



[2017] UKFTT 0642 (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 2016/0443

BETWEEN

THE OLD CANAL COMPANY LIMITED

Applicant

and

JAMES RUSSELL TATE

Respondent

Property Address: Land at Royston Bridge, Bacton Road, North Walsham

Title number: NK440423

Before: Judge McAllister

Sitting at Norwich Magistrates Court

5 July 2017

Representation: Amy Proferes of Counsel instructed by Birketts LLP appeared for the Applicant; Russell Butcher of Counsel instructed by Hansells appeared for the Respondent

DECISION

Introduction

1. The Applicant ('the Company') is the registered owner to parts of the North Walsham and Dilham Canal ('the Canal') under three registered titles, NK403089, NK403088 and

NK402399 which were registered on 19 August 2010, 15 September 2010 and 15 September 2010 respectively.

2. The Respondent (Mr Tate) is the registered owner of a parcel of land (NK44023) which shares a boundary with the Company's land registered with title NK403089.
3. By an application dated 4 June 2015 the Company applied under Schedule 4 to the Land Registration Act 2002 ('the 2002 Act') to remove an area of land from the Respondent's title and to include it within the red edging of title number NK403089 (and not, as stated in the Case Summary, to include it within NK402399).
4. The Disputed Land is a rectangular piece of land on the western side of the Canal bank bounded to the west by the River Ant and lying to the north of a 'spur' of land registered as part of the Company's title. There are no physical features on the ground to allow identification of the precise location of the Disputed Land. Land Registry have shown the Disputed Land as shaded pink on their illustrative plan (again, confusingly, the disputed land is shown shaded blue on the illustrative plan enclosed with the case summary. The area of land is the same).
5. It is to be noted that the Disputed Land is not contiguous with the Bacton Road but runs parallel with it. The illustrative plan in the trial bundle also shows an area shaded blue, which occupies part of the land (contiguous with the River Ant) between the Disputed Land and the road. The remaining area south of the Disputed Land is, (it seems clear), the 'spur' referred to above. The blue land is unregistered. I believe there is (or may be) a further application by the Company in relation to this land, which will be dealt with following this reference.
6. In effect, therefore, if the Company succeeds in its application in relation to the Disputed Land and, in due course, to the blue land, it would own a not inconsiderable strip of land between the Canal and the River Ant, with access from the road. There is no gate or fence preventing access from the Bacton Road to the Disputed Land, albeit that there are gate posts which, I am told, have been erected recently.

7. Mr Tate's land is open land between the edge of Canal (as registered) and the River Ant. The Canal is an artificial waterway which stretches from Antingham Ponds to Wayford Bridge, a distance of some 9 miles. It was opened in or about 1826 and was created by an enabling Act of Parliament dated 5 May 1812 ('the Act') which is still in force. It has not been navigable since the 1950s. It is the aim of the Company to make that part of the Canal in its ownership navigable again and, to that end, works of improvement and re-instatement have been carried out at various points.
8. The Company's case, as appears more fully below, is that the Disputed Land forms part of the land originally conveyed to the Company Proprietors of the North Walsham Canal Company ('the Statutory Company') from which it derives its title. Mr Tate's case, in contrast, is, in essence, that he has paper title to the Disputed Land, and that whatever evidence has been adduced by the Company it is not sufficient to establish otherwise, and that accordingly there is no mistake within the meaning of Schedule 4 to the Land Registration Act 2002 ('the 2002 Act') which requires an alteration to his title.
9. I had the benefit of a site visit on 4 July 2017. The Disputed Land is approached from the North Walsham end of the Bacton Road, just before a small bridge, known (now) as Royston Bridge (and previously variously referred to as Austin Bridge or Oystern Bridge).
10. For the reasons which are set out below I will order the Chief Land Registrar to cancel the application. I am not satisfied that the Disputed Land forms part of the title of NK403089.

Nature of the application

11. By paragraph 5 of Schedule 4 to the 2002 Act the registrar (and therefore the Tribunal) may alter the register for (amongst other things) the purpose of correcting a mistake. The register is not indefeasible. But it is for the Applicant to establish, on a balance of probabilities, that there is a mistake which requires an alteration either to the plan or to entry in the register. If the alteration involves the correction of a mistake which prejudicially affects the title of the registered owner, the alteration is a rectification. In such a case, particular safeguards are in place where the registered owner is in possession.

12. By rule 5 (a) of the Land Registration Rules 2003 the property register of a registered estate must contain a description of the registered estate which must refer to a plan based on the Ordnance Survey map and known as the title plan.
13. Section 60 of the 2002 Act provides as follows:
- (1) The boundary of a registered estate as shown for the purposes of the register is a general boundary unless shown as determined under this section.
 - (2) A general boundary does not determine the exact line of the boundary.
14. There is no definition of a 'general boundary'. But it is clear that the 2002 Act intended that the general boundaries legislation under the Land Registration Act 1925 was to remain unchanged (see Law Com 271, at paragraphs 9.9 and 9.11). Rule 278 of the Land Registration Rules 1925 provided a clearer definition:
- (1) Except in cases in which it is noted in the Property Register that the boundaries have been fixed, the filed plan shall be deemed to indicate the general boundaries only.
 - (2) In such cases the exact line of the boundary will be left undetermined – as, for instance, whether it includes a hedge or wall and ditch, or runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it; or whether or not the land registered includes the whole or any portion of an adjoining road or stream.
15. The effect of these provisions is that (unless the boundaries or any of them have been determined in accordance with section 60(3)) the boundaries shown on the title plan are indicative only. Removal of land from a title plan does not, therefore, necessarily mean that any land is being removed from the registered title. It may be simply the case that the Court or Tribunal is establishing a more accurate general boundary (see *Derbyshire Council v Fallon* [2007] EWHC and *Drake v Fripp* [2011] EWCA Civ 1279), in which case it is an alteration to the register, and not rectification. In some cases, the removal of land from one title to another will involve more than merely establishing the general boundary, and will properly be described as property dispute. In such a case, the alteration involves a rectification of the register.
16. In the present case it seems to me clear that the application is for alteration of the register to show the correct boundary between the two titles referred to above, and is not an application for rectification. But in any event, whether the issue involves deciding where the general boundary is, or whether the issue involves removing land from one

title and placing it in another title, the first step is to determine whether the Applicant has paper title to the disputed area. If the answer is yes, then unless the land is in possession of the Respondent, the application must be approved unless there are exceptional circumstances which justify not making the alteration.

17. I should say that the outset of the hearing, Mr Butcher, for the Applicant, raised for the first time the suggestion that Mr Tate might be (or might have been) in possession of the Disputed Land) thereby possibly bringing into play the provisions of paragraph 6(3) of Schedule 4, which confer a greater protection on the registered owner

18. It seems to me that it was too late to raise this issue but in any event, the evidence did not come near to establishing that Mr Tate was in possession of the Disputed Land. The point is of no relevance to this case since my findings are that the Disputed Land forms part of Mr Tate's title.

Construction of conveyances generally

19. The approach to construing conveyances is well established. As was stated by Lord Hoffman in *Alan Wibberley Building Limited v Insley* [1999] 1 WLR 894:

- (1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land...
- (2) An attached plan stated to be 'for the purposes of identification only' does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land.
- (3) Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the time of the conveyance.
- (4) In principle there is no reason for preferring a line drawn on a plan based on the Ordnance Survey as evidence of the boundary to other relevant evidence that may lead the court to reject the plan as evidence of the boundary.

20. In appropriate cases, it is clearly relevant to have regard to the conveyance or other founding document as a whole, as well as extrinsic evidence such as topographical features.

The Company's title

21. The starting point is the Act. This is headed: *'An Act for making a Navigable Canal from the Rivers Ant and Bure at or near Wayford Bridge, near Dilham, to the Towns of North Walsham and Antingham in the County of Norfolk'*. Title to all parts of the Canal was first vested in the Statutory Company. The Act empowered the Statutory Company to make the Canal and, amongst other things, to *'make, maintain, repair and alter any Fences, Roads or Passages over, under or through the said Canal, or the Tunnels, Aqueducts, Soughs, Trenches, Gutters, Watercourses, and Sluices which shall communicate therewith and also to make, set out, and appoint such Towing-paths, Banks, Roads and Ways for the towing, haling or drawing of Boats, Barges or other Vessels passing upon the said Canal with Men, Horses or otherwise and such convenient Places for Boats, Barges and other Vessels to turn, lie or pass each other as the Company of Proprietors shall think fit or expedient...'*

22. It is the Company's case that the relevant conveyances through which the Company derives its title to part of the Canal need to be looked in the light of the more general provisions in the Act, in particular regarding the maintenance of, and infrastructure for, the Canal. In particular, reference was made to clause IX (which provides that in making the Canal, the Statutory Company was not to deviate more than one hundred yards from the course shown on the map deposited with the clerk of the peace of the County of Norfolk); clause XII (which provides that the Canal and the towing paths were not to exceed 30 yards in breadth, except in any place where any dock or basis was made) and Clause XLIX (which imposed a duty on the Statutory Company to fence off the towing paths from the adjoining lands).

23. In 1866, pursuant to the North Walsham and Dilham Canal Act 1866, the Statutory Company was granted permission to sell the Canal on certain terms and (although this may be no more than of historical interest) on the proviso 'that no such sale or lease shall authorise the closing of the said Canal'. By 1866 the Canal had been built and was used for public traffic, but, as the preamble to Act states, it was no longer 'Part of any more extended System of Water Communication'.

24. On 11 September 1907 the Canal was sold at auction to the Canal Company Limited by the Estate of Mr Edward Press who had purchased the Canal from the Statutory Company in 1886. The auction particulars describe the lot as including ‘locks, banks, tow-paths and backsocks....’ A backsock in a Norfolk term, I am told, for drain. The plan attached to the particulars, showing the canal in blue, states: *‘The Blue colours on this Plan do not necessarily indicate that all the lands under which the water so shewn runs form any part of the Canal undertaking. Such colours are shewn for the sake of reference and convenience.’*
25. On 2 September 1921 the Canal Company Limited (in liquidation) sold the Canal to a Messrs Cubitt and Walter. The parcels clause is set out in the First and Second Schedules to the conveyance. The Canal was sold by reference to a plan (for identification purposes only). The land sold included the ‘locks, banks, towpaths, backsocks and easements’ belonging to the Canal. The plan is unevenly coloured, but it appears to show a spur on the west side of Austin Bridge, in the direction of, but not leading to, the River Ant.
26. On 4 January 1922 Messrs Cubitt and Walker sold the Canal to the North Walsham Canal Company Limited.
27. On 23 September 2009 the North Walsham Canal Company Limited entered into an agreement for the sale of, and a transfer of, a section of the Canal described as: *‘ALL THAT bed or site of the canal or waterway known as the North Walsham and Dilham Canal in the County of Norfolk extending from Swafield Bridge to and including the lock at Ebridge Mill together with all the locks towpaths backsocks and easements to the canal belonging to or used in connection with the same and as defined in the Acts in particular Section XIII of the North Walsham Dilham Canal Act 1812 and shown edged red on the two plans numbered 1 and 2 annexed hereto...’* It is to be noted that ‘banks’ are omitted from the description of the Canal, but this may simply be an oversight.
28. The Agreement stated that no warranty was given as to the exact boundaries of the land being sold. Plan 2 shows the Canal where it leads to the Ebridge Mill basin, and it appears that the 1921 Plan was used as Plan 1, showing the Canal in red. The ‘spur’ is not coloured, but the scale is very small. And again this might have been an oversight

29. The title plan to NK403089 shows the 'spur' of land extending westwards from the canal but not extending as far as the River Ant. The Disputed Land, as I have said, is immediately to the north of this spur, extending across to the east bank of the River Ant.

The Respondent's title

30. On 13 April 1885 the Will of Edward Storey settled certain lands on trust including '*ALL THAT meadow lying in Knapton aforesaid called Oystern Bridge Meadow containing by estimation 9a. 3r.9p which I purchased of the Trustees under the Will of Samuel Sewell deceased*'. This land (the land at Royston Bridge) devolved in due course to Vera Margaret Wooll, Charles Hugh Wooll and Edward Nigel Carlisle Wooll who sold the land to Mr Tate on 4 March 1976. The parcels clause in the 1976 conveyance describes the land as follows: '*ALL THOSE closes or parcels of land situate in the Parish of Knapton in the County of Norfolk near Royston Bridge there being enclosure or parcel numbers 5552 and 5741 on the current edition of the Ordnance Survey map for the said Parish (sheet TG 2831-2931) according to such sheet containing Nine decimal nine nine acres of four Four decimal nought four five hectares) As the same is for the purposes of identification only shown edged red on the plan annexed hereto.*'

31. It seems that there is no available plan to the 1976 Conveyance. However, there is a plan attached to the requisition for an official search made in November 1975 which shows the land at 'Oystern Bridge Meadow' by reference to the Ordnance Survey map. The western boundary follows the River Ant. The eastern boundary follows the Canal bank. Mr Tate sold most of the land at Royston Bridge by a conveyance dated 18 April 1980 (and the same OS plan is used). This edition of the OS map does not show any dry dock or basin at the Royston Bridge end of the Canal, although it shows a strip of land between the road and the southern end of Mr Tate's land. On 27 August 2014 the remaining land held by Mr Tate was registered under title number NK440423.

The evidence

32. I heard evidence from Mr Ashton on behalf of the Company and from Mr Tate. No survey of the land has been carried out. As mentioned above there are no clear physical features on the ground which can assist with identifying the exact extent of the Disputed Land or

Mr Tate's land at Royston Bridge, or the extent of the land acquired by the Company in 2009 as part of the purchase of part of the Canal.

33. Mr Ashton's evidence is that the Disputed Land forms part of the Canal bank. He relies on various provisions in the Act referred to above and on the evidence of Ivan Cane, an amateur canal historian, as well as on his own knowledge of the Canal over 20 years of being involved in its restoration.
34. Mr Cane's written report starts with an assertion that Mr Edward Press set up 5 dry docks. The 1880 25 inch map of the Canal by Austin Bridge (as it was known then) on his analysis, shows the basin (dry dock) extending westwards from the water's edge, but not extending as far as the eastern bank of the River Ant (I have referred to this as 'the spur' above). The dry dock was probably lined with timber, and when it required to be emptied a sluice opened to allow the water to flow into the River Ant, which flowed at a lower level. A number of other plans are referred to. In none of these maps is it possible to say that the dry dock or basin or spur (as I have described it) runs to the edge of the River Ant, or is the same shape as the Disputed Land. There is nothing which shows the dimension of the dry dock or basin. Mr Ashton stated that a typical wherry using the Canal would be some 12f wide and 50/60 ft long, and it is this which determined the size of the dry dock. This is where the wherry could be pulled out of the canal. It would be wrong to describe this as a ditch, according to Mr Ashton. It is a depression the size of a normal wherry on a canal.
35. In 2013 Mr Ashton was on site when brickwork at the end of the dry dock was apparently uncovered. Mr Ashton stated this dry dock was a close copy of the dock at Ebridge. However, he readily accepted that the pipe which was uncovered and the brickwork around the mouth of the pipe, was, as claimed by Mr Tate, an overflow pipe from the River Ant into the Canal, which had been constructed by Mr Tate, and which, therefore, was not part of the original Canal built in the late 1820s. Although he believes there would have been a backsock (drain) connecting the River Ant to the Canal before this, there is no evidence of such a drain. A new bridge was built to allow heavier traffic over the Bacton Road in the 1950s which has also had some effect on the lie of the Canal.

36. When pressed on the point as to how Mr Ashton could establish that the Canal included the Disputed Land, Mr Ashton fell back on the way in which the Canal would have been used: the canal bank is 5ft, and a further 25ft would have been needed to get a horse and cart with sugar beet (or whatever other goods were being carried) off the road to the water. As I have said above there is no evidence as to the width of the Disputed Land.
37. Mr Ashton also gave evidence to the effect that, in 2009, the western side of the Canal and the access to and from the road were covered in trees, reeds and bushes, so that it was difficult to gain access to the western bank of the Canal. There was no evidence of any occupation of the land. Vehicles could only drive down off the road once the trees and other vegetation was cut back.
38. Mr Tate's evidence, supported by a number of photographs he took in 1976, was that the land was simply a meadow between the River Ant and the Canal, and there were no features or structures indicating that any part formed part of the Canal itself. He laid a pipe in the ground to allow water to flow away from the river when it was in flood, and the brickwork which can be seen in the 2013 photographs. There were trees, bushes and sinks, or drains, but these were filled with debris. Mr Tate knew that the access to his land from the meadow did not belong to him, but there were no gates, albeit that there was quite dense vegetation.

Submissions

39. Miss Proferes, for the Company, submitted that the various plans referred to above are for identification purposes only, and that it is necessary to look at the relevant conveyances in the light of the Canal Acts. The Canal included, at some point, a basin or dry dock. By contrast Mr Tate's land is properly described as a 'meadow' and is quite distinct from the Canal. It lies to the north of the Disputed Land. Miss Proferes also pointed out that in almost all the relevant plans it is possible to see the 'spur' running westwards from the Canal.
40. Mr Butcher submitted that Mr Tate had good title to all the land included within title number NK440423 by reason of first registration based on the relevant conveyancing history. The local search plan matches the verbal description of the land sold to Mr Tate in

1976. The same plan was used when the northern part of Mr Tate's land was sold in 1980. He also submitted that Mr Ashton accepted that the one physical feature relied on by him (the pipe and brickwork surrounding it) could well have been built by Mr Tate, as a means of allowing water from the River Ant to flow away. There is no evidence of any area of land used as a dry dock or basin which corresponds with the Disputed Land.

Conclusion

41. I agree with Mr Butcher. It seems to me clear that the land registered under title NK403089 (albeit with general boundaries) includes 'the spur' which can be seen on the various historic maps referred to above. There is no evidence of any kind (either in the Canal Acts, the conveyances, or any other evidence) that the 'spur' or 'basin' extended westwards to the eastern bank of the River Ant nor that it lay to the north of 'spur' as registered. As I have said, there is nothing on the ground to indicate the exact position of the Disputed Land, and no satisfactory explanation as to why the Disputed Land should extend so far west if it formed part of the Canal.

42. It may well be that wherries could be pulled out of the water by the bridge, using the 'spur', but, as I have said, there is no evidence that the basin or dry dock occupied the Disputed Land (and was not the 'spur' shown on the filed plan). It may also be that horses and carts gained access to the river bank from the road. But a right of access (if indeed one could be established) is quite separate from ownership of land. There is simply not enough evidence of any kind to justify the alteration to the filed plans sought by the Company.

Costs

43. Mr Tate is in principle entitled to his costs from the date of the reference (16 June 2016). A schedule in Form N260 or the like is to be filed and served by 11 August 2017. The Company may make representations in reply by 25 August 2017.

BY ORDER OF THE TRIBUNAL
Ann McAllister

Dated this 26th day of July 2017

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Applicant

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JAMES RUSSELL TATE

Respondent

Property Address: Land at Royston Bridge, Bacton Road, North Walsham

Title number: NK440423

ORDER

The Chief Land Registrar is ordered to cancel the application dated 4 June 2015

BY ORDER OF THE TRIBUNAL

Ann McAllister
Dated this 26th day of July 2017

