[2017] UKFTT 0641 (PC)

REF/2016/0382

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

BETWEEN

VERNON SMART

APPLICANT

and

TOBIAS JAMES SEARS

RESPONDENT

Property Address: Land on the west side of Little London Lane, Northwold, Thetford IP26 5NH

Title Number: NK431626

Before: Judge Owen Rhys

Sitting at: Bury St Edmunds Employment Tribunal

On: 20th June 2017

ORDER

IT IS ORDERED that the Chief Land Registrar shall give effect to the Applicant's application dated 17th February 2016 to cancel the Respondent's Caution against first registration.

Dated this 17th day of July 2017

Owen Rhys

BY ORDER OF THE TRIBUNAL

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Applicant representation:	Mr Sinclair of Counsel instructed by Rudlings Wakelam Solicitors
Respondent representation:	In person

DECISION

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1. This comes before me as an application to bar the Respondent from taking any further part in this reference, pursuant to Rule 9(3)(e) and (7)(a) of the Tribunal Rules. The Applicant submits that there is no reasonable prospect of the Respondent's case succeeding, on the grounds that it is misconceived. He relies on a witness statement dated 21st December 2016 made by his solicitor Ms Berry. The Applicant is represented by Mr Graham Sinclair of Counsel, and the Respondent has represented himself throughout. The jurisdiction under Rule

9(3)(e) is broadly akin to that under CPR Part 24, as was held in the Tribunal decision in Quinn v Unique Pub Properties Alpha Ltd [2016] EWLandRA 2015_0546 (12 April 2016). The considerations that apply on an application under Part 24 are well known, and are set out in the White Book (see the notes to CPR 24.2). Critically, the court will not conduct a mini-trial of disputed issues of fact, and under ordinary circumstances will not resolve such issues summarily. However, if a party's case is demonstrably unsustainable as a matter of law, or incredible as a matter of fact, summary judgment may be given.

2. In the present case, the Respondent has the benefit of a Caution against First Registration ("the Caution"), NK431626, entered in respect of the land identified on the Caution plan and described as *"Land on the west side of Little London Lane, Northwold, Thetford (IP26 5NH)"* ("the Property"). As is recorded in the Caution property register, the Respondent's statement of truth made in support of the Caution states as follows: *"I am the owner of 2 Little London Lane and as the registered owner of the above property I wish to register any right, easements, appurtenances which may arise and are reserved for the benefit of 2 Little London Lane thereover."* The Applicant is the owner of the Property against which the Caution has been registered. On 17th February 2016 the Applicant applied to cancel the Caution, and on 17th March 2016 the Respondent objected, claiming the benefit of a right of way. The Chief Land Registrar referred the dispute to the Tribunal on 31st May 2016.

3. The case concerns a strip of land used from time to time by the Applicant as an additional pedestrian and vehicular access leading to the rear of his home situated at 6 Little London Lane, Northwold. The land is unregistered but the Applicant's root of freehold title can be traced back to a conveyance dated 29th December 1919 and made between John Burroughs Carter (1) and Frederick Charles Fendick (2), on the plan of which the relevant strip of land is that seen at the northernmost end of OS parcel 658. It was later conveyed by Mr Fendick's widow to the Applicant's father on 14th August 1953, and thence by his father to him by a Conveyance dated 1st July 1974. None of the conveyances referred to any rights of way granted or reserved in favour of adjoining occupiers such as the Respondent. I should add that the Applicant's unregistered title to the land has been accepted by Land Registry and appears to be a good and marketable title. In

the hearing before me the Respondent attempted to argue that part of the Property was not in fact within the Applicant's title. Quite apart from the fact that the title is, as I have said, a good one, this was not the basis on which the Caution was obtained, which related only to the claimed easements.

4. The Respondent's title to 2 Little London Lane is registered at HM Land Registry under title number NK409789. The Property Register refers to various rights granted by a Conveyance dated 21st October 1946 – being the root of title – but these do not include any rights granted or reserved over the Property. It does, however, contain a number of other specific pedestrian rights of way over various paths around 2 Little London Lane.

5. Before the application was made to remove the Caution, there was extensive correspondence between the parties, much of which has been attached to the Applicant's Statement of Case. The correspondence includes two letters from the Respondent, dated 18th May 2015 and 29th October 2015, in which he set out in some detail the arguments relied on in support of the claimed right of way. These are essentially the same arguments that he advanced orally before me, by reference to the same statutory provisions and associated case law. These arguments are quite elaborate, but may be summarised very briefly. Indeed, helpfully that is exactly what the Respondent has done, in his letter of objection dated 17th March 2016, sent to the Land Registry in response to the Applicant's application to remove the Caution. It reads as follows: "[RE PARA 1] I OBJECT TO THE APPLICATION ON THE BASIS THAT I HAVE THE BENEFIT OF A RIGHT OF WAY OVER THE LAND HATCHED BLACK ON THE ATTACHED PLAN. [RE PARA 2] THE ABOVE RIGHT BEING CONFERRED BY THE ENCLOSURE AWARDS, NOT BY PRESCRIPTION." He elaborated a little further in the earlier letter dated 9th March 2016.

6. In his Statement of Case dated 20th August 2016, the Respondent appears to advance a different or at least additional argument, as the following passage (paragraph 5) makes clear:

> "It is denied that the disputed land forms part of the title and deeds of the applicant. The disputed land (The Way) has been used as a common and commonable piece of open and uncultivated waste land formerly copyhold land of the manor of Northwold, which has subsisted for the benefit in

common and open use without restriction by the copyholders and occupiers of the dominant land and subsequent cottages abutting for a period in excess of 170 years."

7. I have already said that the basis of the Respondent's objection to the removal of the Caution is a claimed right of way over the disputed land, not that he himself has a better title to the land. The Applicant's title has been accepted by Land Registry which is entirely understandable, given that he has provided a good root of title dating back to 29th December 1919. Nothing that the Respondent has produced, by way of historical records or documentation, even remotely casts any doubt on the validity of the Applicant's title. There is no evidence that the land was copyhold, just speculation. This is an untenable argument which is bound to fail, even if it were one which was open to the Respondent, which it is not..

8. The essence of the Respondent's case, therefore, is the allegation that a right of way was created when the disputed land became the subject of enclosure. In his letter dated 18th May 2015, this is how the Respondent explains his argument:

> "1.Your client has previously stated that no legal right or easement exists in favour of Mr Sears, and that none would be granted. Mrs Sears has therefore commissioned extensive research into the historical origins and use of the way, and land. This has revealed a parliamentary deed of enclosure and exchange between Charles-Carter-Tyssen-Amhurst [land owners] henry Partridge [lord of the manor of Northwold, dated 10th March 1864 (Deed of 1864) which clarifies that the land and the way was formerly copyhold land of the manor, and a common piece.
>
> 2. As the land was formerly copyhold land of manorial origin and a common piece prior to enclosure, the customary rights of the manor attached to the land were regranted by the Deed of 1864. That means that whatever rights easement or appurtenances which were in existence prior to the Deed of 1864 are confirmed and recovenanted.
>
> 3. A customary right of the manor is a right of common and use being exercised at all times of the year, for all purposes without constraint, over the common-field-common piece or parcel of waste land of the manor."

9. It is by no means clear how the various strands of the Respondent's arguments hang together. There is no comprehensible thread to these three paragraphs, at all events as a matter of real property law. I do not follow how the fact that disputed land was formerly copyhold – which has not been demonstrated on the balance of

probabilities in any event - can translate into the continued existence of a private right of way over the formerly copyhold land. Any rights attaching to that land would, in any event, remain vested in the Lord of the Manor, not the Respondent (who does not claim to have manorial rights).

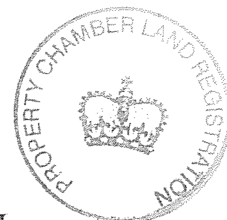
10. As to the suggestion that there are rights of common over the disputed land, the Commons Register contains no reference to any such rights and it is difficult to see what rights could exist. A right of way is not a right of common. Rights of common are profits – i.e rights to take something off the land - not easements. The only grounds for asserting the existence of common rights would appear to be the fact that in a Deed of Exchange dated 10th March 1864 ("the Exchange") this parcel of land was described as "Common Piece". Manifestly, that description, without more, cannot establish the existence of common rights. Furthermore, none of the title documents relating to the property either of the Applicant or the Respondent makes any reference to the right of way claimed by the Respondent. On the contrary, different rights are granted and reserved, but not that claimed by the Respondent.

11. In short, and with all due deference to the time and effort that the Respondent has put into this case, I cannot see that he has any reasonable prospect of succeeding in his objection to the application. There is neither a coherent argument nor any evidence to support his objection. I shall therefore direct the Chief Land Registrar to give effect to the Applicant's application to cancel the Caution.

12. The Applicant has lodged a Statement of Costs in the sum of £9,741 inclusive of VAT. I am minded to order the Respondent to pay these costs in full, but will allow him the opportunity of making written submissions if he wishes to object, either to the amount or to the principle. He must send such submissions to the Tribunal, and serve them on the Applicant, no later than 4 pm on Friday 28th July 2017.

Dated this 17th day of July 2017

Owen Rhys



BY ORDER OF THE TRIBUNAL