

REF/2012/1044 and 2013/0350

**PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL**

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

SUSAN DENISE CLARE

APPLICANT

and

DELORES YVONNE TOMLIN

RESPONDENT

**Property Address: Rose Cottage, 1 Rose Cottages, Middlesex Lane, Acle NR13 3DQ
& The Old Chapel, Middlesex Lane, Acle NR13 3DQ**

Title Numbers: NK321491 and NK409099

Before: Judge Michell

Sitting at: Norwich Magistrates Court

On: 14th January 2014

Applicant Representation: Mr James McCulloch, solicitor of Cozens-Hardy LLP

Respondent Representation: Mr Simon McCloughlin, counsel, instructed by Fosters

DECISION

*ALTERATION OF THE REGISTER – WHETHER DOUBLE CONVEYANCE-
CONSTRUCTION OF CONVEYANCES – WHETHER REGISTER SHOULD BE RECTIFIED-*

ALTERNATIVE CLAIM TO PRESCRIPTIVE EASEMENT

Cases referred to

Eastwood v. Ashton [1915] AC 900

Wiggington & Milner Ltd v. Winster Engineering Ltd. [1978] 1 WLR 1462

Ali v. Lane [2006] EWCA Civ 1532

1. At the conclusion of the hearing of this matter, I gave my decision orally with reasons and made an order as to costs. I now give written reasons for the decision pursuant to Rule 36 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

2. The Applicant, Ms Clare is the owner of land registered under title number NK404099 and known as The Old Chapel, Acle. It is the site of a former Methodist chapel. The only access to the land is over an unmade road called Middlesex Lane. The Respondent, Mrs Tomlin is the owner of a house and garden known as 1 Rose Cottages registered under title number NK321491. Her property is also accessed over Middlesex Lane. Middlesex Lane runs westwards from Reedham Road to the east and is to the south of both The Old Chapel site and 1 Rose Cottages. 1 Rose Cottages lies principally on the east side of The Old Chapel but included in the title is a thin strip, about 4 to 5 feet wide, lying between the Old Chapel site and Middlesex Lane. Title to 1 Rose Cottages was registered in Mrs Tomlin's name in 2005 but Mrs Tomlin has been the owner of 1 Rose Cottages since 18th November 1977. Mrs Clare obtained planning permission to demolish the old chapel and to build a house on the site. The plans for the house include a garage accessed from Middlesex Lane and an adjacent parking space, also accessed from Middlesex Lane. Ms Clare applied to HM Land Registry to register a vehicular and pedestrian right of way over the strip but subsequently applied to alter the register to remove the strip from the title of 1 Rose Cottages and add it to the title of The Old Chapel site. Mrs Tomlin has objected to both applications.

3. I inspected the site on the day before the hearing. The parties and Ms Clare's solicitor were present. The main part of the old chapel has been demolished but the single storey part occupying the northern part of the site is still standing. The south east corner of the foundations is visible. The strip is covered in concrete. The concrete finishes where the south wall of the chapel once stood and Middlesex Lane is surfaced differently from the strip. At

the eastern end of the strip, there is a narrow bed of soil (perhaps 12 inches wide) between the concrete and the end of a wooden shed, standing in the garden of 1 Rose Cottages. The bed of soil lies to the west of the line of the fence which runs from the north east corner of the soil northwards along the eastern boundary of the Old Chapel site.

4. I heard evidence and argument as to the rectification application. As I found that the register should be rectified, it was not necessary or appropriate for me to consider the application to register the benefit of a right of way over the Strip.

5. Ms Clare produced an indenture dated 22nd September 1866 whereby William Stockings conveyed to 14 named individuals a piece of land for the purpose of the erection thereon of a Methodist chapel. The land conveyed was described in the indenture as follows

“All that piece or parcel of land lying and being in Acle ...containing by admeasurement 6 rods forming part of a piece of Pasture Land containing three Acres two rods thirty-seven perches being part of an Inclosure of pasture land called “Hall Close” marked numbered 379 on the tithe commutation map of the said parish of Acle and formerly in the occupation of Benjamin Heath Baker bounded on the north and east by other part of the said pasture land of the said William Stockings on the south by a road leading from the Turnpike and on the west by the Police Station at Acle aforesaid which said land admeasures in length from north to south on the east and west sides thereof sixty-five and a half feet and in width at the south end to the extent of forty seven feet in a northerly direction twenty eight and a half feet and at the north end to the extent of eighteen and a half feet in a southerly direction sixteen feet and in is more particularly delineated in the plan endorsed on these presents”.

The land was conveyed with

“ full and free liberty and power so far as the said William Stocking can or may lawfully grant the same to and for [the purchasers] ...and all persons ...attending the chapel to be erected on the said piece of land hereby conveyed from time to time and at all times for ever hereafter with or without horses carts wagons or other carriages to pass along through and over the said road or way leading from the said Turnpike to the said piece of land hereby conveyed”.

The vendor reserved

“an uninterrupted way or passage three and a half feet in width on the west side of the land hereby conveyed the whole extent thereof”

The plan drawn on the indenture is in the form of a simple diagram rather than a geographically accurate map. However, it shows the turnpike road in the position of what is now Reedham Road and the road in the approximate position of what is now Middlesex Lane leading off Reedham Road. The land conveyed is shown as adjoining that road.

6. Important aspects of the description of the land conveyed are

(a) the land is described as being bound on the south by a road leading from the Turnpike;

(b) the land is described as measuring 65feet 6 inches in length from north to south; and

(c) the plan is said to “more particularly” delineate the land conveyed, meaning that any deficiencies in the verbal description are intended to be covered by the plan – see *Eastwood v. Ashton* [1915] AC 900; and

(d) the plan shows the land conveyed as adjoining the road leading from the turnpike road.

The road leading from the turnpike or public highway can only refer to what is now called Middlesex Lane. On the site visit, in my presence Ms Clare’s partner, Mr Simon Wiseman measured the length from the north east corner of Ms Clare’s land in a straight line to south edge of the Strip where it adjoins Middlesex Lane. Mrs Tomlin was shown the measurement and given an opportunity to check it. I am satisfied that the measurement made by Mr Wiseman was accurate. The measurement to the edge of the concrete was 65 feet.

7. On 16th February 1982 the Trustees for the Methodist Church Purposes and the Trustees of the Acle Circuit Meeting conveyed to Malcolm Tuddenham

“All That property being land and buildings at Middlesex Lane Acle ... formerly being a Methodist Chapel the site of which is for identification only edged red on the attached plan Together with the right for the purchaser and his successors in title (a) to pass and repass with or without vehicles over the road known as Middlesex Lane coloured brown on the said plan ...”.

The red edging on the plan shows a line to the south which is to the north of the line showing the southern boundary of the garden of 1 Rose Cottages to the east and the southern boundary of the garden of the house to the west. The brown colouring ...

8. By an Indenture dated 16th October 1878 the executors of William Stockings conveyed to Daniel Lark land described as follows

“All that two cottages tenements with the gardens in front thereof situate and being in Acle aforesaid now in the occupation of ... and bounded by land late belonging to the said William Stockings deceased and sold and conveyed by the said Mark Frederick Stockings and Matthew Lane Stockings to the said Harriet Baker towards the North by glebe land belonging to the Rectory of Horning towards the East by a Road or way called Chapel Loke leading from the Turnpike Road to the cottages or tenements hereby conveyed and assured in part towards the South by the Methodist Chapel and in other part towards the South and in part towards the West and by the Police Station in other part towards the West”.

The land was conveyed together with a right of way to and from the cottages “over and along the said Road or way leading from the said Turnpike Road to the said cottages” and also

“full free and uninterrupted way of passage 3 ½’ in width to and from the said Chapel Loke to the whole extent thereof on the west side of the said Methodist Chapel”.

9. No plan is attached to this Indenture or referred to in it. One thing appears to be particularly significant in construing what land was conveyed. The land is not described as being bound in part towards the north by the Methodist Chapel although it is described as being bound to the south in part and in west in part by the Chapel. If the land conveyed included the Strip, it would have been described as being bounded towards the north in part by the Methodist Chapel.

10. Mrs Tomlin produced an Indenture dated 11th October 1911 between the executrix and beneficiaries under the will of the late Alfred Daniel Clark and Jesse Woodrow, which conveyed to Jesse Woodrow

“All those two cottages or tenements with the gardens in front thereof situate and being in Acle...and bounded by land now or late of Harriet Baker to wards the north by Glebe land belonging to the Rectory of Horning towards the east by a road or way called Chapel Loke leading from the turnpike road to the cottages and hereditaments hereby conveyed in part and by the Methodist Chapel in other part towards the south and in part towards the west and by the Police Station in other part towards the west

... All which premises are for the purposes of identification (but not by way of limitation or enlargement of the description hereinbefore contained) delineated in the plan drawn hereon and thereon coloured round with pink”.

The land was conveyed together with

“full free and uninterrupted way of passage three and a half feet in width to and from the said Chapel Loke to the whole extent thereof on the west side of the said Methodist Chapel”.

The original indenture was not produced in evidence. On the best copy produced, the pink edging on the plan is drawn so as to include the Strip, although not the southern end of the strip to the west of the chapel building marked as a “right of way”.

11. Two things of note in the 1911 conveyance are

(a) the verbal description does not describe the land conveyed as being bound in part to the north by the Methodist Chapel, which would have been appropriate if the Strip was included in the land being conveyed; and

(b) the plan is for identification purposes only and is not to limit or enlarge the verbal description. It is clear therefore that where there is an inconsistency between the verbal description and the plan, the plan must be disregarded – see *Wiggington & Milner Ltd v. Winster Engineering Ltd.* [1978] 1 WLR 1462.

12. I heard evidence from Mr Tuddenham about the appearance of the Methodist Chapel when he purchased it. The front of the chapel was the southern façade and the main entrance was a door in the centre of that façade with two arched windows on either side. There was also a smaller side entrance leading into the vestry at the rear of the chapel building.

13. It is clear to me that the Strip was included in the land conveyed in 1866 for the purpose of the erection of the Methodist Chapel. That is clear from the wording of the 1866 Indenture. That construction is one which is supported by a consideration of the purposes for which the land was conveyed and the actions of the purchasers. The actions of the purchasers are admissible in construing the indenture provided only that they have some probative weight – *Ali v. Lane* [2006] EWCA Civ 1532. The land was conveyed for the purposes of the erection of a public place of worship. The purchasers erected on the site a chapel having its main entrance facing onto the Strip. It is unreasonable to assume that the purchasers would

have intended to buy land to the front of which there was no access from the land and then have erected a chapel having its main entrance opening onto land which was neither part of the land conveyed as part of the chapel site or part of the lane. It is possible to conceive readily of the reasons why the chapel was constructed so as to be set back from the lane, namely so that members of the congregation gathering when entering or leaving the chapel would have somewhere to stand other than on the lane. The construction of the chapel having its main entrance leading from and onto the Strip supports the construction of the Indenture to which I have come on its wording, namely that the Strip was included in the land conveyed.

14. It is also clear on the construction of the wording of the 1878 Indenture that the vendors did not purport to convey the Strip as part of the Rose Cottages site to Mrs Tomlin's predecessors in title. The land conveyed was not land described as land bound in part to the north by the Methodist Chapel. It would appear that at some stage a mistake was made in the colouring of the plan to the 1911 Indenture, either when the original was prepared or subsequently when a copy was prepared.

15. Mrs Tomlin sought to argue in the alternative that she had been in adverse possession of the Strip so as to bar the title of Ms Clare's predecessors in title. This argument was based only on Mrs Tomlin's evidence that she had tended a small part of the Strip, namely the 12 inch wide earth strip seen on the site inspection, as a garden and had at some time in the past driven over the Strip in order to enter her garden at a point which is now occupied by a large garden shed. I do not accept that Mrs Tomlin was in possession of the Strip for such a period as to bar the title of Ms Clare's predecessors in title under the Limitation Acts. I heard evidence from Mr Tuddenham, the previous owner of the old chapel. He gave evidence that from 1982 he used the old chapel for the storage of carpet and furniture. He concreted the Strip in 1982 and used it to load and unload lorries. The Strip was kept open until 2000 when he erected posts and a chain to stop tenants of the cottage neighbouring Mrs Tomlin's cottage parking their cars on the Strip. The chain was padlocked and Mrs Tomlin was not given a key. I accept Mr Tuddenham's evidence. The narrow strip of earth and any tending of that is not sufficient to amount to possession of the Strip. Mrs Tomlin was not in possession of the Strip while Mr Tomlin owned the old chapel.

16. Schedule 4 to the Land Registration Act 2002 provides as follows (so far as is

relevant)

“1. In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which –

- (a) involves correction of a mistake and
- (b) prejudicially affects the title of a registered proprietor.

5. The registrar may alter the register for the purpose of

- (a) correcting a mistake; ...

6.(1) This paragraph applies to the power under paragraph 5, so far as relating to rectification.

(2) No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor’s consent in relation to land in his possession unless –

- (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake; or
- (b) it would for any other reason be unjust for the alteration not to be made.

(3) If on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration”.

17. The application made by Ms Clare is an application for rectification because the alteration of the register by removing the strip from the title of 1 Rose Cottage would involve the correction of a mistake and prejudicially affect the title of Mrs Tomlin.

18. I am satisfied that there is a mistake on the register. The Strip should not have been included within Mrs Tomlin’s title.

19. There is no evidence that Mrs Tomlin was at the date of the application for rectification in possession of the strip. Accordingly, paragraph 5(2) does not apply. If there is a mistake, the application must be approved, unless there are exceptional circumstances justifying not making the alteration.

20. Some guidance as to the meaning of “exceptional circumstances” was given by Morgan J. in *Paton v. Todd* [2012] EWHC 1248 (Ch) at paragraph 67, where the learned judge said

"Exceptional" is an ordinary, familiar English adjective. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered: see R v Kelly [2000] 1 QB 198 at 208 C-D (a decision from a very different context but nonetheless helpful as to the ordinary meaning of "exceptional circumstances"). Further, the search is not for exceptional circumstances in the abstract but those which have a bearing on the ultimate question whether such circumstances justify not rectifying the register”

21. There are no exceptional circumstances in this case justifying not making the alteration. It was submitted that the exceptional circumstance in this case was that a mistake had occurred a very long time ago when the plan to the 1911 Indenture was wrongly coloured. I do not consider that this justifies the alteration not being made. Mrs Tomlin has been entitled to the degree of protection afforded by Schedule 4 to the Land Registration Act 2002 only since 2005 when her title was registered. Prior to that date, Mrs Tomlin would have had no answer to a claim for possession of the Strip (had she been in possession) by Ms Clare’s predecessors in title. She has enjoyed the statutory guarantee of her title afforded by the Land Registration Act 2002 only since 2005. Further, the circumstances taken as a whole suggest strongly that it is just to rectify the register rather than the contrary. Mrs Tomlin has not made any significant use of the Strip since 1982 when Mr Tuddenham acquired it. The Strip is very important to Ms Clare to enable her to continue the development of the old chapel site.

22. I shall direct the Chief Land Registrar to give effect to the application of the Applicant, Ms Clare to rectify the title of 1 Rose Cottages and The Old Chapel by removing the Strip from the former title and adding it to the latter. It follows that I shall direct the Chief Land Registrar to cancel the application of Ms Clare to register the benefit of a right of way over the Strip.

23. I consider it just that Mrs Tomlin pay 80 per cent of the costs of Ms Clare to be

assessed on the standard basis. I consider this to be just because Ms Clare succeeded on the rectification application but has not succeeded on her claim to a right of way.

BY ORDER OF THE TRIBUNAL

DATED 11th APRIL 2014