

[2019] UKFTT 0050 (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: 2017/0940

BETWEEN

KENNETH ISLWYN OWEN

Applicant

and

QUALITY HOMES SELLY OAK LIMITED

Respondent

**Property address: Land adjoining 2 Knight Avenue Coventry CV1 2AY
Title number: MM82026**

Before: David Holland QC sitting as Deputy Judge of the First-tier Tribunal

ORDER

The Tribunal directs HM Land Registry as follows:

1. To allow the Applicants application for first registration of the land, which is the land tinted blue on the notice plan dated 16th June 2017, and which has been allocated provisional title number MM82026.

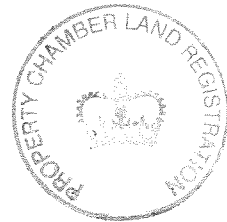
2. To cancel the Respondents application for first registration, allotted provisional title number MM82218, insofar as it concerns the same land.
3. If either party wishes to make any representations about costs, then they can do so in writing within 14 days of receipt of the Decision in this case whereupon the Tribunal gives notice that it will make any further decision in writing and without a hearing. If neither party makes any representation within that period then there will be no further order.

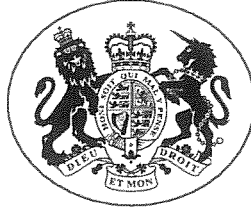
BY ORDER OF THE TRIBUNAL

David Holland

DAVID HOLLAND QC

Dated this 17th December 2018





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Before: David Holland QC sitting as Deputy Judge of the First-tier Tribunal

**The Applicant appeared in person
The Respondent did not appear and was not represented**

DECISION

1. In this case the Applicant has applied in Form FR1 to be registered as the first freehold proprietor of a small tract of unregistered land (“the land”) situated adjacent to the south-eastern corner of his property at 2 Knight Avenue Coventry CV1 2AY. He claims to have acquired it by adverse possession since the middle of 1990 when, he

says, he dismantled the wall that stood between the land and his garden, erected a fence between the land and Knight Avenue and effectively incorporated it into his garden. The Respondent, which claims to hold the paper title to the land, opposes the Applicants application and has made its own application for first registration of the land as part of a larger tract of land situated immediately to the east of 2 Knight Avenue (“the garage site”).

2. I heard this case in Birmingham on 7th August 2018. The Applicant represented himself, gave evidence and called his next-door neighbour at 2 Knight Avenue, Francis Keith Johnson. The Respondent, as it had previously indicated was its intention, did not attend and was not represented. I had a site visit on 6th August 2018 which was attended by the Applicant and by a Mr Earp on behalf of the Respondent. Mr Earp’s father, who I assume is a director of the Respondent, was not present but was able to participate to a certain extent via his son’s mobile phone. Thus, at the site visit, I had input from both parties.
3. In addition, both parties had disclosed and exchanged documents (including some plans and photographs) and certain witness statements, to which I shall refer below. I have read all of these.
4. The following history is taken from those documents and statements. Where matters are, or appear to be, controversial I shall indicate.
5. 2 Knight Avenue is a semi-detached house over two stories title to which is unregistered. It fronts onto Knight Avenue to the south which itself runs in a westerly direction from Terry Road veering northward thereafter to join Humber Avenue. The house has a garden at the front and a larger one to the rear. Situated immediately to the east of 2 Knight Avenue is a larger site effectively on the corner of Knight Avenue and Terry Road. Until they were demolished by the Respondent in or around June

2018, this site contained 26 lock-up garages (access to which was from Terry Road) and, at its south western corner facing onto Knight Avenue, a former electricity sub-station. This is what I have called the garage site. That garage site as a whole has an area of approximately 0.2 acres. I shall call that part of the garage site on which the old sub-station stood, the sub-station site. As stated, the substation site was situated on the south western corner of the garage site and adjacent to the south eastern corner of the front garden of 2 Knight Avenue.

6. Until it was demolished by the Respondent in 2018, the garage site was separated from 2 Knight Avenue to the west by a substantial brick wall.
7. The substation site itself appears (from the plan to the conveyance dated 31st May 1955-see below) to have measured roughly 24 feet in length along its boundary with 2 Knight Avenue and 12 feet in width, along its frontage to Knight Avenue to the south. Until it was demolished in 2018 by the Respondent, it contained the substation itself (which appears from the photographs I have seen to have been a very solidly constructed brick building roughly two stories in height) with a smaller open space, or forecourt, at its southern end fronting Knight Avenue to the south. There were at some stage gates leading from Knight Avenue into the forecourt and thence into the substation through a solid wooden door. It is this small enclosed space or forecourt on the substation site, originally situated between the substation building itself and Knight Avenue, which comprises the land over which the Applicant claims adverse possession. By my rough estimation it measures 12 feet (or 3.6 metres) along its frontage to Knight Avenue by approximately 8 feet (or 2.4 metres) along its boundary with the front garden of 2 Knight Avenue. On the site visit I was shown the remains in the ground of a pipe which had been attached to the southern wall of the substation building near the boundary with 2 Knight Avenue. Thus, the northern end of the land

is measured to the northern edge of this pipe. The land is that tract of land coloured blue on the Land Registry Notice B149 served on the Respondent and dated 16th June 2017.

8. The land is shown coloured green on the Land Registry Survey attached to its letter dated 6th June 2017 whilst the substation itself is shown on that plan coloured blue. The land has been given the provisional title number MM82026.
9. It appears that the substation was originally constructed in or around 1923 but had become disused by the early 1950s. By a conveyance dated 31st May 1955 (a copy of which I have seen) the then owners of the substation site, The East Midlands Electricity Board, sold it to Thomas Albert Baskott. The land conveyed was described as:

“all that piece or parcel of land containing an area thirty-two square yards or thereabouts together with the former electricity sub-station now erected thereon on the west side and to the rear of Terry Road in the City of Coventry and on the south side and to the rear of Humber Avenue in the said City which said piece or parcel of land is more particularly delineated on the plan hereto annexed and thereon coloured pink”

The plan clearly shows the substation site as the land conveyed.

10. Mr Baskott died on 26th May 1982 with his daughter, Valerie Ward, named as his sole executrix. By a vesting assent dated 3rd November 1982, the freehold in the substation site was vested in Ms Ward.
11. It is quite clear that Ms Ward rarely if ever visited the substation site. In a letter dated 22nd November 2016 from her solicitors to those instructed by the Respondent in preparation for the sale of the substation site by her, the former stated that she had “never seen or entered this building” (i.e. the substation) which had remained locked

throughout her ownership with her having no key. As we shall see, she does however claim to have visited the site in or around 2012.

12. In the meantime, the Applicant and his wife bought 2 Knight Avenue in 1960 and he has lived there ever since. It is the Applicants case that, by 1990: the brick wall which separated the substation site from his front garden had cracked and was in danger of collapse; the front gate from Knight Avenue into the substation site had gone; coping stones on the top of the wall which overhung his garden were loose; the substation was in a state of some disrepair and the substation site was being used as both a dumping ground and a gathering place for youths. I have seen various photographs provided by the Applicant which he says were taken at this time and which would appear to show the existing wall between the land and the garden of 2 Knight Avenue (which looks to have been at least 26 courses of bricks in height together with concrete coping stones on top) with a very substantial crack running from top to bottom. This crack, asserts the Applicant, rendered the wall unsafe and liable to collapse into his garden. This crack had been caused by a large tree which had grown in the substation site and had undermined the wall. At some stage in 1990 the wall duly collapsed.
13. The Applicant asserts that at this time he made various attempts to ascertain who owned the substation site. He contacted, he says, the local council about the tree but was told that they could do nothing as it was growing on private land. He and his wife, he asserts, then contacted various people to try to trace the owner. I have seen various handwritten notes, which the Applicant asserts were made contemporaneously by his late wife, of her attempts to trace the owner. The Applicant asserts that these notes are accurate. If they are, then it appears that, in June 1990, the Applicant and his wife in addition to contacting Coventry City Council, contacted the EMEB, BT, HM Land Registry and Norwood Freeholds, which company owned the garage site apart from

the substation site. No one claimed ownership of the substation site. I have seen a letter dated 13th June 1990 from EMEB sent to Mrs Owen in which the Board assert that it had not owned the substation site since 1955.

14. Mr and Mrs Owen then consulted a solicitor, a Mr Heynes of Richards Heynes and Coopers, who advised them that they should “make safe” the land, fence it off and that they would then be able to claim ownership by way of adverse possession in 10 or 12 years’ time.

15. Following this, from mid to late June 1990, the Applicant and his wife, he says: removed the remains of the brick wall between the land and the front garden of 2 Knight Avenue (which had by that stage collapsed); cut down the tree; fenced off the entrance to the land from Knight Avenue with a 6 feet high close boarded wooden fence which was a continuation of the fence between the front garden of 2 Knight Avenue and Knight Avenue itself. The Applicant asserts that he regularly maintained this fence by, for example, treating it with creosote every year. Thus from 1990 and until the Respondent removed the Applicants fence in 2017, the only means of access to the land was via the garden of 2 Knight Avenue and the land was treated and cultivated as part of that front garden. During this period, and until the letter dated 7th December 2016 from Ms Wards solicitors, no one had ever challenged or disputed the Applicant’s occupation or use of the land and no one had ever asserted ownership of it.

16. I have seen a series of photographs, one taken in 2005 and others taken in 2016, which clearly show what the Applicant describes. They show the dark wooden fence which is about 6 feet in height (part of which remains on site today along the frontage of 2 Knight Avenue) enclosing the land on the Knight Avenue side and plants growing on the land. The photographs are taken from the front garden of 2 Knight Avenue. The

land is enclosed on three sides by the Applicants fence to the south, an existing brick wall on the eastern side and by the front of the substation on the northern side.

17. The Applicants wife died in November 2007 but he has continued to live in 2 Knight Avenue and to cultivate his garden. I saw myself, on the site visit, his vine and his various fruit trees. He is obviously a keen gardener and this is also clear from the photographs.

18. The Respondent however denies this all this. Its case is based on a Statement dated 10th January 2017 from Valerie Ward which is signed by her immediately below a statement of truth. In this statement she asserts that she had inspected the substation site (to which she refers as “the property”) “approximately five years ago” and:

“no adverse claims or fencing had been erected on any part of the property. I inspected the forecourt, and the access to the building to check everything was secure. If any person is making an adverse claim, by way of advised possession that possession was not evident five years ago.”

19. This leads the Respondent in its Statement of Case not only to put the Applicant to proof of his assertions but also to say:

“The Respondent’s case is that the Applicant only erected any fencing once he acquired knowledge of the sale of the adjoining development site in or around 2016.”

It is also asserted that the Applicant knew the identity of the owner of the substation site. Thus, the Respondent denies that the Applicant has had either factual possession or the necessary intention to possess the land for the requisite period.

20. In his Statement of Case the Applicant describes the assertion made by Ms Ward that there was no fence in place 5 years previously as “a total fabrication”.

21. In the meantime, the Respondent acquired the garage site, apart from the substation site, at auction on 15th September 2016. The land was described as “comprising 26 garages (mostly vacant/dilapidated)” and as having “potential for development”. The Respondent also acquired the paper title to the substation site from Ms Ward by contract and transfer dated 19th January 2017. It made its own application for first registration on 23rd January 2017.
22. As already stated, the Respondent’s interest in the substation site had caused correspondence to pass between the solicitors acting for it and those acting for Ms Ward. This eventually led to a letter being written by the latter dated 7th December 2016 addressed to “Owner/Occupier” of 2 Knight Avenue asserting ownership of the substation site and complaining about the erection of the fence. It requested removal of the fence “forthwith”.
23. Following its purchase of the garage site and the substation site, at some stage in mid-2017, the Respondent removed the Applicants wooden fence along the front of the substation site and erected its own new wooden fence along the Knight Avenue side of the land and along its boundary with 2 Knight Avenue. Thus, since that time, the land has been enclosed within the garage site as a whole with no access from 2 Knight Avenue.
24. Notice of the Applicants Application, which had originally been made in the wrong form on 4th January 2017, was served on the Respondent who objected in a letter from its then solicitors dated 4th July 2017.
25. On the site visit it was clear that the garage site and the substation site had been cleared of buildings (including the substation itself) and excavation had begun, presumably for the foundations of the new residential buildings for which the Respondent has obtained planning permission. One could see this as the substantial

brick wall which had separated the remainder of the garage site from 2 Knight Avenue had also, by that stage, been demolished (albeit no doubt to be replaced as part of the new development).

26. At the hearing the Applicant appeared and gave evidence. He confirmed to me the contents of both his Statement of Case and his form ST1 dated 30th December 2016, the contents of both of which I have summarised above. He added that in 1990 he and his wife had primarily been concerned with the safety and security of the substation site. Had they been able to find out who owned it in 1990 then they would have asked the owner to take steps to secure it. However, despite their efforts, they had been unable to find the owner, and they then took steps themselves to secure it. They fully intended to fence off the land from Knight Avenue so that it was only accessible from their property. Having fenced it off in 1990, they subsequently treated the land as part of their garden. He said that they had cleared it of ivy and the tree and, over the years, had cultivated various plants on the land: potatoes, wall flowers, parsley and peas as well as various potted plants. They had also maintained a buddleia plant as a natural screen.

27. The Applicant also called his next-door neighbour at 4 Knight Avenue, Francis Johnson. Along with his wife, he had signed a brief statement dated 25th July 2017. In this he said that he had lived next to the Applicant for 44 years, since 1973, and that he could confirm that the disused electricity sub-station was fenced off in approximately 1990 and that the forecourt of the sub-station had been incorporated into the front garden of 2 Knight Avenue since that time. Orally he confirmed the truth not only of his statement but also of the Applicant's Statement of Case and form ST1 (which he confirmed he had read). Having sat in court and listened to the Applicant give evidence he confirmed the accuracy of what the Applicant had additionally said in the

witness box. He added that the residents of the Avenue were very grateful for what the Owens had done in 1990 as, prior to that, the sub-station and its forecourt had been used as a dump and a lavatory and a vantage point for youths who were intent on causing trouble. He had, he added, been appalled by the way in which the Respondent had treated the Applicant.

28. The Applicant also asked me to read, and take into account, brief handwritten statements from other neighbours: Mr Biggs of 70 Terry Road (who had lived there in 1990); Mr and Mrs Cooper of 11 Knight Avenue (who had lived there since 1963); Mr King of 6 Knight Avenue (who had been there 12 years); Mr and Mrs Ferguson who had lived at 8 Knight Avenue between 1987 and 2017. All of these statements confirmed that the land had been fenced off by the Applicant as he has stated.
29. Against this, as stated, the Respondent relies on the statement of Valerie Ward which I have set out above. Its case, which it did not seek to put forward by attendance at the hearing before me, was as set out in its Statement of Case.
30. The law is well settled and uncontroversial. As the land is unregistered, the restrictions on acquiring title by adverse possession set out in sections 96 and 97 and Schedule 6 to the Land Registration Act 2002 do not apply. Sections 15 and 17 together with Schedule 1 to the Limitation Act 1980 apply.
31. Paper title being vested in the Respondent, the Applicant has to show that he has been in adverse possession of the land for at least a period of 12 years up until he was effectively dispossessed by the Respondent in mid-2017. Once 12 years adverse possession has occurred then, by section 17 to the 1980 Act, the paper title holder's title is extinguished.
32. As is well known, as a matter of law, the possession necessary to extinguish title and to found a claim based on adverse possession (legal possession) has two elements:

- a. A sufficient degree of physical custody and control (“actual possession”); and
- b. An intention to exercise such custody and control on one’s own behalf and for one’s own benefit (“intention to possess”).

See PYE V GRAHAM [2003] 1 AC 419 (at paragraph 40).

33. Each case of course depends on its own facts, however it is worth noting the decision in POWELL V MCFARLANE (1977) 38 P&CR 452 in which Slade J, albeit in the context of agricultural land, said this (at 477-8):

“There are a few acts which by their very nature are so drastic as to point unquestionably, in the absence of evidence to the contrary, to an intention on the part of the doer to appropriate the land concerned. The ploughing up and cultivation of agricultural land is one such act: compare Seddon v. Smith. The enclosure of land by a newly constructed fence is another. As Cockburn C.J. said in Seddon v. Smith “Enclosure is the strongest possible evidence of adverse possession,” though he went on to add that it was not indispensable. The placing of a notice on land warning intruders to keep out, coupled with the actual enforcement of such notice, is another such act. So too is the locking or blocking of the only means of access.”

Here of course, the Applicant claims both to have fenced off and cultivated the land.

34. An intention to possess is sufficient. It does not matter that the squatter does not intend to acquire ownership. All that is required is the actual and manifested intention to occupy and use the land as one’s own. In the PYE case Lord Hope (at paragraph 71) said this:

The important point for present purposes is that it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor. The word “adverse” in the context of section 15(1) of the Limitation Act 1980 does not carry this implication. The only intention which has to be demonstrated is an intention to occupy and use the land as one’s own.

35. It seems to me that, if I accept the Applicants evidence, then he clearly had the necessary legal possession of the land between 1990 and 2017. He enclosed the land within his garden by removing what remained of the former brick wall and erecting the close boarded wooden fence. He thus excluded everyone else from it. The only access thereafter was from the front garden of 2 Knights Avenue. After 1990 he

6

treated the land as part of his garden. He cleared it and grew various plants on it as set out above. Whilst initially in 1990 he was keen to find the owner of the sub-station site and would have been keen for that person to make the land safe, once he and his wife had been unable to find the paper title holder, they then determined to take possession of the land for their own benefit and to make use of it as their own. The fact that their primary aim, at least initially, was to make the land safe and secure does not seem to me to matter. They had the requisite intention. Besides, they knew from what their solicitor had said that, if they possessed the land long enough, then they could acquire title to it.

36. I unhesitatingly accept the evidence of the Applicant and his witnesses. The Applicant came across to me as a completely honest witness who was telling the truth. His evidence was supported by the various photographs to which I have referred and by the evidence of Mr Johnson who was also, in my view, an entirely truthful witness. I was particularly struck by his comment about how what the Applicant and his wife had done in 1990 was appreciated by his neighbours. This to me had the ring of truth to it. The evidence of the Applicant and Mr Johnson was in turn supported by the written statements from the other neighbours.

37. I reject the evidence of Valerie Ward as contained in her statement. It is contrary to all the other evidence and is not corroborated by anything else. Further, although she asserted that she had visited in or around 2012, I note that in the letter dated 22nd November 2016 her solicitors assert, in relation to the sub-station, that Ms Ward “*has never seen or entered this building*”. This statement, although perhaps taken out of context, might be said to be inconsistent with her subsequent assertion that she had seen the building and the forecourt on her visit in or around 2012. At any rate, she was

not called to give evidence before me and her statement could not be tested in cross-examination.

38. I add that I have seen the various “Google Earth” photographs presented by both parties. I have not found any of them helpful. The photographs which I have found helpful have been those provided by the Applicant and taken on various dates from the front garden of 2 Knight Avenue to which I have already referred.

39. In the circumstances I find that the Applicant, from 1990 onwards, had both the necessary factual possession of the land and the requisite intention to possess it. He was thus in adverse possession of the land from 1990 until he was ejected by the actions of the Respondent in mid-2017. However, by that stage, Ms Ward’s title had long been extinguished as a result of the Applicant’s adverse possession such that, in respect of the land, she had no title to convey to the Respondent in 2017.

40. As such I will direct HM Land Registry to allow the Applicants application for first registration of the land, which is the land tinted blue on the notice plan dated 16th June 2017, and which has been allocated provisional title number MM82026.

41. I will also direct HM Land Registry to dismiss the Respondents application for first registration insofar as it concerns the same land.

42. If either party wishes to make any representations about costs, then they should do so in writing within 14 days of receipt of this Decision whereupon I give notice that I will make any further decision in writing and without a hearing. If I do not hear from either party within that period then I will make no further order.

BY ORDER OF THE TRIBUNAL

DAVID HOLLAND QC

David Holland

Dated this 17th December 2018

