

[2019] UKFTT 0156 (PC)

REF/2018/0325

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

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

**(1) MR TIMOTHY RICHARD NIXON
(2) MR CHRISTIAN LEADER**

APPLICANTS

and

**(1) MR STEPHEN ALDRIDGE
(2) MRS CATHERINE ALDRIDGE**

RESPONDENTS

**Property Address: 2 High Swinburne Place, Newcastle Upon Tyne, NE4 6AT
Title Number: TY10920**

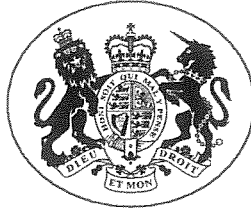
ORDER

The registrar is directed to cancel the Applicant's application dated 22nd May 2017

Dated this 26th February 2019

Daniel Dovar

By order of the Tribunal



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Title Number: TY10920**

**Before Judge Dovar
Sitting at: Gateshead Magistrates' Court
On: 17th January 2019**

Applicant Representation: Catherine Taskis instructed by Womble Bond Dickinson
(UK) LLP
Respondent Representation: James Ballance instructed by Sintons LLP

DECISION

KEYWORDS Ownership of highway - Presumption that soil of highway ad medium filum passes to adjoining owner – rebuttal of presumption

Cases referred to:

Giles v County Building Constructors (Hertford) Ltd (1971) 22 P&CR 978

Mappin Brothers v Liberty & Co Ltd [1903] 1 Ch 118

Commission for New Towns v JJ Gallagher Limited [2002] EWHC 2668 (Ch)

Paton v Todd [2012] EWHC 1248 (Ch)

St Edmundsbury v Clark (No2) [1973] 1 WLR 1572

Pardoe v Pennington (1996) 75 P&CR 264, CA

Introduction

1. The register of title shows the Applicants' property divided in two. Their house is separated from their garden by an unregistered road which, by this application, they seek to bring within their title. Whether they are entitled to do so rests on the application of the presumption *usque ad medium filum viae*, which in plain English means those who own land by the side of the road are presumed to own part of the road up to the mid-point (up to the middle thread of the way).
2. In this case the matter is made slightly more complicated by the fact that they own land to the north and south of the road and the Respondents' property borders the road on the east.

The Site

3. The Property sits in a Georgian residential terrace set back from the main road, the Westgate Road, to the north and bordered on the south by Summerhill Park.
4. As I have said, the Applicants' property is divided by an unregistered and unmade-up road, High Swinburne Place. The Applicants' front door opens onto the road and over the road, behind railings, is their garden.
5. In the same manner, the road dissects the properties immediately to the west of the Property, being 3 and 4 High Swinburne Place. Indeed, there are similar roads running east to west to the west of the Property at Greenfield Place and Swinburne Place. Each of those roads dissects properties from their gardens and all three roads provide places for the occupants to park their cars. Although not determinative of this dispute, it seems that car parking has been causative of it. The Applicants wish to park both their cars outside their property. They consider that if they own the land, they are entitled to do this to the exclusion of the Respondents ability to park on the road
6. Unlike the Property, the Respondents' property is one continuous stretch with the house leading out to a garden at the front that runs to the same northern boundary line as the Property. The same pattern appears at the other end of the terrace, Ravensworth Terrace and on Greenfield and Swinburne Place; the book-end property of each run is

uninterrupted from house to garden, whilst those in between have house and front garden separate by an unmade-up road.

7. Even if the application succeeds, the Respondents will still be able to access their property along the road, albeit they may not be able to park near their home.

The Conveyancing history

8. Prior to 1916 both properties and the road and the gardens had been in common ownership and on the death of the then owner, William Andrew L'Anson Charlton, in 1914, his executors, Jane Elizabeth Charlton and Fredrico George Lundi looked to sell the houses and gardens off individually.
9. In 1916, the Property was conveyed out of common ownership. That conveyance, dated 19 June 1916, sold the Property *'TOGETHER with a right of way and passage in through over and along the street called Swinburne Place aforesaid...'*. It is common ground that the reference to Swinburne Place is to High Swinburne Place; albeit there is a dispute as to whether it is to all or part of that road. The actual conveyance has not been obtained, but that quote appears from the Official Copy.
10. The Respondents' property, No1, was sold a few years later in 1920. Again the actual conveyance has not been obtained. But again rights granted with the conveyance are apparent from the Official Copy, which records that it was sold *'Together with the full and free liberty of Wayleave and passage at all times hereafter ... in common with the owners of the adjoining houses in High Swinburne Place ... to pass and repass through over and along ...the Carriage Road twenty five feet wide leading from the aforesaid Road eighteen feet wide Eastward in front of or on the South side of the other dwellinghouses in High Swinburne Place aforesaid...'*. Again it is common ground that this is a reference to a right of way over High Swinburne Place.
11. Although neither conveyance is available. There is an abstract of title dated 1916 of the Property. It appears that that abstract was created prior to (and possibly in relation to) the conveyance in June of that year. That confirms that prior to the conveyance in 1916, the properties, gardens and part of the road in between were in common ownership. It notes that the road is subject to a right of way. There is also an abstract dated 1926 which was agreed to be in relation to No1 which confirms the common ownership and

right of way over the road. A further abstract dated 1853 also confirms a right of way over the road in favour of the Property. Both rights of way deploy similar, if not the same, wording as that set out on the title to No1.

12. Both parties agree that their titles derive directly from the conveyance in 1916 and 1920 respectively. The current ownership of that part of the road dissecting the Property is uncertain.

The presumptions

13. There are two presumptions that can arise when land adjoins a roadway. The first is when there is no record of the conveyancing history at all, the second is when there is, but ownership of the road is unknown. I was taken through a number of authorities in which the operation of the presumptions has been explored.
14. Although both parties agreed that the second presumption applied in this case, the Applicants contended as an alternative basis for their claim that if the second did not deliver them title to the road, then recourse could be had to the first to achieve that aim. It is therefore necessary for me to consider both presumptions.
15. The presumptions were considered by Brightman J in *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P&CR 978, who stated

“As I understand the law, there are two presumptions relative to the ownership of the soil of a roadway. One presumption operates in certain circumstances when the conveyancing history of the land and the road is unknown. This presumption supplies a fact of which there is no direct evidence, namely the ownership of the road. ... There is no room for this presumption when the conveyancing history of the land and the road is known from the time when they were in common ownership as in the case before me. In such a case, there is, in certain circumstances, a totally different presumption which is more in the nature of a canon of construction that a conveyance of the land includes half the adjacent roadway.”

16. That echoed similar comments from Joyce J in *Mappin Brothers v Liberty & Co Ltd* [1903] 1 Ch 118,

“I suppose there is a presumption where persons own the land by the side of a street that, in the absence of evidence or knowledge of what the real facts were, they must be taken to own the soil of the street usque ad medium filum. But, of course that presumption is displaced, or rather cannot be held to apply, in a case where we have evidence and know all the facts as to the acquisition of the land. In the present case we have evidence, and we really know the history of what has taken place with reference to No.220, Regent Street, and the neighbourhood. The presumption which I have mentioned really has no application.” (p126)

17. The last sentence referred to the first presumption, which was held not to apply because the conveyance history in that case was known. In this case, given the fact that the conveyancing history out of common ownership is known, I agree with the parties that the first presumption does not apply, but that given the Property adjoins a road, the ownership of which is uncertain, the second presumption does.

18. Joyce J continued

“The contention of the plaintiff can only be supported by recourse to another presumption of law which is thus stated in Elphinstone’s Interpretation of Deed p.179:

“By the conveyance of land abutting on a highway, ... the prima facie presumption of law, in the absence of evidence of ownership, is that ... the soil of the road usque ad medium filum passes.”

.... I observe that Blackburne J., in his judgment in Plumstead Board of Works v. British Land Co. Says that it has always been held enough to rebut the presumption where there was anything to shew that it was not the intention to convey any part of the road. ... this presumption may be rebutted by evidence of surrounding circumstances which lead to the inference that no part of the soil of the highway was intended to pass.” (p.127)

19. In relation to the specific facts of that case and whether or not the presumption was rebutted, Joyce J said,

“... there was no one single reason for their leasing this subsoil, ... while on the other hand, to my mind, there were a thousand and one reasons against their doing anything of the kind. The very least it could be said, in my opinion, is that in the present case it would have been a very ill-advised thing to do ...”
(p.127)

20. This latter point has some relevance in this case because both parties put forward reasons which support their respective claims based upon what would or would not be sensible or common-sense ‘things to do’.
21. In terms of what can be relied on to rebut the presumption, it is not necessary or even permissible to consider what the vendor’s actual intention was. It must be garnered from the surrounding circumstances. In that respect, if a transfer of the road would be disadvantageous or ill-advised, that would be sufficient to rebut the presumption. This ties in with the policy underlying the presumption in that it is presumed that the owner has no reason for holding onto a road when they did not retain any surrounding land.
22. Brightman J set out further limits on what can be relied on in *Giles v County Building Constructors (Hertford) Ltd* when he said

“Mr Jopling relied on Norton on Deeds, 2nd ed. (1928), p.252 for a correct statement of the nature of the second presumption.

A conveyance of land abutting on a highway, or a non-tidal river, passes the adjoining half of the highway, or the river bed.

The presumption may be rebutted, but it is not rebutted (i) by the land being described as containing an area which can be satisfied without including half the road or river bed; (ii) by the land being described as bounded by the road or river bed; (iii) by the land being referred to as coloured on a plan, whereon the half of the road or river bed is not coloured; (iv) by the grantor being the owner of the land on both sides of the road or river; of (v) because subsequent events not contemplated at the time of the grant show it to have been very disadvantageous to the grantor to have parted with the half of the road or river bed ...”

23. The latter passage enumerated evidence that cannot be used to rebut the presumption. This can be understood on the basis that in most cases the vendor may not have actually intended to transfer the road as well, but the utility behind having it transferred is greater than not, particularly if the vendor does not retain any land in the vicinity.
24. With that point in mind, both parties relied on the purpose behind the presumption, not so much as a ground in itself for finding in their favour, but as an aid to understanding how it operates in practice and why and how the rebuttal evidence should be considered. Neuberger J dealt with the purpose in *Commission for New Towns v JJ Gallagher Limited* [2002] EWHC 2668 (Ch)

“In the absence of a good reason to the contrary, where a vendor conveys land adjoining the highway and (as is usual) he therefore owns the land of the adjoining highway ad medium filum, he should be presumed to have conveyed away that land, which he owns under the highway, together with the land the subject of the express conveyance. The rule is essentially one of convenience, both in public terms and bearing in mind the interests of the parties. It is undesirable, in terms of public interest, to have odd pieces of land, whose ownership is largely academic in practice (unless for instance the highway is diverted), vested in persons who have no interest in the adjoining land, and who may well not even be aware that they own part of the highway. It is in the interest of the parties to a conveyance that the purchaser takes the adjoining highway land, essentially for the same reason.” (para 28)

25. This follows another authority I was taken to, *St Edmundsbury v Clark (No2)* [1973] 1 WLR 1572, in which Megarry J stated

*“When from a practical point of view such a strip of land is unlikely ever to be capable of beneficial enjoyment by anyone save the grantee of the adjoining land and his successors in title, not only is it improbable that the grantor intended to retain the strip but also it would not be very long before serious difficulties in tracing the title to the strip might arise. As Lord Moulton said in *City of London Land Tax Commissioners v Central Railway Co* [1913] AC 364, 384., “The law cannot permit that the land under the highway should belong to nobody”. (p1583H)*

26. It does appear that bar those factors which cannot rebut the presumption, it is not a heavy evidential burden to shift, as Brightman J stated in *Giles v County Building Constructors (Hertford) Ltd*

“the second presumption, if it applies at all to a conveyance of a plot of land forming part of a building estate by grantor who owns both land and road, is a presumption which readily yields to indications of contrary intention.”

27. Another helpful case is on the approach to rebutting the presumption is *Paton v Todd* [2012] EWHC 1248 (Ch) in which Morgan J said

“Many of the cases which discuss the second presumption also discuss what suffices to rebut the presumption. Many of the relevant cases on that point were considered in The Commission for the New Towns v JJ Gallagher [2003] 2 P&CR 24. The decisions in many of those cases turned on matters of detail and involved some fine distinctions. The presumption may be rebutted by internal evidence within the relevant conveyance itself or by reference to practical and common sense factors which would have been known to the parties at the time of the conveyance” (para 37)

28. The final authority I was taken to was *Pardoe v Pennington* (1996) 75 P&CR 264, CA in which the presumption was rebutted because as Waite LJ pointed out there were circumstances that suggested very strongly that the parties never intended the road to pass. Amongst them was the fact that another road had been expressly granted with rights over it reserved, thus demonstrating that when they wanted to transfer title to a road, they knew how to express that desire. There were also sensible reasons for keeping ownership, not least access to other properties.

Application of the presumptions

The Second Presumption

29. I start with the second presumption. Both parties say this is engaged. The Respondents say it is rebutted. The Property adjoins the road. The ownership of the road is unclear. Given that the Property adjoins the road on both sides, there is a presumption that that part of the road is within the Property’s title. I agree that it is engaged.

30. Both parties agree that the Applicants derive their current title directly from the 1916 conveyance. It follows that nothing material has happened since then. Given that the registrar on looking at the conveyance divided the land into two parcels and excluded the road, it seems likely that there was no intention, at least as evinced from the conveyance, to transfer title to the road with the Property.
31. Whilst I accept that the second presumption, is not a strong presumption, I do not think that my view on what the actual conveyance depicted can be taken into account as this clearly falls within the impermissible rebuttal evidence set out above in *Giles v County Building Constructors (Hertford) Ltd*. In essence, the presumption is not rebutted just because the actual conveyance clearly expresses the fact that that land is excluded. To do so would confine the positive application of the presumption to cases of mistake.
32. With that in mind, my task is an exercise to weigh up the competing factors that the parties have said favour their case in terms of whether the presumption is rebutted. As set out in *Paten v Todd*, this can be internal evidence within the conveyance or practical factors which would have been known to the parties at the time of the conveyance. Given the guidance on how to approach evidence of rebuttal, I do not consider that I need strong evidence to rebut it. It is in some part a matter of construction and in other parts a matter for me to consider what sensibly is likely to be relevant.
33. I will deal with each factor in turn that is said by the Respondents to rebut the presumption.
34. The first is the grant in the 1916 conveyance of the express right of way. The Respondents say this is inconsistent with ownership of the road (or at least that part adjoining the Property); why grant a right of way over land which is owned? The Applicants suggest that properly construed, this is a reference to only part of the road, being that part up to the part claimed by them. They draw this from the following:
 - a. The reference to '*Swinburne Place aforesaid*', points to a prior definition of the road, which is no longer available given the lack of the conveyance;
 - b. It does not appear that the executors owned any other part of the road and in granting that right of way, they were simply passing on the right that had already existing in favour of the Property when it had been held in common

with No1. A right referred to in the abstracts of title. According to the Applicants, that would just pass on the right of way up to the Property but not the part of the road adjoining it.

35. I favour the Respondents on this point. The reference to 'aforesaid' is neutral. It is raised to cast doubt on the Respondents case, but in the absence of any further evidence I do not consider it assists either party. Further, the title shows that the wording of the right of way granted is very different to that found in the abstracts and that reflected on title to No1. That in my view is an indication that this was not simply a continuation of that right of way, but was a new right of way, both relying on the existing one up to the Property and then over the road that dissects the Property.
36. The second is that at the time of the 1916 conveyance access was still needed over the road to No1. The Respondents contend that if the road had been conveyed with the Property then a right of way would have been reserved in favour of No1. Whilst the Applicants recognise that this is a possibility, they contend that it is but one of three possibilities in light of which the presumption cannot be rebutted. The other, equally credible, being:
- a. A reservation could have been made, it is not clear that one wasn't; or
 - b. That No1 retained a right of way that had existing prior to the properties coming into common ownership and so there would be no need for a reservation. It was said this right of way may have continued in existence if the Property and No1 were not in common occupation; i.e. in order to have extinguished any pre-existing right of way, there would have to have been common occupation as well as ownership.
37. The third, which is closely related to the second, is that as the vendors of the Property also owned and retained No1, they would have had a greater benefit by retaining it, rather than selling it and reserving a right of way. The Respondents say that the presumption does not apply with the same force where a party continues to own adjoining land. The Applicants submit that in this context, where the property was in the hands of executors, the common-sense approach put forward by the Respondents is displaced. The executors would only be interested in extracting the most value out of

both properties, which would be obtained by selling the road with the Property. They would not be concerned to retain it for themselves for the sake of convenience.

38. Taking these two points together, again I favour the Respondents' claims. Firstly, the issue taken with the lack of reservation is probably neutral. I accept that it would be the benefit of the reservation that would most probably be registered; it is also difficult to see where the burden could be registered given that the title to the road is unregistered. However, the most significant factor is that the adjoining property, No1, was retained and whatever the intentions were of a future sale of that property, access was needed.
39. In my view this provides two significant pieces of evidence that are capable of rebutting the presumption in line with *Pardoe* and in light of the underlying rationale for the presumption given in both *Commission for New Towns* and *St Edmundsbury*.
40. I am persuaded that although the executors were not intending to live at No1, it was still more practically convenient for them to have retained ownership. Not least, it would have helped them obtain a sale of No1 after the Property had been sold if they could freely deal with rights over the road. Further, I agree with the Respondents contention that it would be unwise to rely on the other points raised by the Applicants to support the presumption; i.e. preservation of the right of way to both properties through a continuing lack of common occupation. That does appear to be a precarious basis to proceed and an unnecessary one.
41. The fourth, is that at the time of the 1916 conveyance it was known who owned the road, it was the executors. There was no need or room for the presumption to apply at that point in time. The Applicants say that the time for considering the presumption is when it is relied on, not at the time of the conveyance. It is now being relied upon and so now is the time to consider its application and the ownership of the road is uncertain.
42. I can see some force in the Applicants' submission that it would not be at the time of the conveyance as at that time it was known who owned the road. However, the presumption works by considering that the road was granted with the conveyance as a matter of construction. This cannot be at a later stage. Further, just as it is not permissible to rebut the presumption because the conveyance expressly transfers land up to the road, it must also follow that the fact that it is known who owns the road is no bar to applying the presumption at the time of the conveyance. Therefore in my view, it

should be considered at the time of the conveyance but it does not operate in favour of the Respondents. It is part of the impermissible evidence referred to in *Giles v. County Building*.

43. In light of my view, in particular of the second and third points referred to above, the presumption is rebutted. That is reinforced by my view on the first point relied on. The final point makes no difference to the outcome.

First Presumption

44. The Applicants contend that if the second presumption does not apply then the first fills the void and provides the result they seek. I do not agree.
45. Firstly, I do not consider that recourse can be had to the first presumption where it is accepted that the second applies. In such a case there is sufficient conveyancing history for the presumption to be excluded, as in *Mappin* and *Giles v County Building*.
46. Secondly, even if it were to apply, I consider that it would be rebutted by the very strong inference that can be drawn from the conveyancing history, that there was in fact no intention to transfer title to the road. In my view the conveyance made that clear and I have set out my reasons for that above. Unlike the second presumption, I do not consider that I am constrained in taking this into account when considering the first presumption. That operates in different circumstances and in a different manner. In any event, for the same reasons that I find that the second presumption is rebutted, so is the first.

The Respondents claim to take advantage of the presumption

47. In light of my decision it is not necessary to entertain the Respondents' alternative argument that as they adjoin the road, they too can take advantage of the presumption. However, in my view that would not have succeeded. A literal translation of the maxim is the middle of the thread; i.e. a split along the centre line of the road as it runs east to west. The Respondents' contention only works if it applies to the length, which it clearly does not. The difficulty with this argument is reflected in their acceptance that that could create an absurd result; i.e. that they would be entitled to half the length of the road. This is a presumption and cannot be stretched outside its bounds.

Conclusion

48. I recognise that this decision leaves the ownership of the road in doubt. That alone does not justify giving the title to the Applicants and is the result, in my view, of applying the principles surrounding both presumptions.
49. Accordingly, I will direct that the registrar to cancel the application.
50. The Respondents may make an application for an order for costs within 28 days of the date of this decision, accompanied by a detailed schedule of costs. The Applicants may make any submissions as to liability or quantum within 28 days of the service of that application, and the Respondents will then have a further 21 days to respond.

Judge Dovar

Dated this 26th February 2019

Daniel Dovar

By order of the Tribunal

