[2018] UKFTT 419 (PC)

REF/2017/0587

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

BETWEEN

REGINALD BERNARD WOOD & MURIEL IRENE WOOD

APPLICANTS

and

NORMAN RODNEY BINKS & JOYCE BINKS

RESPONDENTS

Property Address: 6 Mount Scar View, Scholes, Holmfirth HD9 1XH

Title Number: WYK124153

Before: Judge Owen Rhys

Sitting at: Wakefield Civil & Family Justice Centre

On: 8th May 2018

O R D E R

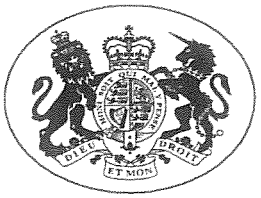
IT IS ORDERED that the Chief Land Registrar shall give effect to the Respondents' application in Form UN4 dated 17th January 2017.

Dated this 7th day of June 2018

Owen Rhys

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL



[2018] UKFTT 0419 (PC)

REF/2017/0587

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Applicant representation: In person
Respondent representation: In person

DECISION

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1. The parties are neighbours. The Applicants are the registered proprietors of 4 Mount Scar View, Scholes, Holmfirth ("No.4"), under title number WYK197080. The Respondents are the registered proprietors of 6 Mount Scar View ("No.6"), under title number WYK124153. Mount Scar View runs east off Cherry Tree Walk and is a cul-de-sac. Nos. 4 and 6 are at the eastern end of the cul-de-sac, No.6 lying immediately to the north of No.4. The issue relates to a shared driveway – unfortunately, a not

uncommon source of friction between neighbours. Both properties are accessed from Mount Scar View by means of this shared driveway, which curves south-east from a hammerhead at the end of the cul-de-sac. The first part of this driveway is in third party ownership over which both parties have a right of way. Where the driveway enters the Respondent's title it widens out, and forms an entrance to the garage and forecourt of No.6. Another branch of the driveway continues past the front garden of No 6 (to the east) and leads into the garage and forecourt of No. 4. This section of driveway, not much more than a car's width, is in the Respondents' ownership. The Applicants have an express right of way over that part of the driveway that leads from the Respondent's boundary on the north-west to the common boundary with No.4 to the south-east. The right of way was created by a reservation in a Transfer dated 19th December 1977 ("the 1977 Transfer") and is in this form: *"free and uninterrupted passage and way on foot and with vehicles over and along the drive or roadway shewn coloured yellow on the said plan subject to the payment ... of one half part of the cost of repairing and maintaining such drive or roadway...."* The drive or roadway coloured yellow is the area I have described above.

2. On 15th December 2016 the Applicants applied for and obtained the registration of a unilateral notice in respect of the Respondent's title *"in respect of a claimed right to park..."* The application was supported by a statement of truth (ST4) made by the Applicants. They claimed an easement for *"The parking of vehicles on the 8 metre section of drive from the boundary between 4 and 6 Mount Scar View towards the cul de sac, Mount Scar View..."* Further details were given in panels 10 and 11 of the ST4. It was said that from 1992 onwards, the Applicants and their family had four cars, a caravan and a trailer, which were kept at No.4. Between April 1992 and September 1993 *"at least one car was parked, at times, on the drive indicated by the cross hatching". "Our daughter continued at University until July 2002 and our son from September 1993 until July 1997. Their cars were at home during the vacations and occasional weekends when, at times, the area of drive indicated by the cross hatching was used."* It was further stated that in June 2012 a second caravan was bought *"so 2 caravans were now parked on our property. This reduced the available space for parking cars, since, although a car was removed, a larger vehicle, a caravan took its place and this was parked partly on the drive to allow access to both caravans."* They state that in 2013 they began to store their daughter's car (a red BMW) at No.4, which

was parked in front of their garage with the trailer next to it. *"This meant that our cars and our visitors' cars were now parked more frequently along the hatched section of drive."*

3. On 17th January 2017 the Respondents applied in Form UN4 to cancel the unilateral notice. The application was supported by a letter dated 16th January 2017 which sets out their grounds. It is stated that the Applicants have a right to "pass and repass" over the Respondent's title by virtue of the 1977 Transfer. They state that *"Mr and Mrs Wood have sufficient land to park a minimum of 4 motorcars – 2 on their hardstanding and 2 in the double garage. They choose to manage their land in a way which prevents them doing this."* They continue: *"Their land presently accommodates one unroadworthy touring caravan, a second touring caravan which may be serviceable, an old unroadworthy and rotting BMW motorcar and a towed garden trailer..... The double garage houses a further unroadworthy Peugeot motorcar. One serviceable family car is parked partly on their hardstanding and partly on the shared driveway – the title holders' land."*

4. Both the ST4 made by the Applicants, and the Respondents' letter dated 16th January 2016, make reference to certain discussions between Mr Wood and Mr Binks that took place in December 2015 and early 2016. These arose out of the following circumstances. Prior to early December 2015 the north-western side of the shared drive, as it passed by the front garden of No.6, was marked by a tall, thick Leylandii hedge. It appears that the Respondents caused this hedge (which of course belonged to them) to be removed. This meant that vehicles parked on the drive close to the boundary between Nos. 6 and 4 were clearly visible from the front windows of No.6. On or about 12th December 2015 Mr Binks asked Mr Wood not to park on his section of drive because the cars were visible from his windows. It seems that Mr Binks then blocked the drive on 16th December 2015, apparently considering that one of the Applicants' cars had been parked on the drive. This was, in effect, the trigger for this dispute. Following that event, there was a discussion on site. It was agreed that The Applicants would only park on "their" side of the boundary. The boundary line according to the 1977 Transfer was agreed to run from the north-western end of the rear fence of No.2 Mount Scar View and then at an angle to the entrance to the hardstanding at No.4. I

think it is accepted by Mr Wood that he did indeed agree to respect this boundary line and not to park anywhere to the south of it.

5. However, it seems that this agreement did not last very long. The subsequent events are clear from the correspondence between Mr Wood and Mr Binks in January 2016. Mr Binks wrote on 23rd January protesting that Mr Wood had "gone back on" the agreement. On 25th January Mr Wood replied, as follows: "*Before Christmas I came to you to apologise for my reaction when you asked me to park on my property as I did not want the bad relationship, so caused, to continue. I shook hands with you on the understanding that I would park on my property and I would again ask Jennie to consider what she was going to do with her BMW..... As I did not have the deeds to my property .... I could not verify where the property boundary occurred. I therefore parked, with difficulty, further onto my property so that no issue would arise. After the Christmas and New Year break, I obtained my deeds. The boundary is in fact a line down the rear fence of no.2, Mount Scar View to the corner of your bungalow. I had thought that I had explained why I am parking where I am and therefore do not feel I have gone back on the agreement that I would park on my property.*" Mr Binks responded on 26th January 2016 stating that "*I think your interpretation of the site plan may be quite right.*" I think it is fair to characterise the written exchanges between Mr Wood and Mr Binks, at this stage, as respectful and courteous with both gentlemen clearly wishing to resolve the dispute in a neighbourly way. However, as Mr Binks pointed out in his final letter, the "real issue" was the continued parking of the red BMW, the car belonging to the Applicants' daughter, since its continued presence put pressure on the available parking on the hard standing at No.4 and was therefore likely to cause problems in the future.

6. Whilst on the subject of the boundary, I should say that I agree with Mr Wood's interpretation. It seems tolerably clear from the plan to the 1977 Transfer that the boundary between Nos.4 and 6 runs across the drive as a projection of the rear fence line of No.2 Mount Scar View, in line with the south-eastern corner of the bungalow on No.6. It then turns to follow the curve of the drive. On the ground, it is marked by the southern end of the low fence erected by Mr Binks – see the photograph at page 58 of the Bundle. The difference between the "1977 boundary" and the "conceded boundary" (see page 57) is 2.8 metres. Accordingly, the "agreement" in December

2015 would have deprived the Applicants of 2.8 metres of additional parking space. In the event, the Applicants' claim relates to an 8 metre stretch of the drive,in addition to the 2.8 metre area, which runs from the boundary referred to above almost as far as the entrance to the forecourt of No.6. It has been marked on the ground by Mr Binks with a small white post and a dab of black paint on the wall. This comprises most of the stretch of drive to the east of the entrance to No. 6. I shall refer to it as "the Disputed Area".

7. Regrettably, the parties were unable to settle their differences. On 23rd February 2017 the Applicants objected to the UN4, and on 20th June 2017 the Chief Land Registrar referred to the Tribunal the disputed application to cancel the unilateral notice. I heard this case at Wakefield Civil and Family Justice Centre, having had a site visit on the previous day, in the presence of the parties. The parties were without legal representation, with Mr and Mrs Wood sharing the Applicants' advocacy duties, and Mr Binks representing his wife and himself. I am grateful to both sides for the efforts they made to ensure that the hearing was conducted in a courteous and respectful manner, despite the very strong feelings that this unfortunate dispute has engendered.

8. Before I go any further, I shall summarise the relevant law. An easement may be acquired by long uninterrupted user – by prescription, as the lawyers would say. A person claiming to have acquired such an easement must prove 20 years' use "as of right" – namely, without force, without concealment and without permission. If such user over a period of 20 years can be proved, the law will presume that there was a lawful origin and a full legal easement will come into being. Technically, there are three ways of establishing such a right, but for present purposes these do not concern the Tribunal. Since the present application was made in December 2016, the Applicants must establish that there has been regular parking on the Disputed Area since, at the latest, December 1996. Mere intermittent and irregular use will not suffice, although obviously literally continuous user is not required.

9. Two additional points must be mentioned. First, there has been some controversy as to whether a right to park can be acquired as an easement. A right of way does not automatically carry with it a right to park, although in certain circumstances it might. Generally speaking, however, it does not, certainly where the "dominant" land has

adequate parking facilities of its own. At one time it was thought that an easement of parking could not exist. More recent cases have established that a right to park in a defined area may be regarded as capable of existing as an easement - see for instance the Scottish case of Moncrieff v Jameson [2007] UKHL 42. However, the right cannot be acquired if it would deprive the servient owner of any reasonable use of his land – see Batchelor v Marlow [2001] EWCA Civ 1051, a decision of the Court of Appeal which is binding on this Tribunal. In principle, a parking easement may be acquired by long user – see Gale on Easements (20th ed.) at 9-134. Secondly, since the doctrine of prescription depends on the acquiescence of the servient owner, it must be proved that he had actual knowledge, or at least the means of knowledge, that the Applicant and his family were parking on the Disputed Area. This point is made clearly in Gale at 4-139 to 4-151. I shall consider this point in more detail later in this decision.

10. Evidence was given by Mr Wood, his daughter Jacqueline, his son Jonathan, his sister-in-law Mrs Hirst, Mrs K M Heaney, Mr M Wakefield, and Mr L Peasley. Mr Binks gave evidence, as well as his son Robert Binks, his daughter Joanne Gamble, Mr Winter, Mr Matthews, and Mr Aizlewood. All these witnesses had made statements, upon which they were questioned.

11. Before I deal with the evidence in detail, I shall describe the relevant physical features of the site.

    (a) There is sufficient space within the entrance and forecourt at the front of No.4 to park several vehicles, and a touring caravan, even without using the double garage.

    (b) The entrance drive to No. 4 curves to the east as it passes the corner of the Respondents' house. However the Applicants also own a short section of the drive farther west, now contiguous with the fence panel erected by the Respondents at the edge of the drive. This is within the "conceded boundary" as Mr Binks refers to it, but, as I have said, it appears to be the correct line as per the 1977 Transfer.

    (c) It is therefore also possible for the Applicants to park an additional vehicle on their own land adjacent to the fence panel, outside the forecourt area. This can be demonstrated by the photograph (exhibit RD10 in the Statement of Case),

showing Mr Wood's Skoda estate car with its rear just protruding over the invisible boundary line.

(d) Prior to late 2015, the Respondents' side of the drive was marked by a thick hedge. The size and thickness of the hedge may be gauged from the photograph attached to Mr Jonathan Wood's statement, showing his Polo car being removed in August 2012. This hedge would necessarily make it difficult (I refer to this evidence in due course) to see, from inside No. 6, whether and to what extent vehicles were parked at No. 4's end of the drive. Vehicles parked closer to the entrance of No. 6 would however be clearly visible.

12. Having regard to the evidence that I heard, my findings of fact are as follows:

(a) Until the discussions between Mr Wood and Mr Binks in late 2015 and early 2016 (to which I have referred above), the precise line of the boundary between the two properties was undefined. However, I think it may be inferred that the Applicants believed that the boundary lay in the position that had originally been agreed in December 2015, that is, some 2.8 metres closer to No. 4 that the true ("conceded") boundary line. Mr Wood expressly agreed not to park on the Respondents' property – which he took to be both the Disputed Area and also the 2.8 metre stretch actually within his own boundary. *"Before Christmas I came to you to apologise for my reaction when you asked me to park on my property as I did not want the bad relationship, so caused, to continue. I shook hands with you on the understanding that I would park on my property and I would again ask Jennie to consider what she was going to do with her BMW...."* This discussion and agreement is quite inconsistent with the Applicants' evidence that they always believed that the entire driveway east of the entrance to No. 4 (i.e the Disputed Area) actually belonged to them. It is plain that they (certainly Mr Wood) were aware that most of the drive belonged to the Respondents and that they had no right to park on it.

(b) I conclude that since 1992 for the most part the Applicants' vehicles were parked within the boundaries of No. 4, although on occasions parts of a vehicle may have encroached onto the Disputed Area. Various photographs have been produced showing Mr Wood's car encroaching minimally on the Disputed Area. One of these photographs (page 105 of the Bundle) was produced by the Applicants. There is another photograph (RD9) which shows a slightly more

substantial encroachment. This type of encroachment may well have occurred from time to time.

(c) Since the Applicants themselves did not know precisely where the boundary lay, it is quite understandable that friends and relatives were also unclear about it, if indeed they ever gave any thought to it. Take Mrs Hirst, Mrs Wood's sister, for example, who gave evidence. In her witness statement, she said that "*Not being confident enough to access the area in front of [No. 4], I would park between the hedge and the stone wall, which I now recognise to be the cross-hatched area shown on the land registry plan.*" She repeated this in cross-examination, but added that she did not "*go round the corner*" when parking her car. However, it would be perfectly possible to park west of the corner but within the boundary of No.4. In my view, she has confused the "*cross-hatched area*" to which she refers (i.e the Disputed Area) with the entire stretch of drive west of the corner – pretty much where Mr Wood's Skoda is parked. That is perhaps understandable, since the actual forecourt in front of No. 4 starts at the corner. There would be absolutely no point in parking a vehicle on the Disputed Area if there was sufficient space available within the boundaries of No.4. However, it means that when she recalled parking on the Disputed Area, in fact she was parking on the section of drive that lay within the boundaries of No. 4. I consider that the Applicants' other witnesses have fallen into the same error. It clearly demonstrates the limitations of witness statements which refer to markings on a small-scale plan rather than to actual physical features.

(d) Furthermore, Mrs Hirst accepted that although she herself did not feel confident enough to drive past the corner, her car would be moved by Mr Wood into the forecourt in front of No.4. In other words, even her parking on the section of driveway close to the corner was only a temporary expedient. If the car remained there overnight it would be parked on the forecourt.

(e) Although Jacqueline Wood specifically recalled that she parked on the Disputed Area close to the entrance of No.6, I think she must be mistaken. Neither Mr Binks, nor an independent witness, Mr Aizlewood, their neighbour at 3 Mount Scar Road, has ever seen a vehicle parked on the Disputed Area, and Mr Binks has produced a series of Google Maps images, taken over a number of years, none of which show any vehicles parked other than in the forecourt of No.4. I accept their evidence in this regard.

(f) Overall, the evidence produced by the Applicants suggests, at its highest, that on a few occasions over the required period a car, or delivery vehicle, was stationed on some part of the Disputed Area close to the boundary for a period up to a few hours in length. Jonathan Wood recalls a specific occasion in 2012 when a breakdown truck parked in the Disputed Area in order to remove his VW Polo, and produces a photograph. Part of the truck is parked within the conceded boundary, but clearly part is on the Disputed Land. However, this was no more than a temporary expedient while the car was loaded. If Jacqueline Wood's evidence is treated as the high point of the Applicants' case, she is only able to identify a handful of specific occasions when she can say with certainty that she parked on the "*cross-hatched area*". I have already indicated that the use of this phrase is unhelpful, and in my view it is far more likely that the vehicle was parked on the part of the drive that lies within the Applicants' boundaries.

(g) Until 2013 there had always been adequate space on the area in front of No.4 to accommodate the Applicants' vehicles, including the touring caravan. In 2013 Jacqueline Wood's red BMW was parked in front of the double garage at No. 4 and has remained there ever since, with the exception of one occasion when attempts were made to start the engine on the public road. This has taken up one permanent parking place and necessarily reduces the available space for parking the Applicants' and their visitors' vehicles.

(h) If more than one car is parked in the drive of No.6, and in order to avoid reversing down the shared drive into Cherry Tree Walk, it would be necessary to reverse out of the drive and towards No.4, and then leave the property in forward gear. This sort of manoeuvre was a regular occurrence.

13. It will be apparent from the above that I have not accepted the totality of the Applicants' evidence, and generally have preferred the evidence called by the Respondents where there is a conflict. I bear in mind that family members gave evidence on both sides, and often in this type of case, and for very understandable reasons, their evidence is coloured to some extent by the desire to assist their relatives. Independent witnesses are of great value, and I consider that Mr Aizlewood, a neighbour of both parties of long standing, fell into that category. His evidence strongly corroborated that of Mr Binks and the other witnesses for the Respondents. In assessing the evidence, I have

regard to my assessment of the witnesses themselves, but also to the inherent probabilities of the situation. In this connection I consider that it is inherently improbable that the Applicants would have tolerated regular parking on their drive of which they were aware. Given the physical situation, they would have been bound to see any vehicles parked on the Disputed Area, save perhaps for vehicles encroaching on the extreme eastern end of the area, closest to the boundary with No.4. Furthermore, regular parking would have interfered with the manoeuvring of the Respondents' own vehicles and would have been an obvious source of conflict. It is possible, indeed likely, that there was some occasional encroachment onto the Disputed Area by the Applicants' vehicles, but the Respondents would not have been aware of this due to the presence of the thick hedge until 2015. Mr Binks and other witnesses insisted that it would have been possible to see cars parked on the Disputed Area, and in a general sense that must be true. However, it would have been very difficult to gauge if some small part of the vehicle was overhanging the Disputed Area at its eastern end, given the presence of the hedge. Furthermore, given the space available to the Applicants at No.4 prior to the stationing of the red BMW in 2013, save in exceptional circumstances there would be no reason to park on the Disputed Land, which would necessitate a series of complicated manoeuvres to extract parked cars from the drive of No.4.

14. I therefore conclude that the Applicants have been unable to prove their case. In my judgment, the most they can show is occasional and intermittent encroachment onto the Disputed Area with parked vehicles, falling far short of the sort of regular and open user that gives rise to a prescriptive easement. This may have occurred prior to 2013, but it has happened more frequently after that date due to the presence of the red BMW in the drive of No.4 and the consequent pressure on parking space. Delivery vehicles will probably also have stopped for short periods on the Disputed Area from time to time. Additionally, I am not satisfied that the Respondents, as servient owners, would have been aware of the encroachments onto the Disputed Area. These would have been relatively trivial and occasional, and the presence of the thick hedge would have concealed them. It is an essential element of a successful prescription claim that the servient owner must have been aware of the user and did nothing to prevent it. That condition would not be satisfied in the present case. Furthermore, Mr Binks demonstrated in his evidence, which I accept, that he and his wife were not present at No.6 on many of the occasions when the Applicants' witnesses stated that they had

parked on the Disputed Area. Even if that evidence is accepted (as to which see my remarks above), I cannot see that the Respondents could be treated as having acquiesced in such parking if they were unaware of it.

15. As a final point, the right to park vehicles on the entirety of the Disputed Area would, in my view, deprive the Respondents of any reasonable enjoyment of that part of their land. The drive is little more than a car's width – see the Applicants' photograph at page 32 of the Bundle – and a parked car would obstruct it completely. The Respondents require at least some part of the Disputed Area for the purpose of manoeuvring their vehicles out of their forecourt, and a right to park there would clearly prevent that use. Accordingly, I consider that this claimed right falls on the wrong side of the line as stated in Batchelor v Marlow and, in the circumstances of this case, is too extensive a right to form the subject-matter of an easement.

16. I shall therefore direct the Chief Land Registrar to give effect to the Respondents' application in Form UN4 dated 17th January 2017. As to costs, I am minded to order the Applicants to pay the Respondents' costs (if any), but will give them an opportunity to make submissions on the point within 7 days of being served with the costs statement. I assume that the Respondents will want to recover costs – they should file with the Tribunal and serve on the Applicants their costs statement within 7 days of receiving this Decision and Order. They are of course limited to the costs payable to a litigant in person (in line with the Civil Procedure Rules).

Dated this 7th day of June 2018

Owen Rhys

BY ORDER OF THE TRIBUNAL