[2023] UKFTT 00325 (PC)

REF/2021/0153

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

Before Tribunal Judge Timothy Cowen

BETWEEN

NIGEL PHILPOTT — **Applicant**

- and -

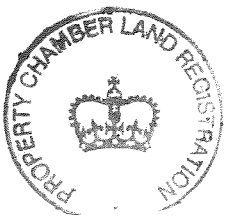
BOVISAND PARK LIMITED — **Respondent**

Property Addresses:
(1) Swiss Cottage, Andurn Estate, Down Thomas, Devon PL9 0AT
(2) Bovisand Park Estate, Bovisand, Wembury
Title Numbers:
(1) DN389158
(2) DN426445

SUBSTANTIVE ORDER

The Chief Land Registrar is directed to reject the Applicant's application.

Dated this 7th day of October 2022



Judge Timothy Cowen

BY ORDER OF THE TRIBUNAL

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Sitting remotely via CVP on 27 April 2022

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SUBSTANTIVE DECISION

Introduction

1. The Applicant claims to have the benefit of an easement over the Respondent's land. The Applicant has been, since 24 March 2000, the registered freehold proprietor of Swiss Cottage which is on the Andurn Estate in Down Thomas, Plymouth, Devon. His title is registered under title number DN389158.

2. The Respondent's land is the Bovisand Park Estate. The Respondent has been the registered freehold proprietor of that land (registered under title number DN426445) since 1999, when it was transferred by South Hams District Council.

3. The Applicant claims a right of way on foot along a passageway which runs through a small piece of the Respondent's land. The passageway is hatched blue on the plan attached to the Applicant's application to HM Land Registry ("HMLR"). He claims the right of way as an easement acquired by long user. The Applicant claims to have used the land hatched blue ("the Blue Land") since March 2000 in order to access the Southwest Coastal Path. The Applicant also claimed that the Blue Land was similarly used by his predecessor in title.

4. The Applicant applied on 7 September 2020 to HMLR for the alleged easement to be registered as a benefit to his land and as a burden on the Respondent's land. The Respondent objected on 10 December 2020. The matter was therefore referred to this Tribunal by HMLR pursuant to section 73(7) of the Land Registration Act 2002.

5. The Respondent has no first hand knowledge of whether the Applicant has used the Blue Land as alleged and puts the Applicant to proof of the factual elements of his case. The Respondent's principal positive objection, however, is that any use of the Blue Land by the Applicant was with the consent of the Respondent. The Respondent alleges that from 1993 until 2019 a "gentleman's agreement" ("the Informal Agreement") was in place between (a) the owner, for the time being, of the Bovisand Park Estate and (b) the Andurn Road Residents Association. By that Informal Agreement, the Respondent (and/or its predecessor in title) is alleged to thave granted permission to all residents of Andurn Road. Since the Applicant is a resident of Andurn Road, he was included in the class of people who were given consent to use the Blue Land.

6. The Applicant accepts that, as a matter of law, use by consent does not satisfy the legal criteria for the creation of an easement by long user. The Applicant, however, denies that he was using the Blue Land with consent, because he claims that he had no knowledge of the Informal Agreement.

7. The Respondent's consent argument therefore raises the following legal issue (subject to the evidence): does the recipient of consent need to be aware of the consent for the purposes of acquiring an easement by long user? I shall deal with that issue below.

8. The Respondent also contends that the Applicant's use of the Blue Land cannot have been continuous and uninterrupted for 20 years, because the Respondent locked a gate in 2010 which would have blocked his access to the Blue Land.

The layout of the relevant land

9. The Andurn Estate consists of 11 plots of land in a row which runs roughly parallel to the nearby coastline. The Applicant's land is a plot more-or-less in the middle of the row. A road runs along the back of the plots ("the Back Road"). On the other side of the Back Road is the Respondent's land which covers a large area (also roughly parallel to the coastline) containing several houses and beach huts (some or all of which have been demolished). The Back Road belongs to Andurn Road Company Limited and has not been adopted by the highway authority. The Blue Land is a small stretch of path running from the end of the Back Road onto the Southwest Coastal Path, which is owned by an unconnected third party. In order to reach the Blue Land on foot from the Applicant's land, a person would exit the Applicant's land from the rear, turn right onto the Back Road and continue to the end. They would then enter the Blue Land which winds through some shrubs out onto the Southwest Coastal Path.

10. The Blue Land does not therefore immediately adjoin the Applicant's land. The Applicant would need to cross at least one other area of private land in order to reach it.

Form B13

11. Before considering the substantive issues in this case, there is one preliminary matter to mention. In any easement application, HMLR generates a form B13 to give notice of the application to any potentially affected landowners. The B13 contains a draft of the entry which HMLR would make in the registered title of the affected property (here the Respondent's land) if the application succeeds. The draft contained in the B13 in this case, dated 30 November 2020, reads as follows:

> (07.09.2020) Part of the land in this title, as shown by blue hatching on the plan to the statement of truth is subject to a right of way **with or without vehicles** in favour of Swiss Cottage, Andurn Estate. The extent of this right, having been acquired by prescription, may be limited by the nature of the user from which it has arisen.
>
> (my emphasis)

12. The application is only for a right of way on foot and so the bold highlighted words should not appear in that form in the register if the application succeeds.

The legal framework

13. To establish his rights under the Prescription Act 1832, the Applicant would need to demonstrate use of the Blue Land for the benefit of his Property for a 20 year period immediately before the current dispute arose.

14. Alternatively, if the Applicant has been exercising rights over the Respondent's land for a long period of time, which is not necessarily immediately before the dispute arose, and if those rights could have been the subject of an express grant made at the start of that period of time, then English law will presume that there was an express grant. That is the doctrine of lost modern grant. The requisite long period of time is also 20 years.

15. The user of the presumed rights (whether under the Prescription Act 1832 or the doctrine of lost modern grant) can only succeed if they have done so in a way which the recipient of an express grant would exercise them. The recipient of an express grant would not exercise their rights secretly or by force because they would not need to do so. The recipient of an express grant would not need permission, because they would already have it. That is the requirement for the use relied upon to have been "as of right", which has been held to mean "as if of right" – see *R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 A.C. 889 at para 72.

16. The requirement to use "as of right" is expressed by the usual formula: *nec vi, nec clam, nec precario* (without force, secrecy or permission).

17. The Applicant must therefore show the following elements[1]:

    1.1. He has used the Blue Land for an uninterrupted period of 20 years.

    1.2. Such use was open, free from force and not dependent upon any precatory permission[2].

    1.3. The existence of a grant, such as would be presumed by the doctrine, is not impossible.

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[1] adapted from *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528 at 552 per Buckley LJ

[2] sometimes expressed as "*nec vi, nec clam, nec precario*".

18. Uninterrupted does not have to mean continuous. The law recognises that use of a right of way is discontinuous by its nature, but will take account of the nature and normal usage of the land in question when assessing whether the user has been uninterrupted.

The hearing

19. The matter was heard remotely. There was no site visit, but the Applicant provided a video of the relevant area which was perfectly adequate for me to gain an accurate impression of the land in question and its relevant features.

20. The Applicant gave evidence in support of his case. He served a witness statement of Judith Smaldon, but she was not called to give oral evidence.

21. The Respondent served a statement of Peter Fielding, but he also did not attend to give oral evidence.

Evidence of user

22. The Applicant gave evidence that he used the Blue Land, as landowner of Swiss Cottage, for the first time about a week after he purchased his land. He said that he was excited to see his new property and presumably to explore the surrounding area. That would have been in 2000.

23. He had purchased the site with outline planning permission to build a new house, but he did not like those plans. He therefore applied for fresh planning permission to build a new house to his own preferred specification.

24. In the meantime, he demolished the bungalow which was on the plot shortly after purchasing the land - in 2000/2001. That left no permanent structures on the Applicant's land, just a vacant plot of land.

25. He did not obtain planning permission until 2005, after appeal. He started to build the new house in 2006 and completed it by 2008, which is when he moved in. He has been using the Blue Land since then to access the Southwest Coastal Path. Obviously, however, his use since 2008 is not sufficient to amount to 20 years' uninterrupted user.

26. His evidence of use before 2008 was that he visited regularly (sometimes with his father) to check on the work being done by his contractors. Every time he visited the building site, he said that he would use the Blue Land to get to and from a café to buy coffee and pasties. This was because there were no facilities for food and drink on his own land once

the demolition had commenced on the bungalow and before his new house was fitted with the necessary facilities.

27. It is worth noting that, according to the Applicant, before 2008 he lived in Tavistock, which is about 15 miles away from Down Thomas. So he would have needed to specific reason to visit the land each time. He would not have simply wandered past it as part of his daily routine.

28. That means that, on his own evidence, he would have used the Blue Land during 2000 and 2001 while the bungalow was being demolished. And then he would have used the Blue Land from 2006 onwards when the new house was being constructed. However, for the period between 2001 and 2006, on the Applicant's own case, his land was empty of any structures and no building work was being done. There would apparently be no reason for him to even to visit his own land, let alone to use the Blue Land.

29. This gap in the timeline of the Applicant's evidence was pointed out, in closing submissions, by the Respondent's counsel.

30. In his reply, the Applicant gave new evidence which he had not previously mentioned and which had not appeared in any of his written statements. He said that during the period when his land was vacant and no building work was being done, he used to take his father to have picnics on the empty plot.

31. I must obviously approach this additional evidence with some caution. On one hand I must bear in mind that the Applicant is not a professional advocate and cannot necessarily be expected to keep evidence and submissions separate when presenting his own case. On the other hand this evidence, which emerged at the end of submissions, was not tested in cross examination. I must also keep in mind that the account of picnics with his father was mentioned by the Applicant only after a large gap in his previous evidence was pointed out. The Applicant had known since he commenced the application that he would need to prove 20 years' continuous use of the Blue Land in order to succeed.

32. Having said all of that, in my judgment, even giving the Applicant the benefit of the doubt and taking that new evidence about picnics at its highest, it does not assist his case. He did not say anything about the frequency of these alleged picnics. Even though, as a matter of law, uninterrupted user does not need to be continuous and the frequency is dependent

on the nature and use of the land, the Tribunal needs evidence of frequency to make that judgment. There is a very wide possible range of frequency of picnics over the period from 2001 to 2006 and I have no way of assessing it in the absence of evidence.

33. More importantly, however, there was no evidence that the alleged picnics were accompanied by any use of the Blue Land as a right of way. It is not impossible that the Applicant and his father might have used the Blue Land access during their picnic, but he did not expressly assert that they did during that period and the Applicant did not offer any reason why they would have done so. His reason for using the Blue Land when he visited the contractors was to buy food from a café. But, if he had brought a picnic to have on his land, he would not necessarily need to visit the café to buy food.

34. This problem with the Applicant's evidence obviously goes to the heart of his case, because even taking his evidence at its highest it does not amount to 20 years' uninterrupted user.

35. There was an additional and separate problem with the Applicant's evidence. In support of his original application to HMLR, he lodged a statutory declaration in form ST4 dated 1 September 2020. Box 10 of that form gives the Applicant an opportunity to set out his evidence of the use of the Blue Land. His evidence in that box consisted of two sentences. The first was that he has continuously used the Blue Land for 20 years since March 2000. I have already explored his evidence for that assertion. The second sentence reads as follows:

> "The previous owner of the land registered DN389158 assured me that he too had used the easement uninterrupted during his ownership, but I have now lost touch with that owner."

36. The ST4 statutory declaration was supported by an oath and the Applicant confirmed the truth of the ST4 during his oral evidence. But during cross examination of the Applicant, he conceded that this sentence was not true. In particular he conceded that he had not received the information from a previous landowner. He said that he had been told about the passageway through the Blue Land by Ms Smaldon, who was a neighbour, not a previous owner of the land registered DN389158. Also, she cannot be described as someone with whom he has lost touch, because he had provided a witness statement from

her in these proceedings. Relying on the evidence of use by a previous owner is very different from being told about the passageway by a neighbour.

37. While I do not believe that the Applicant was being deliberately dishonest, my impression of the Applicant overall as a witness (as a result of all the above) is that he was not always as careful as he should have been about the accuracy of his account, in important respects. I therefore have doubts about the credibility of his evidence.

38. It is for the Applicant to prove his case on uninterrupted user. In my judgment and as a result of all the observations I have made above, he has not done so.

39. That effectively disposes of the application. If, as I have found, the Applicant cannot prove 20 years' uninterrupted user of the Blue Land, then his application must be rejected and none of the other issues need to be resolved.

40. However, out of courtesy to the submissions of the parties, I will deal briefly with the other issues.

Permission

41. The Respondent's positive case was that any use of the Blue Land by the Applicant was with their consent as a result of the Informal Agreement.

42. The first question which arises on this issue is whether, as a matter of fact, permission was granted in 1993 to the residents of Andurn Road to use the Blue Land as a right of way. The Respondent relies on a letter it wrote to Mr Smaldon in 1995 (when the Respondent was the leaseholder of land including the Blue Land) briefly withdrawing permission.

43. The Applicant submitted that permission given by a previous freeholder in 1993 would not assist the Respondent, because permission would be personal to the parties. So any such permission would have expired when the previous freeholder transferred the land to the Respondent. This is, however, complicated by the fact that during the period from 1993 to 2000, the Respondent was the leaseholder of the land which includes the Blue Land.

44. The Respondent correctly relied on *Ward v Kirkland* [1967] Ch 194 at 233-234 in support of the proposition that permission granted by a tenant who is in occupation of the servient tenement is sufficient.

45. The Respondent, in any event, also relies on its own letter dated 22 December 2004 addressed to Mr Drought which refers to the 1993 Informal Agreement and later says as follows:

> "We are happy for your residents to use the gate as access to Bovisand Park, provided the secure steps are installed and a letter of indemnity is provided to Bovisand Park Limited."

46. The letter is addressed to Mr Drought in his personal name at his personal address on the Andurn Estate. It contains the phrase "your residents", but it does not say in what capacity (if any) he was acting as the representative of other residents. A later letter dated 18 August 2006 shows that Mr Drought was a director of Andurn Road Company Limited which owns the Back Road that leads to the Blue Land.

47. It is this document which the Respondent relies upon in support of its submission that it expressly granted permission to all the residents by this communication to one of them. They also rely on evidence (which I accept) that the secure steps were installed so as to comply with the conditions of the 2004 letter. And they rely on the 2006 letter as the letter of indemnity.

48. The Applicant submitted at the hearing that the words "we are happy for your residents to use" does not amount to permission, because the Respondent did not use the word "permission". I reject that submission.

49. The Applicant also submitted that, as a matter of law, permission for these purposes needs to be by deed or by written grant. He referred to the judgment of HHJ Dight in *European Urban St Pancras 2 Ltd v Glynn* (2013) Central London County Court. That judgment did not support the Applicant's proposition. I know of no formal requirement for the medium of the permission in the law of acquisition of easements by long user.

50. I find that the Respondent did write to a director of Andurn Road Company Limited expressly giving permission to all Andurn Road residents to use the Blue Land in 2004.

51. The next factual question is whether the Applicant was aware that he was using the Blue Land with permission. In the 2006 letter, Mr Drought confirmed to the Respondent that "it has been unanimously agreed by all shareholders and residents of Andurn Estate" that they would take responsibility for their own safety while using the Blue Land. This was probably the "letter of indemnity" requested by the Respondent in its 2004 letter (see above).

52. The Applicant has been a shareholder of that company since he purchased his land in 2000, although he says that he was never a member of the residents association. The Respondent invites the Tribunal to infer from the words "unanimously" and "all shareholders and residents" that the Applicant was aware of the permission at the time of the writing of that letter in 2006.

53. I disagree. Mr Drought did not give evidence. There is no evidence of how he came to the conclusion that there was unanimous agreement. It is not uncommon in such situations for the word "unanimously" to refer only to those people who attended a meeting or who voted or who responded to some communication (such as a survey). It does not necessarily imply 100% participation by all those people who could have voted.

54. The Applicant's evidence was that he did sometimes attend company meetings, which were held in January of each year, but he did not attend any meeting in 2006 at which permission to use the Blue Land was discussed. He does not remember receiving any communications about it at the time. There was no evidence called by the Respondent of any such communication. In any event, in 2004 and 2006, the Applicant was not living on the Andurn Road estate, because his plot was empty.

55. I find that there is no evidence that the Applicant knew about the permission.

56. The final question therefore is a legal one. If the Applicant was not aware that permission had been granted to a class of people of whom he was a member, was he using the Blue Land with permission?

57. The Respondent submits that permission granted to an unwitting recipient is permission for these purposes. In support of that submission they rely on a passage in Gale on Easements at paragraph 4-114:

> "As of right" requires one to look at the quality and character of the user and to ask whether the user is of a kind which would be enjoyed by a person having such a right. The user must be such as to convey the impression that such a right is asserted; **it is not relevant to inquire into the subjective beliefs of the persons carrying on the user and, in particular, it is not necessary for such persons to show that they believed that they already possessed the right claimed**. (footnote: *R. v Oxfordshire CC Ex p. Sunningwell PC* [2001] 1 A.C. 335) If a right is to be claimed by prescription, the persons claiming that right
>
> > "**must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose** between warning the trespassers off or eventually finding that they have established the asserted right against him". (footnote: *R. (Lewis) v Redcar and Cleveland Borough Council (No.2)* [2010] 2 AC 70 at [30], per Lord Walker of Gestingthorpe.)
>
> (my emphasis in bold)

58. The first thing to note about this passage is that it is not referring specifically to the present scenario, where the Applicant is not aware of permission. Superficially it looks like the bold highlighted passage in the first part of the quote from Gale is relevant because it seems to say that the subjective belief of the Applicant would not be important when considering if his exercise of a right of way is "as of right". And the highlighted passage in the second part of the quote also appears to be relevant because it says that the Respondent's belief **is** important because the landowner needs to have the opportunity to "choose" what to do about the Applicant's use.

59. So here, where the Applicant did not believe that he had permission, but the Respondent did believe that it had granted permission, it would seem that the authorities would favour the Respondent's argument.

60. But in my view, that is not the correct way to look at the matter. Before we get to the question whether the Applicant's use was "as of right", it is necessary to determine whether what was given by the Respondent in 2004 was permission to the Applicant at

all. Can a person be granted permission without their knowledge? Can such a thing be called permission at all? Does permission have to be communicated at to the person to whom it is given?

61. In my judgment, permission does have to be communicated in some way. It cannot be the case that someone can give permission by simply thinking about it. On the other end of the spectrum, permission could be given to a class of persons without having to communicate it to each of them separately if the person giving permission takes reasonable steps to inform the whole group, for example by communicating it to an apparent representative of that group or by placing a sign in a prominent place.

62. In this case, the Respondent did communicate permission to the whole class of persons who are resident in Andurn Estate (including the Applicant) by informing the director of a company of which all the residents (including the Applicant) were shareholders. They later received a letter informing them that all "shareholders and residents" had "unanimously" agreed to terms and by implication were aware of the permission to use the Blue Land. Although I have found that, as a matter of fact, the Applicant did not become aware of the permission, that does not impact the effect that the 2004 and 2006 letters would have had on the mind of the Respondent company (more specifically on the mind of its controlling officers). The Respondent would reasonably have believed that all the residents that they had permission to use the Blue Land.

63. That would have had the following effect on the Applicant's use of the Blue Land. He was not using it "as of right" because the Respondent had granted permission to all residents. The Respondent did not have the opportunity to "choose" to do anything about the Applicant's belief that he was using it "as of right", because they had no reasonable way of knowing that he was ignorant of the express permission.

64. This opportunity to "choose" is especially important in the light of the formulation of the law of prescription by Fry J in *Dalton v Angus* (1881) 6 App. Cas. 740 at 773 when he described prescription in terms of acquiescence and said:

> "I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power."

65. A landowner who reasonably believes that it has communicated permission to the Applicant cannot be said to have such a power. Nor can it be said to have **willingly** abstained from exercising its power.

66. I am also supported in this conclusion by the authorities of *Alfred Beckett v Lyons* [1967] Ch 449 and *Odey v Barber* [2006] EWHC 3109 (Ch); [2008] Ch. 175 at [36] in which it was decided that where there is an ambiguity or uncertainty about the status of the Applicant's use of the dispute right, then it cannot be said to be "as of right". There is such an uncertainty in this case.

67. In my judgment, therefore on the particular facts of this case, permission was granted (despite the Applicant not having knowledge of it) and any user by the Applicant was not "as of right".

Remoteness

68. There was an argument about whether the proposed right of way over the Blue Land was too remote from the Applicant's land to be capable of being an easement. It was clear however that the Applicant had a right of access over the Andurn Back Road leading to the Blue Land so that the proposed right of way could be capable of benefitting his land.

Gate

69. In the light of my decision, there is no need to consider the factual issue of when, where and whether there was a gate at the Blue Land nor whether and when the gate was locked nor who had access to the keys.

Conclusion

70. It follows that I find that the Applicant is not entitled to an easement over the Blue Land.

71. I therefore direct the Chief Land Registrar to reject the Applicant's application.

Costs

72. According to paragraph 9 of the Practice Direction made under the Rules, costs normally follow the event. In this case, I am minded to make an order that the Applicant should pay the costs incurred by the Respondent since the date when this matter was referred to the Tribunal. I am also minded to carry out a summary assessment of those costs on the standard basis.

73. If the Respondent wishes to make a costs application, then it must file at the Tribunal and serve on the Applicant by 4 pm on 31 October 2022 a schedule of the costs incurred.

74. If either party has grounds to submit that I should make a different order on costs, then they should file at the Tribunal and serve on the other party, by the same date, submissions explaining what the costs order (if any) should be made and why.

Dated this 7th day of October 2022

Judge Timothy Cowen

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).