

Willing to wound, but afraid to strike



In the recent decision of (1) *Leonard Silkstone* (2) *Gary Silkstone v (1) Simon Tatnall* (2) *Chief Land Registrar* [2010] EWHC 1627 (Ch), Floyd J considered on appeal the question of whether an adjudicator to HM Land Registry can refuse to grant a party to proceedings before giving him permission to withdraw from those proceedings.

Background

The Silkstones own a residence next door to Mr Tatnall. The Silkstones alleged that a private right of way on foot in their favour had come into being. The Silkstones applied to lodge a unilateral notice with the Land Registry in respect of their alleged right of way. The Land Registry entered a notice upon the title to Mr Tatnall's residence. He applied to the Land Registry to cancel the notice. The Silkstones objected to the application to cancel their notice. The parties were unable to reach agreement.

Reference to the adjudicator

Section 73(7) of the Land Registration Act 2002 (LRA 2002) sets out as follows:

"If it is not possible to dispose by agreement of an objection ... the registrar must refer the matter to the adjudicator."

Since a dispute had arisen between the parties and no agreement had been reached the matter was at that stage referred to an adjudicator. Deputy adjudicator Mark was seized of proceedings.

It appears that the Silkstones had difficulty obtaining the necessary evidence to support their allegations and sought to withdraw from the proceedings through a series of letters sent to deputy adjudicator Mark in the days prior to the final hearing date. Initially, the Silkstones explained that they wished to withdraw from the proceedings before the deputy adjudicator with a view possibly to bringing court proceedings at a later date in respect of the same issue if they so chose.

The deputy adjudicator was unwilling for the Silkstones to withdraw from proceedings in this way. It was his view that a purported notice of withdrawal would remain ineffective until first an adjudicator

had ruled upon the terms upon which the notice of withdrawal would be given effect and second those terms had been accepted by the party seeking to withdraw. He considered that he held a discretion and, exercising that discretion, he deemed that he should not give the Silkstones permission to withdraw but instead could deliver a decision on the merits. His eventual decision was that there was no evidence to support the right of way that had been claimed by the Silkstones.

The appeal

The Silkstones appealed to the High Court. They submitted that the deputy adjudicator should have simply reported their withdrawal to the Land Registry and then declined to deal with the matter any further except for addressing the issue of costs. They submitted that he should not have reached a decision on the merits.

On the issue of withdrawal, Floyd J drew a distinction between on the one hand a party who sets out that he no longer wishes to play a part in the proceedings before the adjudicator and on the other a party who wishes to withdraw his underlying objection to another party's application to the Land Registry to cancel a unilateral notice.

In the first scenario there can be no issue with an adjudicator going on to decide matters. Such circumstances are no different from a defendant in court proceedings choosing not to attend the hearing and thereby arguing no defence.

The second scenario was more complex. The words of s 73(7) of the LRA 2002 suggest that at least up until the point where the matter is referred to an adjudicator the objection could be disposed of by agreement by the parties. Floyd J significantly considered that "agreement" at this stage would include unilateral withdrawal. Once a case was referred to an adjudicator, however, it was necessary to consider whether the purpose of the reference was simply a means of disposing of applications to the Land Registry to which there remained a subsisting objection or whether its purpose was to establish fully the proprietary rights of the individuals involved in the proceedings.

Floyd J considered that it was the latter. In his view the purpose of a reference to an

adjudicator was to determine the underlying legal rights of the parties, quite unlike the wholly administrative procedure in the Land Registry before a reference was made. His view was that there was no reason why steps that were available to the parties prior to the reference should remain available as of right when the matter was referred to an adjudicator. The reference represented a fundamental shift in proceedings. From that point, one party could not apply to the Land Registry to withdraw the objection (since the Land Registry was no longer seized of the matter) nor could he apply to the adjudicator to withdraw unilaterally his objection (as he once could have done to the Land Registry). The party could only see the matter disposed of by way of either a determination by the adjudicator or an agreement with the other party or parties to the proceedings as to the terms upon which the proceedings should be determined.

Floyd J therefore went further than deputy adjudicator Mark. Floyd J's view was that an adjudicator simply does not have the power to accept or reject a withdrawal of the original objection. His view was that an adjudicator's sole function is to determine the reference before him and there is no basis for an adjudicator to give a ruling upon the acceptability or otherwise of any terms of withdrawal.

Conclusions

Pursuant to s 110 of the LRA 2002, an adjudicator can direct that one of the parties to the reference in front of him commence proceedings in court. That direction remains a matter for his discretion. An adjudicator however does not have a discretion to accept or reject a party's withdrawal of his original objection so that he might preserve his right to go to court.

Floyd J makes the comment in his judgment that the "law has never favoured those who are willing to wound but afraid to strike". A party cannot expect, like the Silkstones had expected, to be able to deprive an adjudicator of his jurisdiction to determine the proceedings by withdrawing their objection just before the hearing and thereby preserve their right to litigate thereafter in court.

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