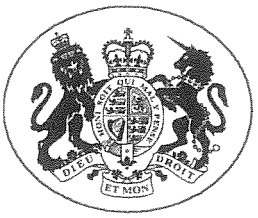


[2019] UKFTT 0159 (PC)

REF/2017/0300

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

LAURENCE IAN BENNION

APPLICANT

and

(1) JOHN THOMAS BENNION
(2) DENISE ANN BURGESS

RESPONDENTS

Property Address: Betley Old Hall, Main Road, Betley Crewe
Title Number: SF487602

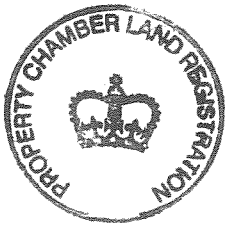
ORDER

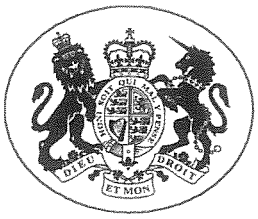
The registrar is directed to give effect to the Applicant's application dated 5th August 2016 as if the Respondent's objection had not been made.

Dated this 11th February 2019

Daniel Dovar

By order of the Tribunal





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(1) JOHN THOMAS BENNION
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Property Address: Betley Old Hall, Main Road, Betley Crewe
Title Number: SF487602

Before Judge Dovar
Sitting at: North Staffordshire Civil Justice Centre
On: 5th February 2019

Applicant Representation:	Mr Hoffman instructed by Hibberts Solicitors
Respondent Representation:	In person

DECISION

KEYWORDS: Rights of Way; Rectification; Schedule 4 of the Land Registration Act 2002; Construction of Assent;

Cases referred to

Thompson v Bee [2010] Ch 412, CA
Phillips v Low [1892] 1 Ch 47

Introduction

1. This is an application for rectification of the register to show a right of way in favour of the Applicant's land, Betley Old Hall, Main Road, Betley, Crewe, Staffordshire, CW3 9AD ('the Hall') (SF487602) over neighbouring land, being land adjacent to Old Hall Farm, Main Road, Betley, Crewe ('the Farm') (SF493208), which is owned by the Respondents.

2. There is already a right of way in favour of the Hall over the Farm, the claimed right of way spurs off this right of way and joins the Hall at an earlier stage than the uncontested right does.

3. The application is dated 5th August 2016, the Respondents objected on 2nd November 2016 and the matter was transferred to the tribunal on 13th March 2017 pursuant to s.73(7) of the Land Registration Act 2002.

Background

4. Both the parties' properties were in the common ownership of James Sutton until he died in 1980.

5. In his Will, dated 2nd February 1978, he set out how his land was to be divided; including separating the Hall and the Farm land. He also set out the reservation of a right of way in favour of the Hall land over the Farm land. He bequeathed to Ronald Jones the Hall *'Together with a right of way thereto for all purposes on coloured pink on the said plan'* [sic]. This provision as well as being grammatically problematic, was entered in manuscript; but it is clear what the intention was. Mr Jones was appointed executor along with Mr Sutton's niece, Marion Kirkham; who received the residue of his estate.

6. The plan attached to the Will, as both parties accepted, clearly showed the registered right of way and the spur right of way claimed by the Applicant. The first was a long curved dashed line coloured red/pink. The latter was also dashed and coloured red/pink and spurred off the former providing a shorter route to access the Hall.

7. Mr Sutton passed away and Mr Jones and Ms Kirkham became the executors of his estate. On 1st March 1983, two Assents were executed by them in their capacity as executors. One transferring the Hall to Mr Jones, the other the Farm to Ms Kirkham.

8. The Assent transferring the Hall to Mr Jones set out the following:

   a. It recited the Will of Mr Sutton;

   b. It vested the Hall in Mr Jones

      'Together with the land surrounding the same as described in the plan annexed to the Will and Probate of the said James Sutton ... a copy of the which plan is annexed hereto TOGETHER WITH a right of way thereto from the main road as coloured pink on the said plan with or without vehicles for the purpose of gaining access to the said property edged green subject to the payment of a fair proportion of the expense and maintenance and keeping the said right of way in repair...'

   c. A plan was attached to the Assent. The uncontested right of way was coloured red. The spur right of way, whilst marked in black, was not coloured red. It is a copy of the plan from the Will, save that it appears to have been recoloured and the quality of the copy has degraded through copying.

9. The Assent conveying the Farm to Ms Kirkham set out the following:

   a. It also recited the Will;

   b. It vested the Farm in Ms Kirkham

      'Subject to a right of way granted to the said Ronald Jones as marked pink upon the upon the plan annexed hereto for the purpose of gaining access to the property'

   c. The plan, as with that of the Jones Assent, does not show the spur right of way coloured red. It does however show it as a line running off the other right of way. Further, there is a key at the bottom of the plan which states that the dashed line

      'DENOTES RIGHTS OF WAY TO BETLEY OLD HALL FARM HOUSE.'

10. When the Assents were used to register both titles, neither included the spur right of way on title.

Applicant's Submissions

11. The Applicant contends that the Will is clear (as is accepted by the Respondents) and granted the spur right of way to the Hall. It is also said that the Assent expressly provides for the spur right of way and that that has been mistakenly left off title. The proper interpretation of the Assent to Mr Jones can only lead to that conclusion.

12. Although the actual plan attached to that Assent did not obviously include the right of way in that it was not coloured pink (or even red), it was said in the Assent, that that plan was a copy of the plan to the Will. When reference is had to the actual Will plan, then the Applicant says, it is clear that it is included. Further, in any event, when reference is had to the Will itself, that resolves any ambiguity in favour of the Applicant.

13. On that basis there has been a mistake and Schedule 4 of the Land Registration Act 2002 is engaged. Schedule 4 permits the alteration of the register where there is a mistake which prejudicially affects the title of a registered proprietor (paragraph 1). Under paragraph 5, the registrar may alter the register in order to: (a) correct a mistake; or (b) bring the register up to date. However, under paragraph 6, no alteration can be made without the proprietor's consent in relation to land in their possession unless they by fraud or lack of care caused or contributed to the mistake or '*it would for any other reason be unjust for the alteration not to be made.*'

14. The Applicant accepted that the Respondents were proprietors in possession who had not consented. Further they did not contend that the mistake was due to their fraud or lack of property care. The issue was therefore whether it would be unjust for the alteration not to be made. The Applicant says it would be. The right was intended to pass, it should be registered. There is nothing, save for the right itself which prejudices the Respondents. They have not built over the right of way, nor is it feasible that they would do. The right of way traverses a small wedge of grassland between the road and the Hall boundary.

15. As an alternative case, it is said that it follows that given the Assents were simply putting into effect the clear terms of the Will, they cannot deviate from those terms. Therefore, even if the Assent failed to set out the spur, the Will takes precedence and creates at the very least an equitable right to the right of way. Further, that such a right will attach to the land by virtue of s.62 of the Law of Property Act 1925 and would have been an overriding interest under s.70(1)(a) of the Land Registration Act 1925 and is therefore protected by Schedule 12 para 9 of the 2002 Act.

Respondents' submissions

16. The Respondents speculated that Ms Kirkham and Mr Jones had deliberately left off the spur right of way on the Assent by agreement. They said that this would have increased the value of the Hall by giving it another and more private right of way. Accordingly, given that such a mistake would have had an impact on the value of the Hall land, if it really was a mistake would have been recognised and acted upon much earlier. It would not have been left for years to rectify. In those circumstances they contend that it cannot have been a mistake.

17. They also pointed to another difference between the Assents and the Will, namely that the former required a contribution to the maintenance of the Right of Way whilst the latter did not. They relied on this to support their contention that Ms Kirkham and Mr Jones had agreed to deviate from the terms of the Will.

18. It was submitted that accordingly this was no mistake and that any ambiguity should be resolved in their favour. They also did not consider that the reference to the plan annexed to the Will in the Jones Assent was determinative of the issue as there was no similar reference in the Kirkham Assent.

19. In terms of whether it would be unjust not to make the alteration, the Respondents relied on the fact that it had been nearly 39 years since the death of Mr Sutton and no mention had been made of this right of way until 2014. Further, they said that it would devalue their property and take away an area of land that they would be otherwise able to use.

Consideration and conclusion

20. Section 36 of the Administration of Estates Act 1925 provides for the effect of assent by personal representatives. It permits the personal representative to assent to the vesting in any person who is entitled thereto to any estate or interest in real estate. By s.36(2) that assent shall operate to vest in that person the estate or interest to which the assent relates. In *Thompson v Bee* [2010] Ch 412, CA, the Court of Appeal considered that although title was derived from the assent and not simply from the will, recourse could be had to the will to determine the scope of the assent. That conclusion was drawn both from s.36(2) and from *Phillips v Low* [1892] 1 Ch 47, which supported the view that the will and assents were to be viewed and construed as one transaction.

21. There is some ambiguity in the Assents. They do not clearly depict the spur right of way. However, any ambiguity is cleared up once reference is had to the Will. Even without the authority of *Thompson v Bee,* it would have been permissible for me to look at the Will for guidance as not only are the Assents simply carrying out the terms of the Will, but they both make express reference to it and the Jones Assent, expressly incorporates the Will plan as its plan. On that basis alone it would clear up the ambiguity in favour of the Applicant.

22. I therefore construe the Assents as including the spur right of way as being granted to the Hall land. It was therefore a mistake not to register that right of way on title.

23. The remaining issue is whether it would be unjust not to make the alteration. The Respondents submitted that the right of way was not only valuable but a more private right of way for the Hall. It is clear then that it would be prejudicial to the Applicant not to allow the alteration.

24. As to the impact on the Farm land, I do not consider that it would devalue that land. It is over a small verge of grassland between the roadway and the boundary to the Hall and is not realistically a site for development or other significant use; I note that it remains a small scrub of land as it no doubt has been since it was split from the Hall land. Further, it remains the Respondent's land, just subject to a short and modest right of way to the Hall.

25. I therefore do not need to deal with the Applicant's alternative arguments, however, I had some doubt as to whether s.62 would apply given that the land was in common ownership and the right envisaged under the Will would not have come into existence

until after the Will had been properly executed. I was also not clear whether any right would have been protected as an overriding interest given that the right of way is not apparent and was, on the Applicant's case an equitable easement at best.

26. Accordingly, I will direct that the registrar give effect to the Applicant's application as if the Respondent's objection had not been made.

27. The Applicants 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 Respondents may make any submissions as to liability or quantum within 28 days of the service of that application, and the Applicants will then have a further 21 days to respond.

Judge Dovar

Dated this 11th February 2019

Daniel Dovar

By order of the Tribunal