



[2017] UKFTT 0889 (PC)

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

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

REF NO 2015/0420

BETWEEN

(1) RICHARD FREEMAN DALE: Applicant;

and

(2) FOREST HEATH DISTRICT COUNCIL: Respondent

Property Address: Land on the north side of A1101Beck Row Bury St Edmunds

Title Number: SK356582

**Made by: Professor Robert M. Abbey sitting as a Tribunal Judge at 10 Alfred Place
London WC1E 7LR on Wednesday 25th October 2017 at 10.30am**

Applicants Representation: In person

Respondents Representation: Mr Paget of Counsel

ORDER

IT IS ORDERED THAT:

1. The application made by the Applicant in connection with the above mentioned property for the registration by adverse possession be refused.
2. The Applicant do pay the costs of the Respondent.

Dated this 20th day of November 2017

Prof. Robert M. Abbey

Judge Professor Robert M. Abbey

BY ORDER OF THE TRIBUNAL





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

REF/2015/0766

BETWEEN

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and

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Respondents Representation: Mr Michael Paget of Counsel

DECISION

- 1. KEYWORDS – Application for registration of a person in adverse possession – objection to adverse possession claim based upon successive claims – HELD – Insufficient evidence to substantiate such a claim in adverse possession – Land Registry ordered not to progress the application for registration by adverse possession of the land claimed*

Cases referred to

J A Pye (Oxford) v Graham [2003] AC 419
Powell v McFarlane (1979) 38 P & CR 452
Ocean Estates Ltd v Pinder [1969] 2 AC 19

Prudential Assurance Co. Ltd v Waterloo Real Estate Inc. [1999] 2 EGLR 85
Wata-Ofei v Danquah [1961] AC 1238
Hicks Developments Limited v Chaplin [2007] EWHC 141(Ch)
Edginton v Clark [1964] 1 QB 367
Seddon v Smith (1877) 36 LT 168
Treloar v Nute [1976] 1 WLR 1295
Brown v Faulkner [2003] NICA 5(2)
see *Allen v Matthews* [2007] 2 P&CR 441

THE APPLICATION

1. The Applicant made an application to the land registry on 23 October 2014 for first registration by way of adverse possession of the property as described above. The area comprising this property is bordered by the A11 trunk road to the north east, the A1101 to the south and land owned by others to the east. Part of the property forms field number 218 for ordnance survey purposes. The actual extent of the property is shown coloured pink on the plan issued by the land registry and shown in the trial bundle at the very start of the bundle and entitled "Revised Print for Case Summary", (the disputed land). The Respondent claims to be the legal owner of the disputed land as Common Land as shown on the plan accompanying entry 39 of the Register of Common Land for Suffolk which was at page 119 of the trial bundle. The Respondent says that it became the legal owner of the common land by virtue of the operation of S. 8 of the Commons Registration Act 1965.
2. The Applicant applied in form FR1 for the first registration of the disputed land on the basis of adverse possession. This application has been allocated by the land registry with the provisional title number SK356582. Notice of the application was served on the Respondent who lodged objections to it on the grounds that the Applicant had not obtained title by adverse possession because the Respondent did not consider that the Applicant had been in exclusive possession for the requisite period of 12 years required for an adverse possession claim of this nature. The Applicant now claims to be able to show 12 years by reason of his and a predecessor's occupation.
3. Thereafter it was not possible for the disagreement to be resolved and consequently the dispute was referred to the Tribunal pursuant to s. 73(7) Land Registration Act 2002. The matter now falls to me to determine. All the parties were given full notice of the date of the hearing. At the hearing both the Applicant and the Respondent

attended and the Respondent was represented by Counsel, Mr. Paget, while the Applicant represented himself.

4. I was able to view the disputed land when I conducted a site visit on a Tuesday 24th October 2017, an autumnal dry but cloudy day prior to the hearing. It is in fact an undeveloped open and wooded space which forms part of a mixed broadleaf woodland in the Brecks area of Suffolk. On arrival I was able to observe a new fence on the eastern and northern boundaries. The Applicant informed me at the time of the site visit that there had been possession action taken very recently and that he had been removed from the land to the east of the new fence boundary by bailiffs.

SUMMARY OF THE APPLICANT'S CASE

5. The Applicant's evidence is mainly comprised in: -
 - a. his statement of case with supporting copy deed and documents;
 - b. his second statement of case with supporting documents. In that regard the respondent did object to the late inclusion of this item. I decided that no prejudice arose from the statement being put in late and as a result this too was in front of me as documentation to support the Applicant's claim.
6. Accordingly at the hearing I was able to hear oral evidence from the Applicant, Mr Dale, who was cross examined at length by counsel for the respondent. In his original statement of case the applicant claimed to have been in adverse possession of the disputed land since August 1998. He suggested that this was confirmed in another case in the County Court but did not produce any Court Order or other written evidence to support this assertion. Put simply his original position was that he had been in possession of the disputed land from 1998 and as such "the limitation time is well passed its due date".
7. In his second statement of case the Applicant set out his fresh assertion that the Forestry Commission were adverse possessors of the land prior to his occupation. He quotes from statements given in a different case involving a claim by the Applicant for adverse possession and where there was an objection from the Secretary of State for Environment Food and Rural Affairs. In those statements the witnesses both stated that although the land was unregistered the land had always been managed by the

Forestry Commission and they have treated it as if they had owned it. One of those witnesses, Mr Ashley, also gave evidence in this case and reference to his evidence is made below. The Applicant also makes mention of reference to possible adverse possession claims in emails and correspondence in relation to the other claim but none of the participants in these exchanges gave oral evidence. Indeed I noted that neither of the witnesses for the Respondent confirmed any current claim by the Commission in adverse possession with regard to the disputed land.

8. In cross examination Mr Paget asked the Applicant why he had not produced any photographic evidence of his occupation as there did not seem to be any photos taken before 2013. The Applicant said he was not one for photographs. Mr Paget put it to the Applicant that there was no evidence of occupation prior to 2013 and the Applicants response was to claim entitlement by succession continuing on from the Forestry Commission. Mr Paget then asked what the Applicant called the disputed land and he replied "Five Ways Farm" and said he had done this about six years ago. When Mr Paget put it to the Applicant that there he had no evidence of this the Applicant said he didn't need to have it as he was going to succeed through his claim by succession.

SUMMARY OF THE RESPONDENTS' CASES

9. The Respondent's evidence is mainly comprised in: -

- a. Its statement of case with supporting copy deeds and documentation
- b. Two witness statements from Mr Chatfield, an employee of Highways England and before the creation of that body, the Highways agency, and Mr Ashley a Chartered Surveyor employed by the Forestry Commission.

10. At the hearing I was therefore able to hear oral evidence given by the two witnesses mentioned above on behalf of the Respondent. Mr Chatfield was not cross examined by the Applicant because he said he didn't want to ask questions "because this is irrelevant." I was able to ascertain from the statement that the witness was familiar with the land through his senior role as a Project Manager for the delivery of a scheme of recent works to the A11. The works involved regular visits to the disputed land as part of a project to convert the A11 from single carriageway to dual carriageway. He worked on this scheme from January 2012 until December 2014. Aerial photographs were taken at the end of 2012 and the witness says that the photographs clearly show

no livestock vehicles or other possessions were stored on the disputed land and that the disputed land had not been fenced or otherwise enclosed at the time the photographs were taken. He says that at that time he was not aware nor did he personally see the Applicant placing possessions on the land or fencing it either. He says he first became aware of the Applicant's encroachment in October 2014.

11. I asked the witness how he had actually inspected the disputed land. He said that he had regularly driven passed the site and that although he was travelling in a car he took particular notice of the area in question. He also said he had visited the land and had walked on it.
12. Next to give evidence was Mr Ashley. He is a Chartered Surveyor employed by the Forestry Commission as the Area Land Agent to manage land placed at its disposal by the Secretary of State for Environment Food and Rural Affairs in the East of England. He confirmed he had been first appointed to the position in 1991 and has dealt with the disputed land since then. He confirmed that the land adjacent to the disputed land was managed by the Forestry Commission.
13. He confirmed that in his role as Area Land Agent he had both driven past and visited the disputed land on several occasions during the 5 year period from 2009 to 2014. This was brought about by various works arnd requirements arising from the A11 trunk road dual carriageway scheme that affected this locality. His evidence was clear on the point that at no time prior to July 2014 did he ever notice any signs of continuous full free and undisturbed activity by either the Applicant or anyone else on the disputed land. He said that the first time he became aware of the existence of the Applicant was in July 2014. He also exhibit some aerial photos from 1999, 2007 and 2008 that he says shows no evidence of structures such as fencing on the disputed land.
14. In cross examination Mr Ashley made it clear that because the land was registered as common land the Forestry Commission had no intention at this time of considering the possibility of starting a claim for adverse possession of the disputed land. He confirmed that this had been considered before he became aware of the commons registration. Accordingly it was apparent that there there had been some

correspondence on the point but little else to suggest that the Forestry Commission were squatters on the disputed land.

THE LAW

15. Before dealing with the factual issues relating to adverse possession, it is necessary to consider the questions of law.

The legal position

a. Section 15 of the Limitation Act 1980 provides as follows:

“15(1) No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

(6) *Part I of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.”*

b. Schedule 1, paragraph 1, provides as follows:

“Where the person bringing an action to recover land, or some person through whom he claims, has been in possession in the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action, shall be treated as having accrued on the date of the dispossession or discontinuance.”

c. Schedule 1, paragraph 8, provides:

“(1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as ‘adverse possession’) and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

(2)

(3)

- (4) *For the purpose of determining whether a person occupying any land is in adverse possession of land it shall be not assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.*

This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case."

16. Thus, the right of action to recover the land is barred whenever 12 years have elapsed from the time when any right of action accrued. It does not have to be a period immediately before an action is brought. The Land Registration Act 2002 preserves the rights of claimants in adverse possession claims where time has run successfully prior to the commencement of this Act namely prior to the 13 October 2003 or under the transitional provisions of the Act where the 12 year period for unregistered land straddles the 13 October 2003. A claimant involving registered land who has achieved the requisite period of possession namely 12 years is entitled to be registered as proprietor under the provisions of Schedule 12, paragraph 18 (1) of that Act.
17. For the purposes of establishing if the period of 12 years has expired, immediately consecutive periods of adverse possession may be combined. In other words the 12 year period can be combined and accumulated by a series of squatters, see *Allen v Matthews* [2007] 2 P&CR 441 at [85]. This will apply if the original squatter transfers his or her "interest" in the land to a second squatter. The second party is then entitled to add the original squatter's period of adverse possession to theirs to reach the 12 year time limit. However if the second squatter has dispossessed the first squatter although the same aggregation rule applies the second squatter may find it difficult to enlist the help of the original squatter in supporting the claim to the 12 years possession required by statute.
18. In the light of the evidence I must now consider if there is a claim that can be made in adverse possession. If a claimant wants to claim adverse possession he or she must show (1) the owner of the property (the paper title owner) who is entitled to possession has been dispossessed or had discontinued possession, and (2) the claimant

has gone into adverse possession of the land. Both these must occur before the Limitation Act 1980 12 year time limit can start running. The question, therefore, is simply "...whether the Defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner...Beyond that...the words possess and dispossess are to be given their ordinary meaning." (per Lord Browne-Wilkinson in *J A Pye (Oxford) v Graham* [2003] AC 419 at paragraphs 36, 37).

19. Accordingly, the squatter has to demonstrate 2 things, (1) factual possession and (2) intention to possess. With regard to factual possession Slade J. in *Powell v McFarlane* (1979) 38 P & CR 452 stipulated that "Factual possession signifies an appropriate degree of physical control. The question of what acts constitute a sufficient degree of exclusive physical control must depend upon the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed." In the light of this judicial guidance I must be satisfied that the Applicant has demonstrated to me in his evidence an appropriate degree of physical control. In the case of *J A Pye (Oxford) Limited and Graham* [2003] 1 AC 419 at paragraph 41 the House of Lords approved the above statement from *Powell v McFarlane*. Therefore one can see from that statement that factual possession can be understood as taking into account the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Furthermore I must be satisfied that the possessor (the Applicant) had been dealing with the land as an occupying owner might have been expected to deal with it.

20. If there is factual possession then there must be demonstrated the requisite mental element, the intention to possess on the part of the squatter (the 'animus possidendi'). You do not need to show an intention to own, an intention to possess is sufficient. Previously it was thought necessary to show that you intended to exclude the paper owner and that you also intended to exclude everyone including the paper owner (*Ocean Estates Ltd v Pinder* [1969] 2 AC 19). The House of Lords have now made it clear in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 that the requisite intention is the intention to possess, and nothing more. To establish the intention to possess the claimant must rely upon the acts of possession. This means that the acts relied upon "must be unequivocal in the sense that his intention to possess has been made plain to

the world. If his act is equivocal and his intention has not been made plain his claim will fail”, (*Prudential Assurance Co. Ltd v Waterloo Real Estate Inc.* [1999] 2 EGLR 85 at 87 per Gibson LJ). Accordingly Intention has been defined as follows:

*“The only intention which has to be demonstrated is an intention to occupy and use the land as one’s own ...If the evidence shows that the person was using the land in the way one would expect him to use it if he were the true owner, that is enough”, (per Lord Hope in *J A Pye (Oxford) Ltd v Graham*, at paragraph 71).*

21. In the case of *Wata-Ofei v Danquah* [1961] AC 1238 the court stressed that the acts required to take possession of land will vary depending upon the nature of the land in dispute. This could mean that if the land was vacant and unenclosed and not being cultivated there is very little that can be done to indicate it had been possessed. In the alternative acts of cultivation can also amount to possession, see *Hicks Developments Limited v Chaplin* [2007] EWHC 141(Ch)
22. Thus, in short, what is required is the intention to exclude the whole world from *control* of the land, not the *use* of the land for the statutory period of 12 years. If the squatter has and manifests the intention to exercise exclusive control of the disputed land, then he or she will have the intention to possess. There must be a deliberate intention to exclude the owner. She or he has to demonstrate an intention to occupy and use the land as one’s own.
23. However the occupation must be adverse, i.e. not permissive. If the paper title owner permits the occupation and the squatter occupies pursuant to that permission there cannot be a finding of adverse possession. Permission can be explicit, i.e. in writing or merely oral, i.e. by word of mouth. However there must be clear and obvious evidence of the permission to stop a claim in adverse possession. Negotiations to buy the paper title owners estate in the disputed land might amount to such evidence. Where an occupier writes to the paper title owner seeking to buy the land that will implicitly recognise the title of the paper title owner, see *Edginton v Clark* [1964]1 QB 367

FINDINGS OF FACT

24. Thus, having regard to the evidence and the principles of law, set out above, I have come to the following conclusions – I find that there is no convincing evidence of

occupation by the Applicant prior to July 2014. In that regard I prefer the evidence of Mr Ashley whose evidence was clear and firm and which undermined the evidence of the Applicant. The witness stated quite firmly that he did not see any signs of occupation or control of the disputed land for the lengthy period from 2009 right through to 2014. I therefore accept his evidence in this regard as confirmation of the actual position on the ground during that time frame.

25. For a claim in adverse possession to succeed what is required is the intention to exclude the whole world from *control* of the land, not the *use* of the land for 12 years. If the squatter has and manifests the intention to exercise exclusive control of the disputed land, then he will have the intention to possess. There must be a deliberate intention to exclude the owner. He has to demonstrate an intention to occupy and use the land as one's own. The Applicant says he was in control of the land from 1998 and yet there are two witnesses for the Respondent who deny this
26. I appreciate that whether or not the disputed land was actually completely fenced off forms part of the current dispute. As is set out in *Megarry and Wade*, "The Law of Real Property" while enclosure is the strongest possible evidence of adverse possession... it is not indispensable. (See the case of *Seddon v Smith* (1877) 36 LT 168). Indeed in *Treloar v Nute* [1976] 1 WLR 1295 the Court of Appeal considered acts of possession that plainly did not at the start of the limitation period include fencing. What is necessary is for the Applicant to show that in the absence of fencing that he was dealing with the land in a manner that was consistent with an owner and which was also adverse to the paper title owner. In essence fencing although important evidence of possession is not conclusive, see *Brown v Faulkner* [2003] NICA 5(2) at [32]. The Applicant claims the disputed land was fenced off and yet this is denied by the Respondent and the witnesses for the Respondent.
27. In the light of my findings set out in the preceding paragraphs I cannot find sufficient evidence for the Applicant to show the fulfilment of the core requirements for a claim of adverse possession for all the disputed land. I must be satisfied that the Applicant has demonstrated to me an appropriate degree of physical custody and control for the statutory period of 12 years.. I am not satisfied that this has been demonstrated from the Applicant's evidence especially when he claims succession through the adverse

possession of the Forestry Commission. The problem here is that there was really no evidence before me from the Forestry Commission about their possible adverse possession of the disputed land and as such I cannot find any period of adverse possession on their behalf before 2014, or at all. This being so there cannot be a period of 12 years to support the Applicant's claim for adverse possession that includes time during which he asserts the Forestry Commission were in adverse possession. Thus his claim must fail.

THE DECISION

28. In all these circumstances I am of the view that the Applicant's claim for adverse possession cannot succeed. There would appear to be insufficient acts of exclusive possession by the Applicant for the statutory period of 12 years. I am not satisfied that there is sufficient evidence of the intention to possess to the exclusion of all other persons for the full period of 12 years required by s. 15 of the Limitation Act 1980 and that such period was not in place before the application was made by the Applicant. As a consequence I am not satisfied that the requirements of adverse possession have been met and in all these circumstances I am not of the view that this claim for adverse possession can proceed, and I will so order.
29. As to costs an order in that regard normally follows the event. So the general rule therefore is the successful party ought to receive their costs, as is the case in this dispute. Therefore following this determination I will also order that the Applicant do pay the Respondent's costs from the date of the reference of this dispute to the Tribunal, such costs to be agreed between the parties and failing such agreement to be assessed and I will if required give directions should there be no agreement.

Dated this 20th day of November 2017

Prof. Robert M. Abbey

Judge: Professor Robert M. Abbey

BY ORDER OF THE TRIBUNAL



