UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 0228 (LC)
UTLC Case Numbers: LC-2021-63

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER), SECTION 11, TRIBUNALS COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – ADVERSE POSSESSION – - evidence - without prejudice correspondence and the existence of a dispute

BETWEEN:

WINDMILL HOLDINGS SPV LIMITED Appellant

-and-

PAUL ADAMS AND MARIA ADAMS Respondents

Re: parcels of land off Ribchester Road, Lytham FY8 4HE

Judge Elizabeth Cooke
Royal Courts of Justice
2 September 2021

Oliver Newman for appellant
Admas Habteslasie for the respondents, instructed by Air Passengers Solicitors

The following cases are referred to in this decision:

Barnetson v Framlington Group Ltd [2007] EWCA Civ 502
Bradford & Bingley Plc v Rashid [2006] 1 WLR 2006
Dowse v Bradford Metropolitan District Council [2021] UKUT 202 (LC)

Introduction.

1. This is an appeal from the decision of the First-tier Tribunal ("the FTT") on a reference from HM Land Registry of an application made by the respondents, Mr and Mrs Adams, to be registered as proprietors of two parcels of land adjacent to their home by virtue of their adverse possession. The appellant is the registered proprietor of the two parcels.

2. I heard the appeal at the Royal Courts of Justice on 2 September 2021. Mr Oliver Newman of counsel represented the appellant and Mr Admas Habteslasie of counsel represented the respondents; I am grateful to them both for their helpful and carefully presented arguments.

3. The appeal was listed as a review with a view to a re-hearing, because the appellant's case on the appeal was that the FTT erred in excluding from his evidence some email correspondence between himself and the respondents and a note of a telephone conversation between its director, Mr Peter Whitehead, and Mr Adams, together with the references to that material in the appellant's statement of case and in Mr Whitehead's witness statement. Had I decided that the material was wrongly excluded there would have been a re-hearing. However, there was no re-hearing because I decided that the judge was right to exclude it, for the reasons set out below.

The factual background and the decision of the FTT

4. Mr and Mrs Adams are the registered proprietors of 34 Ribchester Road, Lytham St Annes. It stands on a strip of land which used to be a railway siding; the strip was sold to a construction company in 1993 and title was registered under number LA538748. There are now five dwellings on the strip, built after plots were sold off individually in the 1990s; Mr and Mrs Adams bought their land on 27 August 1993.

5. In April 2018 the appellant bought what remained of the railway land in title LA538748, from the Duchy of Lancaster (in which the land had vested after the construction company was dissolved). The register of title shows that that title number now comprises three separate parcels, one immediately to the south-west of Mr and Mrs Adams' registered title and another immediately to the north-east of that title (the third parcel is not relevant to these proceedings). In June 2018 Mr and Mrs Adams applied to HM Land Registry to be registered as proprietors of those two areas, to which I shall refer as the north plot and the south strip, by virtue of adverse possession. The appellant, as registered proprietor of both, served a counter-notice and required the application to be dealt with under paragraph 5 of Schedule 6 to the Land Registration Act 2002 (explained below). The matter was referred to the FTT.

The law relating to adverse possession of registered land and the FTT's decision

6. Schedule 6 to the Land Registration Act 2002 provides that where a person has been in adverse possession of registered land for ten years he or she may apply to be registered as proprietor, whereupon notice will be served upon the registered proprietor. The registered proprietor may serve a counter-notice requiring the application to be dealt with under paragraph 5 of the Schedule, with the effect that the application will fail unless the squatter can meet any of the three conditions set out in that paragraph. In this case Mr and Mrs Adams

relied upon paragraph 5(2) and (4). The condition in paragraph 5(2) is that the applicants have a claim to the land arising from estoppel; paragraph 5(4) applies where the adverse possessor believed he or she owned the land because of a mistake about the true position of a boundary (*Dowse v Bradford Metropolitan District Council* [2021] UKUT 202 (LC)).

7. Mr and Mrs Adams' case before the FTT was that when they purchased in 1993 they were going to pay £35,000, but that they agreed in addition to buy the south strip and the north plot and so the price was increased to £50,000. They used the north plot first for a mobile home while they built their house and then as a drive; later they took possession of the southern strip as part of their garden. Their registered title plan nevertheless showed their ownership as extending only to the plot for number 34 and excluding the two disputed areas, which remained as part of the railway title number LA538748. No signed or dated copy of the contract could be found. A plan was produced showing the plot for number 34 and the southern strip together, which was said to have been the contract plan. Correspondence in 1993 from the railway company indicated that Mt and Mrs Adams owned the southern strip and were responsible for fencing it.

8. The FTT decided that Mr and Mrs Adams had been in adverse possession of the south strip and the north plot for ten years at the date of the application. Turning to the conditions in paragraph 5, the judge said at paragraph 30:

> "I therefore hold that the Applicants succeed on both grounds of their Application namely that they genuinely believed that they owned the Garden Land and the Drive and that in reliance upon that belief they acted to their detriment by expending sums, indeed substantial sums, on incorporating these two parcels of land into the Property. Secondly I also find that all the elements of the third condition prescribed by Schedule 6 paragraph 5(4) are made out by them so they succeed on this ground as well for the reason set out above."

9. In granting permission to appeal on the ground raised by the applicant, who was at that stage unrepresented, the Tribunal also granted permission to appeal on the ground that it was arguable that the FTT had misdirected itself as to the terms of paragraph 5(4) and that the condition in paragraph 5(4) could not be satisfied because there was no mistake about the position of a boundary. However, at the hearing of the appeal counsel for both parties agreed that paragraph 30 constituted a decision that Mr and Mrs Adams succeeded under paragraph 5(2) as well as under paragraph 5(4) and that therefore any appeal in relation to paragraph 5(4) was academic. Accordingly, that ground of appeal was not pursued at the hearing.

10. The appeal therefore rests upon the appellant's argument that the judge should not have excluded, at the start of the hearing, the email correspondence of 12 to 23 April 2018 and Mr Whitehead's telephone attendance note of conversations on 13 and 18 April 2018. I refer to the emails and the attendance notes together as the "excluded correspondence". The argument for the appellant is that the excluded correspondence was not without prejudice correspondence, and that had it been admitted the appellant would have been able to show that Mr and Mrs Adams did not believe they owned the south strip and the north plot and that he could therefore have shown that the conditions in paragraphs 5(2) and 5(4) had not been met. The relevance of belief to paragraph 5(4) is obvious; the relevance to paragraph

5(2) is that Mr and Mrs Adams' case was that they believed they owned the disputed land as a result of representations made to them by the vendor in 1993.

The excluded correspondence

11. I can summarise the content of the excluded correspondence as follows. First, on 12 April 2018 Mr Peter Whitehead, the director of the appellant, emailed Mr and Mrs Adams (whom he had known and with whom he had had dealings for some years) saying:

> "Tony, as part of ongoing negotiations of land at Ribchester Road, we've acquired two parcels which I understand are adjacent to your house. If you and Maria would like to purchase these from us, would you let me know fairly quickly please?"

12. Mr Adams replied asking Mr Whitehead to call, and Mr Whitehead emailed again on the same day saying that they could have the two parcels for £25,000 if they moved forward quickly,

13. There follows Mr Whitehead's note, which he says he made at the time:

> "Note of a telephone conversation with Tony Adams on 18th April 2018.
>
> Tony stated that the family had encroached on to the two parcels in question knowing that they were not in his and Maria's ownership.
>
> In a previous conversation on 13th April, Tony had said that the Land Registry had "cocked up" in not recording the two parcels in his and Maria's names when they were originally purchased.
>
> During this conversation (on 18th April), Tony Adams acknowledged that the previous statement (above) was a lie and having spoken to their solicitor they wanted to acquire the two plots.
>
> The sum of £10k was offered and I said that the asking price was £25k. Tony then asked what 'the bottom line' was.
>
> I stated that I would consider and revert."

14. The emails then re-commence in the morning of 19 April with Mr Whitehead indicating a bottom line of £19,375; Mr Adams replied that afternoon suggesting "£18k subject to contract" and asking when he wanted to complete. That evening Mr Whitehead replied to say that the bottom line remained £19,375 but that he would discount it to £18,750 if completion occurred on or before 18 May; and he asked who Mr and Mrs Adams' solicitor would be. On 20 April 2018 Mr Adams replied with his solicitor's details. On 23 April Mr Whitehead email to say that the solicitor seemed unaware of the transaction and warning

that the price would go up if the purchase did not occur by 15 May; Mrs Adams replied on the same day asking him to use a different email address.

15. That is the end of the excluded correspondence. On the 10th May 2018 the Respondent emailed claiming to have found proof of purchase of the two plots, and on 18 May 2018 Mr and Mrs Adams' solicitors, Napthens, wrote to the appellant's solicitors stating that their clients had bought the south strip and the north plot in 1993, and their clients only became aware that they did not have a registered title to them when the appellant "demanded ransom monies", that their clients were horrified, and that they had honestly believed all along that they owned the south strip and the north plot as well as the plot for number 34.

16. At paragraph 8 of his decision the judge said:

> "At the beginning of the hearing an application was made by the Applicants to strike out as inadmissible certain paragraphs of Mr Whitehead's witness statement and supplemental witness statement as they contained or referred to purported conversations which occurred in 2018 when the parties were in discussions aimed at settling this dispute. These conversations were clearly made in the course of negotiations and were thus without prejudice and I ruled them to be inadmissible. I gave an extempore judgment at the hearing setting out my grounds for doing so."

17. No recording of the ex tempore judgment is available and the parties have not been able to agree a note of what the judge said.

The law relating to without prejudice correspondence

18. There is no dispute between the parties as to the purpose of the "without prejudice" rule or its extent. It is trite law that without prejudice material, with some exceptions which are not relevant here, must not be put in evidence, in order to encourage settlement and to enable the parties to speak freely and frankly in their attempts to settle; both Mr Newman and Mr Habteslasie quote *Phipson on Evidence*, 19th edition, paragraph 24.13. Without prejudice material need not be labelled as such. It is not necessary for the parties to be already engaged in litigation, and they may be in a contractual or other relationship (such as employer and employee as in *Barnetson v Framlington Group Ltd* [2007] EWCA Civ 502). What is critical is the proximity of the subject matter of the negotiations to the subject of the litigation. At paragraph 34 in *Framlington* the Court of Appeal (Auld LJ) said:

> "the crucial consideration [is] whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree."

19. In *Bradford & Bingley Plc v Rashid* [2006] 1 WLR 2006 Lord Mance said at paragraph 81]:

> "The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded)… The rule does not of course depend upon disputants already being engaged in

> litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction)."

The arguments on the appeal

20. For the appellant Mr Newman argues that the dispute only began on 10 May 2018. Before that there was no dispute and therefore the correspondence was not without prejudice and should not have been excluded (nor should the references to it in Mr Whitehead's witness statement and the appellant's statement of case in the FTT). The emails are simply a negotiation about the sale and purchase of land, which is not something about which the parties might reasonably litigate if they could not agree; the discussion falls within the bracketed words at the end of the passage just quoted from *Bradford & Bingley Plc v Rashid*, being simply a negotiation of price.

21. I asked Mr Newman if the telephone attendance note might have a different status from the emails; he was resistant to the material being "salami sliced" and argued that the telephone conversations indicate precisely that there was no attempt to compromise a dispute since Mr Adams acknowledged that he did not own the land and that the only way he could continue possession was by buying it.

22. By themselves the emails look like a sale and purchase negotiation that starts from cold. But the respondents' position is that it did not do so; Mr Habteslasie argued that the correspondence starts at a point when Mr Whitehead knew that Mr and Mrs Adams had encroached on the two plots. This was a case where someone has purchased land knowing there is a squatter on it and, in order to avoid litigation, offers to sell.

23. Mr Habteslasie's argument depends upon the premise not only that Mr Whitehead knew when the appellant purchased that Mr and Mrs Adams' were in occupation of the two parcels, but also that must have been clear to the FTT before any findings of fact were made. The Tribunal is hampered by the absence both of written reasons for the judge's decision and of a transcript. Mr Newman was not instructed before the FTT and so cannot assist.

24. It is clear from the appellant's statement of case in the FTT that it did not at that point deny that Mr and Mrs Adams had encroached on the land, although its case was that the encroachment did not amount to adverse possession. There is in the bundle a draft of particulars of claim for in a possession action intended to be issued by the appellant in the county court which of course pleads that Mr and Mrs Adams are in possession of the land. But none of that shows that the appellant was aware, not only at the start of the litigation but also when it purchased in April 2018, that they were occupying the land.

25. Mr Habteslasie points to the letter from Napthens on 10 May 2018 which said:

> "Your client purchased the land from the Duchy of Lancaster with no title guarantee, and were fully aware when they purchased this land that our clients were in possession of the [south strip]. Our clients and your client have been involved in

business together for a long time and he has been to our clients' property prior to purchasing this area of land."

26. That, he says, has never been denied by the appellant. Moreover, a letter from Farrers, the solicitors for the Duchy of Lancaster, to the appellant referred to the valuer instructed on sale to the appellant who had advised that there was encroachment on the north plot.

27. Those two letters support Mr Habteslasie's argument. I bear in mind also that the encroachment at least on the north plot was long-standing and probably obvious since the plot had been used as Mr and Mrs Adams' drive. Even more significant, however, is Mr Whitehead's note of the telephone conversations on 13 and 18 April 2018, quoted above at paragraph 15. Two things stand out:

28. First, the two conversations are squarely concerned with the very dispute that the parties eventually litigated, namely whether Mr and Mrs Adams contracted to purchase the disputed plots when they bought the plot for their house. The conversations are redolent with controversy. There was, on the appellant's case, both an allegation by Mr Adams that he and Mrs Adams had bought the land, and later a retraction of that claim. The potential for litigation is obvious, and is the background to Mr Adams' expressed willingness to purchase the plot; it forms the background to the emails that followed, either to be put to bed by a congenial purchase or to re-ignite into litigation – as indeed it did.

29. Second, the appellant's report of the conversation has Mr Adams beginning by referring to his family's encroachment. The encroachment does not seem to be mentioned as a new idea, but as something that was known and needed explanation. Even if I am wrong about that and even if Mr Whitehead did not know of the encroachment when he sent his email on 12th April, he certainly knew on 18th and in the course of the negotiations beyond.

30. Taken together those two points indicate that there was a problem that formed the context for the excluded correspondence. These were not simply negotiations about a purchase where the only issue was price; if the problem of encroachment could not be resolved by a sale and purchase then conflict was inevitable and litigation was possible if the problem. The conflict was not, at that stage, so acrimonious as that in *Framlington*. But it is there and it explains why the offer for sale was made and why Mr Whitehead was keen to sell quickly.

31. Accordingly I conclude that the excluded correspondence together with the references to it in the appellant's statement of case in the FTT and in Mr Whitehead's witness statements were correctly excluded by the judge.

Conclusion

32. The appeal fails and the decision of the FTT stands.

Upper Tribunal Judge Elizabeth Cooke

10 September 2021