, in fact, the proprietor of the Property because, it is said, the appropriate form was not completed to remove the name of the deceased from the register. This point is entirely without merit. The burden is on Mr Arrigoni to establish that he has acquired title by adverse possession, and for the reasons I have given, he has failed to do so.

24. I will accordingly order the Chief Land Registrar to cancel the application. This leaves the question of costs. As the successful party the Respondent is in principle entitled to her costs. A form N260 is to be filed and served within 14 days. Mr Arrigoni may then respond, and I will determine what order to make without the need for a further hearing.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 14th day of October 2019