

[2019] UKFTT 0113 (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 2018/0246
BETWEEN

THE OFFICIAL CUSTODIAN FOR CHARITIES ON
BEHALF OF THE TRUSTEES OF
PONTRHYDYFEN MINERS WELFARE SCHEME

Applicant

and

KIERON TOMLINSON HOWELLS
ALISON MARJORIE HOWELLS

Respondents

Property: Pontrhydyfen Miners Welfare Recreation Ground
Pontrhydyfen Port Talbot

Title numbers: CYM516398, CYM412482 and WA237934

ORDER

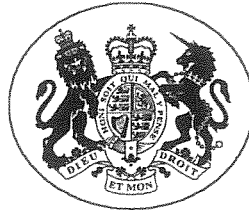
The Chief Land Registrar is ordered to give effect to the application dated 21 November 2017

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 28th day of January 2019





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**PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

**REF No 2018/ 0246
BETWEEN**

**THE OFFICIAL CUSTODIAN FOR CHARITIES ON
BEHALF OF THE TRUSTEES OF
PONTRHYDYFEN MINERS WELFARE SCHEME**

Applicant

and

**KIERON TOMLINSON HOWELLS
ALISON MARJORIE HOWELLS**

Respondents

**Property: Pontrhydyfen Miners Welfare Recreation Ground,
Pontrhydyfen, Port Talbot**

Title number: CYM516398, CYM412482 and WA237934

**Before: Judge McAllister
Cardiff Magistrates Court
10 December 2018**

Representation: The Applicant was represented by Robert Craven of Counsel instructed by Goldstones Solicitors; the Respondents appeared in person

DECISION

Introduction

1. The Applicant is the registered owner of land described as the Pontrhydyfen Miners Welfare Recreation Ground, Pontrhydyfen, Port Talbot, commonly known as Rhyslyn

(or Rhyslin) field ('the Field'). Title was registered on 18 January 2011. The Field is held on behalf of the trustees of Pontrhydyfen Miners Welfare Scheme ('the Scheme') and was conveyed to the trustees of the Scheme by a conveyance dated 11 September 1950 for the purpose of a recreation ground for the benefit of workers in the coal mines and, in particular, for the benefit of those workers (and their invitees) resident in Pontrhydyfen or nearby. It was used as a rugby field, initially both for matches and training. There is an issue as to when it was last used, and the extent of user.

2. The Respondents, who are mother and son, own two parcels of land to the west of the field (defined in title CYM12482 as 'land adjoining the Rugby Football Ground, Pontrhydyfen, Port Talbot'). These titles were registered in their names on 18 April 2013. This land comprises some 6 acres.
3. The issue in this case is whether the Applicants have a right of way on foot and with vehicles over a track ('the Track') which passes through the Respondents' two titles; over a small parcel of land registered in the name of the Vine Christian Society, and over a parcel of unregistered land of unknown ownership. The Vine Christian Society does not object to the application.
4. The Track is a public footpath known as footpath 4 Pontryhydyfen. The description of the footpath on the 1971 definitive map statement describes the footpath as being 2550 yards in length and having a width of between 4 and 15 feet. Part of the Track, under a disused viaduct and former railway bridge, is currently subject to a temporary closure order made by Neath Port Talbot County Borough Council dated 9 May 2018 due to fear of falling masonry. The viaduct was built, I am told, in the 1790s. The order came into force on 31 May 2018 and is to continue in force for six months or until certain works are completed. A sign at the western end of the Track says ' Road Closed'.
5. By an application dated 21 November 2017 the Applicants applied to register a right of way with and without vehicles over the Track. The claims is based on prescription, and more particularly on lost modern grant. The application was supported by a number of statutory declarations claiming user for a period in excess of 50 years, though limited to pedestrian access only from September 2013 when the Respondents

erected a gate preventing vehicular access. The Field was variously described as a community asset used by numerous people.

6. The Respondents objected by letters dated 20 December 2017 and 22 December 2017. The matter was referred to the Tribunal on 16 March 2018. I had the benefit of a site visit, and heard from Stephen Roper, Dennis Roberts and Jason Hole on behalf of the Applicant and from both Respondents, and from Alan John on their behalf.
7. The existence of the public footpath along the Track makes the question of access on foot to the Field something of an academic issue. However, there is no doubt that, as a matter of law, it is possible to acquire prescriptive rights over a public footpath: see *Gale on Easements*, 20th Edition, at paragraph 9.01. In my judgment, and for the reasons set out below, the Applicants have succeeded in establishing a private right of way on foot and with vehicles for access to and from the Field.

Relevant legal principles

8. The claim is put on the basis of lost modern grant. The claim under the Prescription Act 1832 cannot succeed as the access to the Field has been obstructed for over a year, and therefore the Applicant cannot show 20 years user 'next before some suit or action'. It is now settled law that the application to the Land Registry is a 'suit or action'.
9. The term 'lost modern grant' is in fact a way of saying that there has been user for a sufficient length of time to justify finding a lawful use for it. By analogy with the period necessary for the purposes of the 1832 Act, enjoyment for a period of 20 years or more is sufficient.
10. As stated above, the fact that the right of way is also a public footpath does not of itself prevent a right of way in favour of the dominant tenement (in this case the Field) being acquired either on foot or with vehicles or both.
11. Nor is it a bar to the claim that there may have been other routes open to the user of the Field to gain access to the Field. The question is one of fact based on actual user of the Track: can the Applicant show that the route in issue (in this case the Track) was

used on foot and with vehicles to gain access to the Field, for the players, their guests and invitees, and anyone else in any way connected with the Field, and the uses to which it was put. User does not have to be continuous but must be 'as of right', that is to say it must make it clear that this right is being asserted, so that the dominant owner can prevent the user.

12. As a general principle, a right of way acquired by prescription is a right for all purposes connected with the ordinary and reasonable use of the dominant tenement (the Field) at the time the easement is created. No question arises in this case regarding any change of use of the Field. It is irrelevant that the Field has not, or may not, have been used for playing rugby for a number of years. The Field is clearly a rugby pitch, and has been used for community events.
13. Once a right of way has been acquired by long user, the fact that it is not used as frequently as it had been used does not alter the right to use the way. It is very difficult to establish that a right has been abandoned. There are many cases where the courts have held that non user for very long periods of time (30, 40 years or more) does not mean that the right was abandoned: see *Gale* at paragraphs 12.79 onwards.
14. A right of way does not give the user a right to park on the way, or, of course, on the land belonging to the servient owner. Cars can only be parked therefore on the Field.
15. Both the Field and the Respondents' land is registered land. There is no reference to the easement on the Respondents' titles. The position is governed by Schedule 3 to the Land Registration Act 2002. Easements will bind the purchaser of registered land, even if not noted on the register, if they are obvious on a reasonably careful inspection of the land over which the easement is exercised. In this case, as I explain further below, I am satisfied that the right of way was obvious when the Respondents' purchased the land.

Background and evidence

16. The trustees of the Scheme acquired the Field, which was then part of some 218 acres known as the Penrhys Fawr and Llesyn farms, from the Gooding family, by a

conveyance dated 11 September 1950. The precise terms regarding use of the land is set out in clause 2 of the First Schedule to the conveyance.

17. It is clear that the Field and the area around it has changed significantly in the last hundred years, although some physical features have remained the same. The river runs to the south of the Field and the Track, and there is a steep embankment to the north. A railway line ran along the embankment, leading to the station, more or less above the Field, until the line was closed in the 1960s.
18. There are now three ways to access the Field. The first is a path leading from the road (once, and possibly still, known as Station Road) at the top of the embankment and from the parking area above the Field. This zig zags steeply, and is plainly only suitable for pedestrian use. The second is a track further west which rises steeply to part of the land owned by the Respondents, and from there leads to Station Road. The third is the Track. This is clearly wide enough for vehicular use. It is possible to see the parallel indentations caused by vehicular use.
19. The Track is level and easy to access both from the Field and from the western end where it has been tarmaced, and where it joins station road. Shortly before it becomes tarmaced the Track runs close to the river Afon and to the walls of the disused viaduct. There is sharp bend in the Track at this point, making it a blind bend.
20. In addition to the three means of access described above, there is also, it seems, another access to the east of the Field, leading back up to the road at some point further east. It seems to me clear from all the evidence that this access, which may have been used at one point, has not been used (at least not for vehicles) for a considerable period. This track has been referred to as the forestry track.
21. The Field is clearly a rugby pitch. There are goal posts, and a couple of old trailers to the east. There is an electricity supply, albeit that the lighting posts are flat on the ground and may have been for some time. The Field was used as the only rugby pitch in Pontrhydyfen from the 1950s until a new pitch was opened at Oakwood, sometime in the late 1990s. It is the Applicant's case that the Field continued to be used for training. The local club has two teams. I will come back to the oral evidence regarding user of the Field below.

22. The documentary evidence is as follows. There are a series of plans from 1877 onwards. By 1899 the railway had been built. By 1918 a colliery (Oakwood Colliery) to the west of the Field, and a row of cottages to the east of the Field had also been built. The Track is plainly visible on the 1918 plan. The colliery is no longer shown on the 1940 plan, although the cottages to the east are still shown. There are a few houses where the colliery once stood. Again, the Track is visible. By 1965 the station had been demolished, and the railway is shown as a mineral railway. The Field was described as Football Ground.
23. I have also seen a number of aerial photographs clearly showing the Track and the other access ways from station road. These span the period 2006-2018. The Track is shown on all the photographs as being wide enough for vehicles. The Track leads to the Field, and turns (in one of the photos at least) towards one of the structures on the Field. The tracks made by vehicles are clearly visible. The 2006 photograph shows the pitch in good condition, and the Track as clearly passable. The Respondents' land is in part overgrown, and the clearance work which took place in the summer of 2013 can clearly be seen in a photograph dated 7 December 2013.
24. In addition, the Applicants have produced photographs of the Field in use as rugby pitch and showing various communal events taking place there in 1991. Cars can clearly be seen parked on or near the Field.
25. Finally, so far as documentary evidence is concerned, it is also relevant to note that by an agreement dated 6 November 1964 the trustees of the Scheme granted the Wales Gas Board an easement to lay a gas main through the Field and covenanted to allow access to vehicles to inspect and maintain the main gas pipe. It is fair to say that the plan I have seen attached to this deed is not clear enough to show exactly where the gas main was to be laid outside the Field, but the point, so far as the Respondents are concerned, is the inference that the Track would have been used to allow the main to be laid.
26. As stated above, I heard evidence from Stephen Roper, Dennis Roberts, and Jason Hole on behalf of the Applicant. Mr Roper has lived at a property known as The Barracks, which is located at the western end of the Track, for the last 24 years. Mr

Roper has placed tarmac on part of the Track nearest to his property. He began playing rugby on the Field in 1969 and continued to play until 1985. Thereafter he coached the team until 1989 and continued to coach training sessions occasionally until 2013. Rugby was played on the Field until 2004. The only access with vehicles was over the Track which was used by Mr Roper, with vehicles and on foot, from 1969 to 2013.

27. Although no games were played on the Field from 2004, training continued on the Field. The reason that games were no longer played was because the Field needed work to be done which the rugby club could not afford. In 2013 the rugby club was given a grant from the Welsh Rugby Union for the required work. The work has not taken place because the Respondents denied access by placing a gate at the entrance to the Field. Although the work has not taken place, the gate can now be opened and the Track is still used on foot and with cars. The presence of the gates has however meant, he said, that the Field has not been properly maintained and has been allowed to return to a meadow. If access had been available the Field would have been maintained and used for rugby.
28. Mrs Howells initially objected to Mr Roper using the Track to gain access to his house, but that dispute was resolved in Mr Roper's favour. An entry to this effect can be found in the register of his title.
29. Mr Roper was cross examined by Mrs Howells who pointed out that other witnesses stated that the last game of rugby was played on the Field at different dates (2015 and 2010). Mr Roper replied that he is not on the rugby committee and it may be that he does not know all the usage of the Field. He played for the club for 15 seasons but had nothing to do with the running of the club. He was asked about the fact that the gate is open because the locks were broken on a number of occasions, but said that he knew nothing of this. He also stated that lights were last used on the Field in 2013. Part of the plan for the Field is to install new LED lights.
30. Asked about the possibility of accidents on the Track (at the point where it bends sharply under the old railway bridge) he stated that he had never known of any accident and repeated that the Track has always been the vehicular access way for any vehicle connected with playing rugby on the Field.

31. Mr Roper also gave details about the containers on the Field. The first container was a wooden railway wagon. It was taken to the Field along the Track by a truck. Training equipment was kept in this container until it rotted. Further containers were placed on the Field in 2004/5 by lowering them from the station road above.
32. Mr Roper denied that it was not possible to play on the Field because it is a flood plain. He repeated that the Track was used constantly to access the Field from 1952 until 2013. Before that, as the records show, the Track was used to access the row of terraced houses to the east of the Field. The previous owner, Mr Jones, was aware of the use but was not bothered. No permission was ever asked of him.
33. Mr Roberts has lived at Pontrhydyfen for some 28 years. He began to play rugby on the Field in 1975 and last played there, he said, in 2010. Whilst playing on the Field the team trained every week. The only access that he used, both on foot and with a vehicle, was along the Track. He is a groundsman for the Field and has travelled over the Track with a large grass cutter to mow the Field until a gate was erected by the Respondents. The grass cutter could not be taken down the zig zag track from the road above. The same mower was used for both pitches. He also brought markers and flags in a van every week and parked on the Field. He also confirmed that whilst games were played on the other pitch, at Oakwood, the Field was used for training, and further stated that he was never aware of the Field being flooded., albeit that there may have been some ponding on the edge of the Field.
34. Mr Roberts drove along the Track almost every day since 1975 until recently. People watching the matches would park by the lower rugby post having driven along the Track. New lights and rugby posts were put up in 2002/2003, although they are now not used. At about the same time drainage pipes were put into the Field. These were 6 feet in length and were taken down to the Field in a van. He confirmed that further work to improve the Field has been prevented by Mrs Howell.
35. Mr Roberts also stated that soil had been removed from the Field some time ago, which was then placed on the Respondents' land, and then returned to the Field. Mrs Howell's case is that this was done to raise the Field to avoid flooding, but that the

earth had to be put back because the Field is designated a natural flood plain. Mr Roberts was, as stated above, clear in his evidence that the Field never flooded.

36. Jason Hole was born in 1976 and has lived in Pontrhydyfen all his life. He too lives at the western end of the Track. He confirmed that he has used the Track for 29 years on foot and with a vehicle until the gate was erected by Mrs Howells. He began playing rugby on the Field when he was 6 years old. His father also played on the Field and also used the Track to get there. When he was 13/14 he remembered that the Club held fun days on the Field with various stalls, activities, ice cream vans. Access was always along the Track. On one occasion a player dislocated his hip and had to be taken from the field by ambulance. In cross examination he stated that he always parked in the corner of the Field and sometimes on what is now Mrs Howells land. He coaches the junior section and takes equipment to the Field.
37. Mrs Howells bought the land through which the Track runs at auction. She was aware that the Track was a footpath but was not aware of any vehicular use. She did not make any enquiries as to the use of the Track before she bought the land. In her Statement of Case she denied that the Applicants had acquired prescriptive rights along the Track which is, she stated, a public footpath only. It is her case that the Field was last used for playing in the late 1990s due to poor drainage and flooding.
38. Mrs Howells lives two miles away and remembers going to the Field in the 1970s to watch rugby and football. She remembers seeing a footpath. When asked about the fact that there are clear vehicle tracks marking the Track, she stated that these would have been made by the previous owner or owners, who clearly had a right to drive over the Track. She believes that lights, goal posts, etc were taken to the Field in the same way as the containers, ie up and over the top of the embankment. Large trucks would not, in any event, have been able to get round the blind bend and buttress of the viaduct. Shown old photographs of the pitch and a number of cars parked either on it, or possibly on her land, she stated that she could not say how the cars got there. If they did use the Track, it was infrequently. Mrs Howells also referred to the use of the forestry track, but was not able to give any direct evidence as to this use.
39. Mrs Howells stated that when she bought her land it was overgrown and neglected, and it was not even possible to walk through it. She spent a great deal of money in

clearing the land. The machines and vehicles used came down from station road, not along the Track. She offered to allow the Applicants access through the gate for the purpose of maintaining repairing the rugby pitch only, but this was not accepted.

40. I also heard from Mr Alan John, who has lived in Cimla for the past 55 years. He attended matches at the Field between 1979 and sometime in the 1990s when he says, flooding caused the matches to be played at Oakwood. User after that was no more than once or twice. Access was always from station road, the car park, and then on foot along the zig zag path. He also stated that he was aware of the forestry road. This road required the river to be crossed which he said was done on foot or with a horse and cart. He described this as a 'tidy road'. He could not say whether or not the Track was used, although he then added that people did drive to the Field in the 1970s when parties were held there until they were stopped by the police because a woman was knocked over by a car.

41. Mr John also stated that the when the Respondents purchased their land it was not possible to go along the Track: the only way was over the top, ie past the caravan. In his words, a mouse would not go through the land.

42. Finally I heard from Kieran Howells. He also stated that, so far as he was aware, the Field was no longer being used in 2013 and that it lies in a natural flood zone. Their field had to be cleared of earth, levelled, and cleared of undergrowth. He believes that the Field is unfit for purpose which is why the pitch was moved to Oakwood. Many of his friends played rugby but he never saw a match being played on the Field. Shown the aerial photos from 2006 he stated that he did not remember it looking like that. In 2013 it was not possible to drive over their land, except from the top down, ie from the caravan. It was not comfortable driving around the buttress. He believes the gas board ran their pipes from the caravan point.

Conclusion

43. I am satisfied, based on all the evidence, that the Track was used on foot and with vehicles to gain access to the Field for all purposes connected with the use of the Field from 1950 onwards, albeit that this use has been less in recent years, in part due to the

gate erected by the Respondents, and in part due to the fact that the Field itself has been used less both because of the Oakwood pitch and because work is needed to make it fully usable. I fully accept the evidence given on behalf of the Applicant. The Track is the most obvious and easiest route to the Field, even if there is a tight bend by the river where some care would need to be exercised.

44. Whilst it may be the case that the Respondents' land was overgrown in 2013, and whilst I do not doubt that Mrs Howells spent a great deal of time and money clearing the land, I do not accept that the Track was not clearly visible and passable. Mrs Howells stated that she believed that the visible tracks, which she saw when she purchased the land, had been made by the previous owner, and also stated that she knew there was a public footpath. I was told that the previous owner had explored the possibility of developing the site: this too would have meant that the Track was in use. Again, whilst Mrs Howells may have believed that lights, goalposts, etc were taken to the Field over the top of the embankment, she is not in a position to dispute the evidence given on behalf of the Applicant, both oral and documentary.

45. I will accordingly order the Chief Land Registrar to give effect to the Applicant's application. This leaves the question of costs. In principle, as the successful party, the Applicant is entitled to its costs. A schedule in Form N260 or the like is to be sent to the Tribunal and to the Respondents within 14 days of receipt of this decision. The Respondents may respond within a further 14 days. I will then consider what order to make.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 28th day of January 2019

