[2018] UKFTT 334 (PC)

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

Case Number:	**REF/2017/1022**
Title Numbers:	**SK236073**
Property:	**Dagwood Farm, Ashfield Road, Bury St. Edmunds, IP30 9HJ**
Applicants:	**Christine Angela Dyball, Robert James Dyball and Ruth Bolton**
Respondents:	**Julian William Peter Cunningham and Elaine Margaret Cunningham**

UPON the Respondents' application to strike out the Applicants' case

AND UPON HEARING Counsel for the Applicants and the Respondents

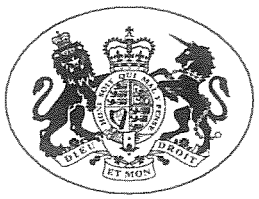
IT IS ORDERED that the application be dismissed

Dated this 29th day of May 2018

Owen Rhys

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL



[2018] UKFTT 0334 (PC)

REF/2017/1022

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

CHRISTINE ANGELA DYBALL
ROPBERT JAMES DYBALL
RUTH BOLTON

APPLICANTS

and

JULIAN PETER WILLIAM CUNNINGHAM
ELAINE MARGARET CUNNINGHAM

RESPONDENTS

Property Address: Dagwood Farm,Ashfield Road, Elmswell, Bury St.Edmunds IP30 9HJ

Title Number: SK236073

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

On: 15th May 2018

Applicant representation:	Mr Graham Sinclair of Counsel instructed by Gudgeon Prentice Solicitors
Respondent representation:	Mr Simon Redmayne of Counsel instructed by Ashtons Legal Solicitors

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D E C I S I O N

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1. In 2008 Mr Dennis Dyball commenced proceedings in the Bury St Edmunds County Court against Mr Julian Cunningham. The claim arose out of a boundary dispute relating to the Defendant's title SK236073, Mr Dyball being the owner of

the unregistered land to the north of that title. The Applicants are the personal representatives of Mr Dennis Dyball.

2. A mediation took place during the County Court proceedings, and an agreement was signed on 12th February 2009. Mr Dyball signed, as did Mr Cunningham *"for and on behalf of Mr and Mrs Cunningham"*. By this time Mrs Cunningham was a party to the claim, I believe, as a joint owner of SK236073. I have seen the document (pages 24-28 of the Bundle) created by "Consensus Mediation". On the first page is a draft and unsigned Order in Tomlin form, staying the proceedings on the terms of the Schedule. There follows two pages of manuscript headed "Terms of Settlement". The terms ("the Boundary Agreement") may be summarised as follows:

   (1) The Defendants agree to move the boundary fence to a particular position *"no more than 1 metre from the farm buildings on the northern boundary of Dagwood Farm"*.

   (2) The parties were to enter into a Deed of Confirmation and Grant ("the Deed"), to be drafted by the Defendants' solicitors, to identify the boundary by means of a surveyor's plan, and to include mutual easements for services etc.

   (3) The Defendants were to grant certain rights to re-connect drainage pipes.

   (4) The parties would bear their own costs of the claim.

   (5) These terms are in full and final settlement of the dispute.

   (6) Both parties agreed to use their reasonable endeavours to complete their obligations within 6 months of the agreement.

3. The Tomlin Order was never made, or so it would appear. I am told that the Respondents moved the fence into the correct position. However, contrary to the Boundary Agreement, their solicitors did not produce the Deed within 6 months. Nevertheless, the Applicants were satisfied with the position of the fence and peace reigned. However, some years later the Respondents began to develop the land within title SK236073. They constructed a new building along the northern boundary and, in the process, removed the fence that had been constructed in

accordance with the Boundary Agreement. This gave rise to a further dispute, which seems to have come to a head in the summer of 2016. I have seen Mr Cunningham's letter dated 4th August 2016 complaining about the erection of a barbed wire fence along the boundary, and the response from Mr Robert Dyball in which he demands that Mr Cunningham re-instate the original post and rail fence. In the final paragraph of that letter he says this: "*The alternative is that I take further legal action for your breach of the Tomlin Order – this is a pointless scenario for both of us and instead I would like to hear from you that you will now, without further delay, as provided by the Tomlin Order, get your solicitor to draft the Deed of Confirmation and Grant for execution by us both so we can both have it registered at the Land registry as necessary, to put an end to such confrontations and move to a neighbourly relationship.*"

4. The dispute remained unresolved, and the Respondents began to market units in the new development. This led to the Applicants notifying the selling agents that there was an ongoing boundary dispute. The draft Deed had still not been produced. Eventually, on 4th May 2017, the Applicants registered a unilateral notice against the title to SK236073 *"in respect of an order dated 12 February 2009 in the Bury St Edmunds Court under Court Reference 8BV01116 relating to the correct position and ownership of part of the boundary....."* On 19th July 2017 the Respondent applied in form UN4 to cancel the unilateral notice. On the same day, more or less, the Respondents solicitors submitted the draft Deed to the Applicants' solicitors for approval. On 10th August 2017 the Applicants lodged an objection to the UN4 at the Land Registry.

5. There then followed an email correspondence between the parties' solicitors relating to the draft Deed. There was a disagreement about the plan to be attached to the Deed. The Applicant's objections were explained in an email from Ashtons dated 30th October 2017. These related to the position of the western extent of the agreed boundary, and also to the position of the posts of a new fence erected by the Respondents in purported compliance with the Boundary Agreement. It also emerged that the Respondents had transferred parts of SK236073 – including the western section of the northern boundary, which was subject to the Boundary Agreement - a company Ashfield Holdings Limited

("the Company") of which Mr Cunningham was the sole director. It was provisionally agreed that the Deed would relate both to SK236073, and also to the new title registered in the Company's name, SK366994. I think it is fair to say that the Applicants dragged their feet somewhat in dealing with the deed, and on 8th November 2017 the Respondents' solicitor wrote a letter in which he gave the Applicants a deadline in which to agree the Deed plan, in default of which the Company (which owned part of the originally agreed boundary) would not become a party to the Deed and would not be bound by the Boundary Agreement. In the meantime, on 1st November 2017, the Land Registry had referred the disputed UN4 to the Tribunal.

6. Discussions between the solicitors continued. On 15th January 2018 Ashtons confirmed that their clients would accept an amended plan with the western end of the agreed boundary at point "X2". On 30th January 2018 the Respondents' solicitors sent an amended plan and asked for confirmation that this was now accepted. That confirmation was not given, and on 30th March 2018 Mr Long, the Applicants' solicitor, wrote a letter explaining the continued objections.

7. In the meantime, the Tribunal proceedings were continuing. The Applicants' Statement of Case was due on 11th December 2017. It was not served, but they asked for an extension of time to allow negotiations to continue. This was not granted, and an unless order was made requiring service of the Statement of Case by 18th January 2018. The document was served by the due date, and on 24th January 2018 the Respondents solicitors wrote to the Tribunal asking for the claim to be struck out. The grounds were essentially that the Applicants were objecting to the position of the western end of the boundary, which was no longer included within SK236073, but in the new title (registered to the Company) SK366994. Further, they were unreasonably withholding their consent to the terms of the Deed and accompanying plan. The Respondents served their Statement of Case on 16th February 2018. On 20th February 2018, the Respondents' application to strike out the claim was listed for hearing. In the order, the Tribunal itself raised an issue whether the disputes under the Boundary Agreement would have to be referred back to the mediator as suggested by certain standard terms of the mediation agreement.

8. The Respondents were represented by Mr Graham Sinclair, whose Skeleton Argument (at paragraph 1) explains the basis for the strike-out in more detail. *"The respondents contend that the applicants' case be struck out as vexatious and lacking in merit as the reasons given by them for refusing to enter into the confirmatory deed originally required by the terms of the 2009 Tomlin Order (but not pursued further until 2016) concern the western boundary of land which, by the time the unilateral notice was sought, was no longer within the title number concerned. As a result, potential sales of the land remaining within the above title number have been thwarted as to interested purchasers have withdrawn."* In addition, Mr Sinclair relied on the Applicants' failure to comply with earlier orders, namely the failure to serve the Statement of Case on time, and the failure to serve the Hearing Bundle until the last minute. He relied on Rules 9(3)(d) and (e) of the Tribunal Rules which permit strike out in the following circumstances, namely when "(d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or (e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding...."

9. Mr Redmayne, for the Applicants, submits that his clients are entitled to retain the unilateral notice and that there are no proper grounds for the application to strike out. He says that the Applicants are persons "entitled to the benefit of an interest affecting a registered estate" within the meaning of section 34(1) of the Land Registration Act 2002. The interest in question is the Boundary Agreement reached at the mediation in 2009. This agreement not only requires the Respondents to erect a boundary fence in a particular position, but also requires execution of a deed confirming the position of the boundary by reference to a surveyor's plan. Such an agreement, Mr Redmayne submits, is a classic example of an interest that may be protected by a notice. Indeed, he referred me to the Land Registry's Practice Guide 9 which explains the nature and effect of notices generally. Section 2.3.3 of the guide gives examples are given of the types of interest that may be protected, and one example given is of an agreement between adjoining owners as to the ownership of a specified boundary wall – in other words, a boundary agreement. He says that the notice is required to protect the Applicants' interest under the Boundary Agreement, pending execution of the

Deed, which would itself be registrable against the affected title at the Land Registry.

10. Furthermore, he rejects the Respondent's characterisation of the Applicants' failure to agree the Deed as vexatious and unreasonable. He sets out at paragraphs 10 to 15 of his Skeleton Argument the principal objections to the draft deed, and plan submitted by the Respondents' solicitors (the latest version of which was attached to Mr Sinclair's Skeleton Argument). He identifies two particular issues. First, the fact that the fence posts of the new fence erected by the Respondents are not entirely within 1 metre of the relevant wall (as stipulated in the Boundary Agreement). The discrepancy is no more than a few centimetres in places, but he says that the Applicants are entitled to refuse to concede (as the Deed requires them to do) that the fence lies entirely in the Respondents' title. Secondly, he says that there is an issue with the western end of the northern boundary. He submits that the Respondents are placing the western end (point X or X2) too far east. Although some of these complaints might seem trivial, he submits that the Respondents have chosen to inflame the boundary issue by constructing their development so close to the agreed boundary, and his clients have every right to hold them to the letter of the Boundary Agreement.

11. In relation to these points the Respondents submit, in effect, that the fence post issue is *de minimis*. As to the western boundary, Mr Sinclair submits that this portion if the northern boundary is now comprised within a different title, namely SK366994, in the Company's ownership. Accordingly, it is vexatious to maintain a unilateral notice against title number SK236073, with the intention, he submits, of interfering with the marketing of the development.

12. In my judgment, the Respondents' application must be dismissed. My reasons are as follows:

    (1) There is no question but that the parties have entered into a boundary agreement relating to the northern boundary of SK326073. This obliges the registered proprietors (the Respondents) to enter into a formal deed which identifies the boundary line. It is not simply a question of erecting a fence, because a fence can be removed or the line changed (as has indeed already happened in this case). Under normal circumstances, a

boundary agreement does not become binding on successors in title unless and until it is entered in the property register – see Land Registry Practice Guide 40 at section 2.3. Until that occurs, a party to the agreement must be entitled to protect his position by entering a notice, as the Applicants have done. The point has been demonstrated by the actions of the Respondents themselves. They have transferred part of the title subject to the Boundary Agreement to the Company, and the Company (through the Respondents' solicitors) is taking the point that it is not bound by the agreement. If the UN1 had been in place earlier, that point would be unarguable.

(2) If the Respondents allege that the Applicants are in breach of the Boundary Agreement, by declining to agree to enter into the proffered deed, the proper course would be to enforce the agreement by an application for specific performance. That would be the appropriate forum for deciding whether or not the Respondents are being unreasonable and their objections vexatious. A strike-out application in relation to a disputed UN1 is not the proper forum. The jurisdiction to strike out is broadly equivalent to the jurisdiction under CPR Part 24 (see, in this connection, Quinn v Unique Pub Properties Alpha Ltd [2016] EWLandRA 2015_0546) and it would not be appropriate to conduct a mini-trial in order to investigate in depth the issues concerning the western boundary.

(3) In any event, I am not satisfied, on the basis of the material placed before me, that the Applicants are behaving unreasonably or vexatiously. Their current position must, it seems to me, be seen in the context of the events since 2009. The contractual obligation to produce the Deed rested with the Respondents, but they failed to comply. Having erected a fence which satisfied the Applicants, they subsequently removed it and re-erected a fence which did not. They also compromised the Applicants' ability to enforce the Boundary Agreement by disposing of part of the title to a third party. It was only after the UN1 was registered that they produced a draft Deed and sought to finalise matters. It is perhaps unsurprising that the

Applicants require the terms of the Boundary Agreement to be fulfilled to the letter.

(4) I was troubled by the correspondence between the parties' solicitors in late 2017 and early 2018, in relation to the terms of the draft Deed. I did wonder whether the Applicants' solicitors had irrevocably bound their clients to the revised plan referred to above. However, as Mr Redmayne pointed out, there was no formal acceptance of the revised plan and, in any event, the Applicants had made their position clear in their Statement of Case served on 17th January 2018. They were therefore free to maintain their original objections both to the line of the fence and to the position of the western boundary.

(5) I have referred to the obligation in clause 4.1 of the mediation agreement to refer all disputes about "the Agreement" back to the mediator. However, no one seems clear about whether this term was actually agreed and incorporated into the mediation agreement. Nor is it clear whether the agreement referred to is the mediation agreement (i.e the agreement to mediate) or the Boundary Agreement. At its highest, this would require a further mediation on the terms of the Deed, but that would not in any sense affect the Applicants' right to protect their interest under the Boundary Agreement by means of the notice.

13. As a final point, although I have suggested that the transfer of part of SK236073 might prevent the Applicants from enforcing the Boundary Agreement against the Company, that is not of course an issue that is directly before me. There is, I think, a separate UN1 application in relation to SK366994, and the issue will have to be determined in the proceedings relating to that title. Any views on the matter expressed in this decision are necessarily of no effect in relation to the other dispute.

14. I therefore dismiss the Respondents' application. Given the conclusion that I have reached as regards the validity of the unilateral notice, I question whether there is any purpose in this reference continuing to the bitter end, but that must be a matter for the parties to consider. I am minded to award the Applicants their costs. I direct them to serve a costs schedule on the Tribunal and the Respondents

within 7 days, and the Respondents may then lodge submissions (also within 7 days) if they object to the amount of costs and/or the principal that they should pay the costs. The Applicants may respond within 7 days thereafter.

Dated this 29th day of May 2018

Owen Rhys

BY ORDER OF THE TRIBUNAL