

[2018] UKFTT 322 (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 2017/0216
BETWEEN

THE INCUMBENT FOR THE TIME BEING OF THE BENEFICE OF FREISTON

Applicant

and

DAVID FREDERICK BROWN

Respondent

Property Address: Land lying to the south of Shore Road, Freiston, Boston

Title number: LL364670

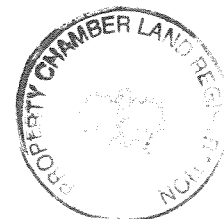
ORDER

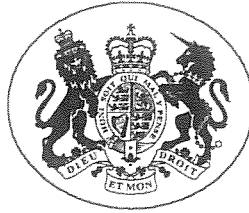
The Chief Land Registrar is ordered to give effect to the application dated 17 March 2016

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 3rd day of April 2018





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**Before: Judge McAllister
Peterborough Magistrates Court
8 March 2018**

Representation: Ms Araba Taylor of Counsel instructed by Chattertons Solicitors appeared for the Applicant; Mr Plummer of Roythornes Solicitors appeared for the Respondent

DECISION

Introduction

1. St James' Church, Freiston ('the Church') dates back to the 12th Century and has been a parish church since that date. Its status as a parish church, I am told, ensured that it survived the suppression, during the dissolution of the monasteries, of the Benedictine abbey of Crowland, of which it was a part.

2. The dispute between the parties relates to the ownership of land, broadly triangular in shape lying immediately to the east of the Church, and known as the Chancel Garden. This area of land is bounded to the west by the wall of the Church, to the north by a wall and fence, and is open to the east and south. The eastern/southern boundary forms an arc, but there is nothing on the ground to indicate the precise limit of the Garden.
3. By an application dated 17 March 2016, the Applicant (the Incumbent for the time being of the Benefice of Freiston) ('the Incumbent') applied for first registration of the Chancel Garden. The application was instigated by, and made with the consent and approval of the Diocese of Lincoln. Mr Brown objected, claiming that he had acquired title to the Garden by adverse possession.
4. It is common ground that he has been in factual possession of the Chancel Garden since 1991.
5. As outset of the hearing, the parties had narrowed the dispute to the following issues:
 - (i) Was the application properly made and constituted, in view of the fact that, neither at the date of the application, nor at the date of the hearing, no incumbent had been appointed, and the incumbency is suspended (pending the re-organisation of four parishes):
 - (ii) If the answer is yes, is the relevant limitation period 12 years (as claimed by Mr Brown) or 30 years (as claimed by the Incumbent)? The answer to this question depends on whether Chancel Garden is vested in the Incumbent or in the Church Commissioners. If it is vested in the Incumbent, it is accepted that the relevant period for the Limitation Act 1980 ('the Act') is 30 years (pursuant to section 15(7) and paragraph 10 of Schedule 1 to the Act) and that Mr Brown is not able to establish possession for that period of time. Conversely, if the Chancel Garden is vested in the Church Commissioners, it is common ground that the relevant period is 12 years.
 - (iii) If the period is 12 years, can Mr Brown establish that he has occupied the Chancel Garden with the requisite intention to found a claim for adverse possession?
6. For the reasons set out below I will order the Chief Land Registrar to give effect to the application.

Conveyancing history and chronology

7. By a conveyance dated 16 March 1886 ('the 1886 Conveyance') the Reverend Henry Linton being a tenant for life of all the lands to be conveyed, as beneficial owner and in consideration of the sum of £1400 (paid to three named reverends as trustees approved by the Ecclesiastical Commissioners for England), conveyed to the Ecclesiastical Commissioners the Priory, outbuildings, land, and *'also all that piece of land situate at Freiston aforesaid containing twenty-six perches formerly part of the Priory Gardens and lying East of the Church all which said lands and premises are more particularly delineated on the plans drawn in the margins of these presents..'* (the Chancel Garden).
8. The 1886 Conveyance was made under the authority and for the purposes of a number of Acts 'for the building and promoting the building of churches in populous parishes'. Specifically, the conveyance was *'for the purposes of the said Acts and to be appropriated as and for a parsonage or house of residence with garden and glebe thereto for the Vicar for the time being of the United Parishes of Freiston and Butterwick in the County of Lincoln and to be devoted to Ecclesiastical purpose forever by virtue and according to the trues intent and meaning of the said recited Acts..'* The relevant Acts were the Church Building Acts 1818 to 1884.
9. The parsonage on the land is known as 'Freiston Priory' and was built in the 16th or 17th Century. The Chancel Garden lies over the presbytery of the former monastic church and, as such, it is believed by the Incumbent to be consecrated land.
10. An entry in the London Gazette dated 3 December 1886 noted that the Ecclesiastical Commissioners, in consideration of the benefaction of a certain house (the Priory) and land comprising in total 5 acres and thirty four perches, which had been permanently secured to the benefice of Freiston-with-Butterwick as a parsonage house and glebe

land, granted the Incumbent of the benefice and his successors a yearly stipend of 45 pounds.

11. Canon Peter Paine MBE took over as vicar of St James' Church from a Rev Trotter in 1937, and lived in the Priory with his wife Joy until his death in March 1977.
12. On 30th October 1968 Canon Paine gave notice to the Parochial Church Council pursuant to the Parsonages Measure 1938 that, as Incumbent of the Benefice of Freiston with Butterwick, he intended to sell the residence house of the said benefice containing in all 4.804 acres or thereabouts. By a letter dated 21 February 1968 he had written to the valuers making it clear that the Chancel Garden (described by him as a *'small (almost three cornered) parcel of land at the East End of the Church going as far as the Pill Box and coming back in a slight curve to the .. gate)* was to be excluded from the sale, and that it belonged to the Church.
13. By a conveyance dated 25 June 1970 Canon Paine, as Incumbent of the Benefice of Freiston with Butterwick, conveyed to himself and his wife, Joy, the vicarage and other land, but not the Chancel Garden. The conveyance was made with the concurrence of the Church Commissioners to whom the purchase price was paid. The conveyance included a number of reservations in favour of the Incumbent, and a number of restrictive covenants were entered into by Canon Paine and his wife as purchasers to protect the retained land and the church.
14. By her will dated 5 June 1985 Joy Paine devised all the land included in the 1970 Conveyance to Mr Brown. The Chancel Garden was, of course, excluded. Mr Brown had known the Priory, including the agricultural land and the Chancel Garden since 1959 when he was 8 years old. On his 12th birthday, in 1963, he obtained a work permit so he could assist Mrs Paine with feeding the animals. He continued to work for Mrs Paine until her death in October 1990 as a farmhand, and with all the day to day activities connected with farming.
15. In August 2015 a report on the archaeology and history of the Church was carried out by Glynn Coppack. The Church (which is a Grade 1 Listed Building) had been placed on the English Heritage At Risk, East Midlands, Register in 2014. It was partly as a

result of the designation of the Church as at risk that the application was made to Land Registry, as explained more fully below.

Oral Evidence

16. I heard evidence from Professor Simon Pearson, secretary of the Freiston Parochial Church Council, and from Mr Brown.
17. Professor Pearson set out in some detail in his written evidence why it is the Incumbent's case that the Chancel Garden is consecrated ground. This formed part of the consecrated graveyard and, in any event, it contains the archaeological remains of the presbytery of Freiston priory.
18. There was no difficulty with the use of the Chancel Garden by Mr and Mrs Paine, and subsequently Mrs Paine, or indeed Mr Brown following his inheritance of the Priory and other land.
19. Problems arose, as far as the Church Council is concerned, in 2009 when Mr Brown began to use the Chancel Garden for cattle, resulting in poor drainage on the site and high levels of slurry draining across the site, causing concern about the stability of the foundations of the main eastern wall of the Church. Rubble was also stored on the Chancel Garden, as were large bales of hay. The vestry was flooded in 2014 when, it is said, a trench was dug allowing the slurry to wash down the eastern side of the Church. It was this damage which led to the Church being put on 'the at risk' register. In order to qualify for monies to fund the repair work, ownership of the Church and land around it needs to be established.
20. Mrs Paine made use of approximately 9.5 acres of agricultural and farm buildings, including the Chancel Garden, to keep male pigs and pedigree goats. The Chancel Garden was farmed as part of the agricultural land. It was never separated or portioned from this land. The male pigs were kept in a pill box in the north east corner of the Chancel Garden. The pill box is still there. Mr Brown has recently sold the Priory but continues to own land and buildings to the south and south west of the Chancel Garden.

21. Mr Brown was employed by Mrs Paine from the age of 12 until her death in 1990. So far as he was concerned, Mrs Paine occupied the Chancel Garden as an owner, and was never challenged as to her use, nor, so far as he knows, was any permission given to her to use this land. She never sought to make any distinction between the Chancel Garden and any other part of the land owned by her (and formerly by her and her husband). Prior to the hearing, Mr Brown's case was that he was entitled, in any event, to rely on Mr and Mrs Paine's period of occupation of the Chancel Garden but that point was not pursued before me.
22. Following Mrs Paine's death Mr Brown continued with his role on the farm, and on inheriting the Priory and the farm, continued to use the Chancel Garden as his own. He bred sheep and pigs, and more recently, cattle, and has used the Garden to store straw and silage bales. Until the application was made to Land Registry, no claim to the Chancel Garden had been made by the Church: indeed on occasion he was asked to repair the wall to the north of the Garden, and did so. Mr Brown disputes that he has caused any damage to the Church by his activities. Grazing stopped in 2009 when he put hardcore down: he dug a soakaway for the water from the Church in the Garden and filled it with hardcore. He denied that any slurry flowed towards the Church. There have been no animals there since 2009. The land was never called the Chancel Garden by him or Mrs Paine. He knows it as the 'backfield'. He has been claiming IACS payments in respect of the Garden since 1991, and paid drainage rates.
23. In cross examination Mr Brown stated that he carried on using the Garden after Mrs Paine's death. He followed in her footsteps albeit that in 2009 the Garden ceased being open grazing land, and was also used, as I have said, for the storage of hay and silage. I found him to be an entirely honest and straightforward witness.

Adverse possession

24. As is well known, in order to acquire title by adverse possession, the squatter needs to establish both factual possession (that is to say, an appropriate degree of exclusive physical control) and the manifested intention to exercise control over the land, excluding all others from such control, including the true owner (see *Powell v*

McFarlane (1977) 38 (&CR 452 at 471-2, and *JA Pye (Oxford)Ltd v Graham* [2002] UKHL 30.)

25. As stated above, there is no dispute in this case regarding Mr Brown's physical possession. The issue is whether he had the requisite intention (or, as it is often referred to, the necessary *animus possedendi*).
26. The required intention is to possess but he need not have a conscious intention to exclude the owner. The intention is to occupy and use the land as one's own. Where the evidence establishes that the person claiming title under the Act has occupied the land and made full use of it in the way an owner would, in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts of the occupier are equivocal, and open to more than one interpretation, that the acts become insufficient.
27. The fact that the squatter knows that he does not own the land does not, of course, prevent the necessary intention from being formed. The intention is to possess and to exercise exclusive control over it, not the intention to own.
28. In the present case Ms Taylor submitted that Mr Brown had not shown the necessary intention to possess since he inherited the Priory and other land in 1991. There was no conscious consideration by either the Church or Mr Brown as to who owned it. The nature of the relationship between them (and, before Mr Brown's occupation, between the Church and Mr and Mrs Paine) was such that neither the Paines nor Mr Brown could be said to be occupying it with the requisite intention. There was, she submitted, an unspoken licence between the Church and Mr Brown to allow him to graze the Garden. Matters changed in 2009 when Mr Brown began to make a more aggressive use of the land.
29. I do not accept these submissions. Mr Brown occupied the Chancel Garden as his own. He knew he did not own it, but this is not material to the issue. Nor is it relevant that he simply continued to use it as Mr and Mrs Paine had done before him. His acts of ownership were not in any sense equivocal.

30. As mentioned above, in the case of actions to recover any land by a spiritual or eleemosynary corporation sole, the limitation period is 30 years from the date on which the right of action accrues: see Schedule 1, Part II, paragraphs 10 and 11 to the Act.
31. Since 1833 there has been an extended limitation period in such cases. The justification for the longer periods for such corporations was given in *Ecclesiastical Commissioners of England and Wales v Rowe* (1880) 5 App Cas 736. The principle was said to be ‘*to prevent the negligence of one or two particular incumbents, each of whom would be in substance a mere tenant for life, from becoming a bar to the rights of their successors*’. (per Lord Selborne LC at 744).

The locus issue

32. At the outset of the hearing Mr Plummer submitted that the Incumbent’s application should fail without more since, even if, and contrary to his submission, the Chancel Garden had vested in the incumbent (as opposed to the Church Commissioners) the absence of a designated incumbent at the date of the application and at the date of the hearing is fatal to the application before me. Absent an incumbent there cannot be a registration. In this case the incumbency has been suspended pending the re-organisation of four parishes. If anyone is the incumbent, it is the Bishop of Lincoln.
33. In one sense, the issue of whether or not the Chancel Garden vested in the Incumbent should be determined first, but as this point was taken as a preliminary issue I will deal with on the basis that the Garden so vested.
34. Ms Taylor submitted that this analysis is conceptually flawed. The incumbent is a corporation sole. During a vacancy, or when, as here, the incumbency is suspended, the powers of the incumbent are to be exercised by the bishop. It is the bishop who can initiate the process of registration but the application is not made in his name. The incumbent does not act in his personal capacity.

35. In my judgment, the question is to be answered as follows. The central issue is the way in which church property is held. The Church does not hold property, but does so through representative owners. In order to ensure that the property continues to be applied and used for its intended purpose, property is generally vested in ecclesiastical corporations rather than individuals. So, whilst the holder of a particular office may change, the corporation continues to hold the property unaffected by such changes.
36. A benefice is a freehold office (to be distinguished from a parish which is a geographical area). Whereas it used to be the case that incumbent of a benefice had the cure of the souls of a single parish, this is no longer the case. Pastoral schemes now make provision for the holding of benefices in plurality.
37. The position is well explained in 'A Practical Treatise on the Law Relating to Church and Clergy' by William Cripps, 8th Ed, 1937. '*Ecclesiastical persons hold their lands, in each instance as a corporation... such corporations are artificial persons who maintain a perpetual succession and enjoy a legal immortality... the freehold was vested in the parson; and if we suppose it vested in him in his natural capacity, on his death it might descend on his heir... the law has therefore ordained that the parson, as parson, shall never die by making him and his successors a corporation. By this means all the original rights of the parsonage are preserved entire to the successor, for the present incumbent and his predecessors, who lived seven centuries ago, are in law one and the same person and what was given to the one was given to the other also.*' (page 377).
38. The position where one holder of the incumbency leaves and before a successor is appointed was described by Cripps (p 429) as follows: '*Upon the death of the parson of a church.. the freehold of his glebe or other ecclesiastical lands, is in abeyance, that is, in expectation, and the fee simple of such lands may be said to be always in abeyance. This is one of the few instances in which a freehold estate can be in abeyance for it is a principle of the highest antiquity in our law that there should always be a known and particular owner of every freehold estate, for the reasons derived partly from general convenience and partly from feudal times.*' (and see *Re St Paul's Covent Garden* [1974] Fam 1 at 4E).

39. The position was further analysed in *Legal Opinions Concerning the Church of England*, 8th Ed, 2007. Under the heading: '*Corporation Sole: vacancy in holder of the office*' the point is made that, whilst the incumbent has certain statutory powers of dealing with the land whilst in office (for example under the Parsonages Measure Act 1938), the position at common law is that the incumbent's interest in the land, however vestigial, continues to be vested in the corporation sole (it does not pass, as has sometimes been suggested, to the diocesan bishop) but during a vacancy there is no means of animating the corporation.
40. In some instances it will be necessary for the bishop to act where there is a vacancy: see, for example, section 1 of the Parsonages Measure Act 1938, which provides that where the residence house, outbuildings, gardens, orchard and appurtenances belonging to any benefice shall be inconveniently situate or too large, the incumbent of such benefice, or during a vacancy, the bishop, shall have power to sell or pull down the relevant building.
41. Rule 174 of the Land Registration Rules 2003 provides that where by virtue of any Act or Measure a transfer to the Church Commissioners has the effect, subject only to being completed by registration, of vesting any registered land either immediately or at a subsequent time in an incumbent or any other ecclesiastical corporation sole, the registrar must register the incumbent or such other ecclesiastical corporation as proprietor upon receipt of the application, the transfer to the Church Commissioners and a certificate in Form 4.
42. Rule 175 (c) provides that where any registered land is transferred to or (subject only to completion by registration) vested in the Church Commissioners, any ecclesiastical corporation, aggregate or sole, by any transfer authorised by any Act or Measure relating to or administered by the Church Commissioners, the registrar must register the Church Commissioners, such ecclesiastical corporation or such other person as proprietor. A certificate in Form 5 must accompany the application.
43. The position seems to me to be put beyond doubt by section 180(2) of the Law of Property Act 1925. This provides as follows: '*Where either after or before the commencement of this Act there is or has been a vacancy in the office of the*

corporation sole... at a time when, if there has been no vacancy, any interest in or charge on property would have been acquired by the corporation, such interest shall notwithstanding such vacancy vest and be deemed to have vested in the successor to such office on his appointment as a corporation sole..'

44. It is therefore clear that the fact that there is a vacancy in the incumbency of the parish has no bearing on the application to register the title to the Chancel Garden in the name of the incumbent for the time being. The registration, in such a case, is merely in the nature of an administrative act (with legal consequences) to give effect to what is the position in law: namely that the Chancel Garden vests (subject to the issue raised below) in the incumbent for the time being as a corporation sole. It does not require there to be a named individual. In the event of a vacancy, the powers of dealing with the registered title vest, by statute, in the bishop.

The vesting issue

45. The position is summarised, succinctly and accurately, in *Halsbury's Laws of England, Vol 34 (2011)* at para 3.76. '*The freehold of the site of any church or burial ground, when consecrated, and of any house, garden, appurtenances or land for the residence or glebe of the person serving any church, conveyed to the Ecclesiastical Commissioners under the Church Building Acts [that is to say, the Church Building Acts 1818 to 1884, mainly repealed by the New Parishes Measure 1943, s 32] is vested in the incumbent of the church for the time being....'* Thus land will so vest if it is either consecrated land, or (to use a short hand term) 'parsonage land'.
46. Mr Plummer's submission is that, notwithstanding this general position, the Chancel Garden remains vested in the Church Commissioners (who succeeded to the Ecclesiastical Commissioners for England in 1947.) There is no issue but that the 1886 Conveyance conveyed the Chancel Garden, and all the other land, to the Ecclesiastical Commissioners for England. The issue is whether the Chancel Garden was ever vested, and if so, whether it remains vested, in the Church Commissioners.

47. The starting point in Mr Plummer's argument is that the provision in section 17 of the New Parishes Measure 1943 (which provides for the vesting of the lands there described in the incumbent for the time being) applies only to land acquired after the passing of the 1943 Act. Mr Plummer accepts, as he has to, that the Chancel Garden falls within the categories of land which can be acquired by the Commissioners (under section 13).
48. It seems to me that this argument is unsustainable. The 1943 Act was a consolidating measure, and it repealed the provisions of the 1818 to 1884 Church Building Acts whilst re-enacting with amendments various provisions of those Acts. Section 33 of the 1818 Church Building Act, for example, provided in terms that: ... *'it shall be lawful for the said Commissioners [the Ecclesiastical Commissioners] to accept and take from any person willing to give the same any house garden and appurtenances, not exceeding ten acres in the whole, for the residence of the spiritual person serving such church or chapel, or any land... for erecting such house and appurtenances and making such garden and the same shall (immediately upon or after the consecration of such church or chapel) become and be the house and glebe belonging to such church or chapel, and shall vest in the incumbent for the time being as such'*.
49. Subsequent acts and measures were to the same effect (see, for example, section 13 of the Church Building Act 1845). There is no basis, in my judgment, for the argument that it was only after the passing of the 1943 Measure that land held by the Church Commissioners vested in the incumbent for the time being. Such a proposition runs contrary to well established law regarding the holding of church property. The vesting of land in the incumbent (with the status of a corporation sole) does not derive from statute (see *Coke on Littleton*, 4th Ed, London 1639, vol 1 250a), albeit that it is to be found in successive statutes.
50. The position is clearly set out in *Halsbury's Laws*. The Chancel Garden is clearly 'parsonage land' under the Church Building Acts on the basis of which the 1886 conveyance was entered into, and almost certainly consecrated land, in view of the fact that the presbytery of the monastic church lies beneath it.
51. Mr Plummer's second submission is that, in any event, as I understand it, neither the 1943 Act nor its predecessors, vests in the incumbent the legal estate and/or does not

have the effect of divesting the Church Commissioners of their legal estate. What is vested is, he submits, something less than the legal estate.

52. Again, this argument in my judgment fundamentally flawed and misunderstands the nature of the estate held by the incumbent. This has been explained above. The incumbent is a corporation sole in order to ensure that the original purpose of vesting land in the incumbent is maintained. For this reason too the powers to dispose or sell land held by the incumbent are limited by statute. It is however not, in my judgment, correct to argue that what vests in the incumbent is the ability to exercise statutory powers, and not the freehold estate. This argument conflates the powers of the incumbent to dispose of or deal with land with the nature of his interest. Those powers derive from statute. It might be said, by analogy, that the land is held in a trust or quasi trust for specific purposes. But the only estates in land which are capable of subsisting in law are the fee simple absolute in possession or a term of years absolute. There is no other estate which is something less than a legal estate.

53. It follows therefore that on a true construction of the 1886 Conveyance the Chancel Garden vested in the incumbent for the time being, and remains so vested. The Conveyance specifically provides that the Ecclesiastical Commissioners were to hold the land for the purposes of the Church Building Acts. The Chancel Garden never vested in the Commissioners.

Conclusion

54. My conclusions therefore are:

- (i) the Chancel Garden vested and remains vested in the incumbent for the time being of the benefice of Freiston;
- (ii) the fact that the incumbency is suspended does not prevent the Garden being registered in the Incumbent;
- (iii) Mr Brown is in adverse possession of the Chancel Garden and has been since 1991;
- (iv) He has not barred the incumbent's title by reason of the fact that he has not been in adverse possession for 30 years.

Costs

55. The Applicant, as the successful party, is in principle entitled to its costs. A schedule in Form N260 or the like is to be filed and served by 19 April 2018. The Respondent may raise such objections or make such representations as he deems appropriate within 14 days of receipt of the schedule. I will then decide what order to make on paper, without the need for a further hearing.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 3rd day of April 2018

