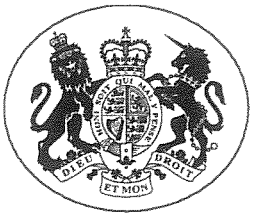


[2019] UKFTT 0249 (PC)

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2018/0161
BETWEEN

MARKOS CHRYSOSTOMOU
JULIE CHRYSOSTOMOU

Applicants

and

JOHN PATRICK KENNEDY
CAROLINE KENNEDY

Respondents

Property: Land adjoining 10 Church Way, London N20 0LA

Title number: AGL408891

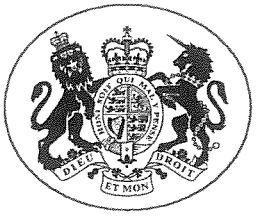
ORDER

The Chief Land Registrar is ordered to give effect to the application dated 3 April 2017

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 6th day of March 2019



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Title number: AGL408891

Before: Judge McAllister
Alfred Place
14 February 2019

Representation: both parties appeared in person

DECISION

Introduction

1. The Respondents, Mr and Mrs Kennedy, are the registered owners of a property, 16 Church Way, London N20, registered with title number NGL197434. The property was registered in their names on 24 January 1994. At the time of purchase, a building (described to me as a garage or coach house) stood at the entrance of Church Way, in line with the other properties on the road. The house or building has since been demolished.

2. The Respondents' registered title includes a considerable area of land. In addition to the back garden of what was once the building, which garden is in line with the other gardens in Church Way, the property extends both (approximately) north and south (left and right), behind the gardens of numbers 10 to 28 Church Way, and in addition includes a large area of land behind the southern (left hand) branch. In effect, the land is in a T shape, with an additional rectangle above the left hand branch. The right hand branch extends behind the gardens of numbers 14, 10 and 12.

3. It is the area behind the garden of Number 10 (the property owned by the Applicants, Mr and Mrs Chrysostomou, which is in dispute ('the Disputed Land').

4. By an application dated 3 April 2017 Mr and Mrs Chrysostomou applied in form ADV1 under section 97 and Schedule 6 to the Land Registration Act 2002 to be registered as proprietors of the Disputed Land. In her supporting statement of truth Mrs Chrysostomou claimed to have been in possession of the Disputed Land from the shortly after the date of purchase of Number 10 on 21 July 1997.

5. Mr and Mrs Kennedy objected on 16 November 2017. The notice in response did not require the Applicants to deal with the application under paragraph 5 of Schedule 6. The only objection advanced by them was that the Applicants had not been in adverse possession for 10 years.

6. The matter was referred to the Tribunal on 13 February 2018. I had the benefit of a site view on 13 February 2019.

7. For the reasons set out below I will order the Chief Land Registrar to give effect to the application.

Topography

8. The Disputed Land is in effect an extension of the rear garden of Number 10. It is fenced on the northern side and on the western side (ie on the right hand side and to the rear as viewed from the house). On the southern side (the left hand side) there is now no fencing, but there is a natural barrier made of stones, wooden logs branches and foliage which, now at least, make access to the remainder of the land owned by the Respondents virtually

impossible. There is no (and has never been any) fencing or barrier of any kind between the Disputed Land and the remainder of the back garden of Number 10. On the northern, right hand side, there are the remains of what might very well have once been a conservatory.

9. The land owned by Mr and Mrs Kennedy has been cleared where the back garden of the original dwelling at Number 16 would have been (and it is still possible to see the concrete footprint of the dwelling) but has been allowed to revert to nature at the rear. It is not now realistically possible to gain access from the entrance to Number 16 to the Disputed Land, not only because of the natural barrier on the boundary with the Disputed Land, but because all the land at the back of Number 16 is covered in dense and impenetrable vegetation.

Relevant legal principles

10. The application for adverse possession of the Disputed Land is made pursuant to paragraph 1(1) of Schedule 6 to the Land Registration Act 2002 which came into effect on 13 October 2003. To make such an application, the applicant must have been in adverse possession of the land for a period of 10 years ending on the date of the application. In this case, therefore, the relevant (minimum) period is from 3 April 2007.

11. When such an application is made the registrar is obliged to notify the registered proprietor: see paragraph 2(1) of Schedule 6. The proprietor may then require that the application be dealt with under paragraph 5 of Schedule 6. This in turn requires the applicant to show that he meets one of the three conditions there set out. In short, the registered proprietor can block the application by requiring the applicant to satisfy a further condition. However, if the proprietor does not require the application to be dealt with in this way, the applicant (if he can show 10 years adverse possession) is entitled to be registered as owner.

12. In this case, Mr and Mrs Kennedy were informed of the application on 30 August 2017. By letter dated 16 November 2017, Mr Kennedy wrote to Land Registry stating that he objected in the strongest possible terms to the application, saying that it was 'complete

nonsense' that the Applicants had been in adverse possession for 10 years. He also enclosed the form NAP. In this form, he did not request that the registrar deal with the matter under Schedule 6, paragraph 5, but simply re-stated the objection that the Applicants had not been in possession for 10 years.

13. The effect of this letter, and the NAP, is that there was nothing to put the reasonable registrar on notice that the Respondents were seeking to invoke the procedure under paragraph 5. It is too late to raise the point in the Respondents' Statement of Case and in their skeleton argument: see *Hopkins v Beacon* [2011] EWHC 2899 and subsequent decisions in this jurisdiction.

14. Another point which has arisen in this case is the relevance of paragraph 12 of Schedule 6. This provides as follows: *'A person is not to be regarded as being in adverse possession of an estate for the purposes this Schedule at any time when the estate is subject to a trust, unless the interest of each of the beneficiaries is an interest in possession.'*

15. The effect of this paragraph is that, for the purposes of a Schedule 6 application, a squatter will not be regarded as being in adverse possession when the registered estate is held in trust, so long as there are successive interests in the land. It is only when these interests are interests in possession that a squatter can be held to be in adverse possession.

16. Mr Kennedy has sought to rely on the restriction in his registered title which states that '*no disposition by a sole proprietor of the land (not being a trust corporation) under which capital money arises is to be registered except under an order of the registrar or the court.'*

17. This is a standard restriction entered on the title to make it clear that the registered proprietors are tenants in common in equity. In this case, the last survivor will not be able to give a valid receipt for money arising on the disposition of the land. No trust falling within paragraph 12 is created by these words.

18. It follows therefore that the sole issue in this case is whether or not the Applicants can establish that they have been in adverse possession of the Disputed Land since at least 28 March 2007.

19. The principles which are to be applied were affirmed in *J A Pye (Oxford) Limited v Graham* [2003] 1 AC which largely followed the well known case of *Powell v Macfarlane* (1977) 38 P&CR 452. These have more recently re-stated in *Balevents Limited v Sartori* {2014] EWHC 1164 and can be summarised as follows:

(1) There is a presumption that the paper title owner of land is in possession: if that presumption is to be displaced, the person seeking to do so must show that he is in factual possession of the land and has the requisite intention to possess the land.

(2) For a person to show that he has factual possession of the land, he must show that he has the appropriate degree of control of the land, that his possession is exclusive, and that he has dealt with the land as an occupying owner might have done and no-one else has done so.

(3) Whether or not a person has taken a sufficient degree of control of the land is a matter of face, depending on all the circumstances, in particular the nature of the land and the manner in which such land is commonly used.

(4) The person seeking to show that he has sufficient possession must also show that he had an intention to possess the land (not necessarily an intention to own) to the exclusion, so far as reasonably practicable, of all others.

(5) This intention must be manifested clearly so that it is apparent that he is in possession.

20. The only additional point I would add is that each case is fact-sensitive. It is important to have particular regard to the nature of the land, and the way in which it has been used by the person claiming possession, and the way in which it would ordinarily be used by an owner. Enclosing the disputed land is usually a very clear indication of possession, but it has been clearly established in a number of cases that fencing or enclosing the land is not essential to establish adverse possession.

Evidence

21. Mrs Chrysostomou gave evidence on behalf of herself and her husband. When they purchased Number 10, the property had been empty for over and year and the garden was was overgrown, as was the Disputed Land. There was no barrier between the garden and the Disputed Land, which seemed to them to form part of Number 10. The garden and Land were cleared over a period of time, beginning as soon as they moved in to the

property. A gardener was employed who has been assisting Mrs Chrysostomou to firstly clear the Disputed Land, and, shortly thereafter, to use it as vegetable garden.

22. There was no fence at the time on the southern (left hand side). A fence was erected in keeping the remainder of the fence on that side. There was (and still is) a fence at the back of the Disputed Land, dividing the land from the garden of 195 Friern Barnet Lane.

23. On 30 April 2000, less than a year after Mr and Mrs Chrysostomou moved in, Mr Kennedy's brother, Maurice Kennedy, knocked on their door and asked them to remove the newly installed fence. This was followed by a letter handed to them on the same day which referred to their meeting and asked them to remove the fence by 6pm that day and to reinstate a fence along the western end of their registered title, so as to divide the Disputed Land from the remainder of their garden. In the event, Maurice Kennedy, on their evidence, knocked down the fence himself dividing the back land of Number 16 from the Disputed Land.

24. Mrs Chrysostomou only ever saw Maurice Kennedy twice; the first time when he came to the house in 2000, and then again at a planning meeting regarding the redevelopment of Number 16. Maurice Kennedy was a director of a building firm known as Kennedy and Baxter. He died on 27 May 2017.

25. Mr and Mrs Chrysostomou never replaced the fence, but erected an impenetrable, or virtually impenetrable, barrier made of stones, logs, and branches to secure, and to create, a natural boundary. Paving stones were put down at one point, but then removed. They have never seen anyone else on the Disputed Land at any time since they moved in to Number 10.

26. On 19 October 2005 Maurice Kennedy wrote once again to Mr and Mrs Chrysostomou. The letter was written on company notepaper and stated that it had been noticed that Mr and Mrs Chrysostomou had once again extended their rear garden without permission. The letter went on to say that they had not, as asked, fenced their own garden at the rear, and to ask that they remove the grass, the paving stones and compost heap. If this was not done within 14 days contractors would be instructed to do so. Nothing further was done, and there was no further communication from anyone connected with Number 16 until a

further letter, written by John Kennedy, was delivered to them by hand on 30 October 2016 which reads: *' Someone has used my land for planting – I believe it is the occupiers of number 10 but I apologise if I am wrong – if I am correct I believe it will still be at least 12 months before I need that land so I would be happy for you to continue to have your plants there under a simple licence from me terminating on one month's notice ... If I do not hear from you by November 14 I will presume it is not you using my land (in which case I apologise) or will assume you do not want a licence and will re-instate the fence'.* Again, nothing further happened.

27. The Disputed Land is and has been used as a vegetable patch, to grow tomatoes, runner beans, pumpkins, broad beans, courgettes, peppers, aubergines, and such like. I have seen a number of photographs, which, though not dated, show the land being clearly cultivated. As I have said, it was Mrs Chrysostomou' evidence that the cultivation of vegetables began shortly after they bought Number 10. Mr Kennedy also produced a photograph taken by him from the land to the rear of Number 16 dated 20 April 2018 which does not show seem to show any cultivation. The Disputed Land is, however, clear, and has been clearly maintained.

28. Mr and Mrs Chrysostomou employed a gardener, a Mr Noto, from 1999. Neither Mr Noto, or the other witnesses who have provides statements in support of Mr and Mrs Chrysostomou (the neighbours at number 8 and the owner of the property at the rear of Number 10) attended to give evidence. In the circumstances I attach little weight to their evidence.

29. Mr Kennedy's written evidence was to the effect that his brother visited the Disputed Land as did gardeners, although he was not clear as to when or how often. He accepted that no tree cutters had gone onto the Disputed Land, although they had worked on the remainder of his land. Mr Kennedy stated that if further fence panels had been erected by the Applicants to separate his land from the Disputed Land, he and or his brother would have taken steps to seek possession of the Disputed Land.

30. Number 16 was purchased by his brother at auction, as I understand it, on behalf of the Respondents. He stated that he had been to Number 16 on very many occasions to meet with planning officers, tree cutters, and gardeners. So far as the Disputed Land is concerned he did nothing more than to walk to the edge of his property, to the point where

it overlooks the Disputed Land, at most once a year or so between 2003 and 2008, and since that date almost never due to the extent of the growth of the vegetation. He was clearly able to see the Disputed Land in 2016, which is when he wrote the last letter to the Applicants.

31. Mr Kennedy also stated that his brother had walked to the Disputed Land, and onto it, as had his niece and boyfriend. Both his niece and her boyfriend have given short statements, but neither attended before me. I understand they are both in Australia. In any event, it seems to me that these statements do not greatly assist the Applicants. Mr Brown stated that he had, on occasion, seen tomatoes stretching to 3 feet, albeit that on other occasions nothing appeared to be growing.

32. Barnet Borough Council refused the Respondents' application to erect a two storey five bedroom house with a detached garage on the grounds of Number 16 on 14 May 2004, and the appeal against this decision was dismissed in March 2005. I am told that there had been a number of other planning applications, all of which have been refused. The proposal was rejected because it was intended that the new dwelling would be on what was described as the 'backland plot' reached via a new driveway through the existing garage which occupied the whole ground floor of Number 16. This building was demolished, it therefore seems, at some date after 2004. The inspector who refused to allow the appeal against the refusal of planning permission stated that he had visited the appeal site from the rear gardens of Numer 10, and 185, 187 and 189 Friern Barnet Lane.

Conclusion

33. I fully accept the evidence given by Mrs Chrysostomou as to the use of the Disputed Land. The land has been used for the growing of various seasonal vegetables for many years, and certainly since 2007. It is an integral part of the garden of Number 10.

34. I also find that access to the Disputed Land from the Respondents' land has been very difficult, if not impossible, since the removal of the fence panelling put up by the Applicants and the creation of the natural barrier. No-one else has used or occupied the Disputed Land since the purchase of Number 10. I do not know how the inspector gained access to the rear garden in 2004 or 2005: no evidence was given as to this, and it may well be that he simply gained access through Number 10 itself. Even if he had been able

to make his way via the Respondents' land, this does not in any way affect my overall conclusion as to the occupation of the Disputed Land.

35. The Disputed Land has been used ,as I have said, for the growing of various vegetables. There would be times, therefore, when the land would have seemed uncultivated. But it has been kept clear, and is effectively enclosed, and, importantly, there is no fencing or any other demarcation between the rest of the garden of Number 10 and the land.

36. The fact that the Respondents may have made more than one planning application relating to the Disputed Land does not, of itself, prevent the land being occupied by the Applicants: the relevant question to be answered is the use of the land itself, and the intention with which it was occupied. I have no hesitation in concluding, based on all the evidence, that it was or would have been apparent to anyone looking at the land that it had become part of the garden of Number 10.

37. My overall impression is that neither Mr Kennedy, nor his brother, took any particular interest in the Disputed Land, but were focussed, at least in the early years, in trying to obtain planning permission to build elsewhere on their land. I do not accept that any member of his family walked onto the Disputed Land, or if they did so, it was again in the early days, and infrequently, and not since their land was allowed to revert to nature. On Mr Kennedy's own evidence this was in about 2008: it may well have been earlier.

38. Accordingly, in my judgment, the Applicants are entitled to be registered as owners of the Disputed Land.

Costs

39. As the successful parties, the Applicants are in principle entitled to their costs since the date of the reference (13 February 2018). A schedule in Form N260 prepared by their solicitors is to be sent to the Tribunal and the Respondents, who will have 14 days in which to raise any objections.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 6th day of March 2019