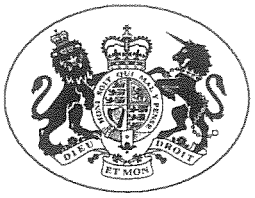


[2019] UKFTT 0593 (PC)

REF/2018/0709

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

(1) BRENDA PALLETT
(2) MICHAEL MAHONEY

APPLICANTS

and

BROXBOURNE BOROUGH COUNCIL

RESPONDENT

Property Address: Land at Baas Hill, Broxbourne

Title Number: HD564313 & HD442184

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

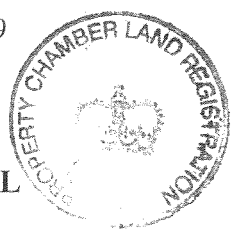
On: 17-19 July 2019

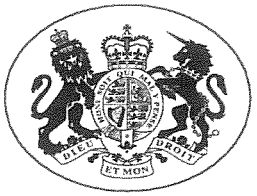
O R D E R

IT IS ORDERED THAT the Chief Land Registrar shall cancel the Applicants' application in Form ADV1 dated 12th May 2017

Dated this 27th day of August 2019
Owen Rhys

BY ORDER OF THE TRIBUNAL





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Applicant representation:	Mr Richard Clarke of Counsel (Direct Access)
Respondent representation:	Mr Richard Eaton Solicitor-Advocate of Birketts LLP

D E C I S I O N

Introduction

1. By an application in Form ADV1 dated 12th May 2017, the Applicants applied to be registered as the proprietor of a parcel of land comprised within the Respondent's title HD442184 ("the Council Land"), on the basis of claimed adverse possession. The Respondent objected to the application by returning

form NAP, but it did not seek to rely on any of the conditions under paragraph 5 of Schedule 6. The dispute was referred to the Tribunal on 20th August 2018. The Council Land was first registered to the Respondent on 15th June 2005. The Applicants have also made a second application, in Form AP1, also dated 12th May 2017, to alter the title to the Council Land to remove from it the disputed land, on the grounds of mistake. They contend that the paper title to the disputed part of the Council Land had already been barred by 15th June 2005, and therefore the Council cannot have acquired a title to it. However, the AP1 application has not been progressed by the Land Registry, pending the outcome of these proceedings.

2. The Respondent acquired the Council Land by a Transfer of Part dated 19th May 2005 made by George Wimpey (North London) Limited ("Wimpey") out of its title HD338588. Wimpey were the developers of a housing estate lying to the north and west of the Council Land, and it took covenants from the Respondent for the benefit of its retained land. In particular, it took a covenant from the Respondent not to use the Council Land *"for any purpose whatsoever other than as a public open space in perpetuity in accordance with the provisions of the Open Spaces Act 1906*". The housing estate is developed around a central spine called Pulham Avenue, and I shall refer to it as the "Pulham Estate"). The Council Land consists of an elongated rectangle of open land to the north of the road known as Allard Way, that effectively forms a barrier between the intense development of the Pulham Estate to the west and the older and more established residential area lying to the east. Allard Way terminates in a turning area, and a public footpath runs in a straight line north to join Norris Way. The Council Land is bounded by the footpath to the east and the rear garden fences of the houses on Pulham Estate to the west. To the north, the Council Land adjoins a much larger area of open land also in its ownership. This was transferred to it by a Transfer dated 30th June 1995 and made by Redland Aggregates Limited ("Redland"). Redland were the owners of development land in the vicinity (including the land now comprised in the Pulham Estate) and it would appear that this transfer of open land was made as part and parcel of the overall development plan for the area. It is common ground that this land forms part of the "Lucy

Warren Open Space". However, one of the issues in this case is whether, and if so to what extent, the disputed land also forms part of the Lucy Warren Open Space. I shall consider this point in due course.

3. Before describing the history of these parcels, I should point out that the land subject to the reference to the Tribunal occupies a smaller area than that which had been claimed in the statutory declaration supporting the ADV1. The land claimed by the Applicants was coloured red on the plan "BCP1" exhibited to the Ms.Pallett's statutory declaration ("the Plan"). I shall refer to it as the "Red Land". Other parcels of land – namely the Green, Blue and Orange Land as described in the following paragraph – were also identified by that colouring in the Plan. However, the Land Registry notice plan, which is referred to in the Case Summary, identifies the disputed land which is the subject of this reference ("the Disputed Land") by blue colouring, and places the northern boundary some way short of the position shown on the Plan. The explanation lies in the fact that the Land Registry plan is drawn to show the actual position of the post and wire fence erected by the Applicants across the northern boundary of the Disputed Land, which is some way south of its position shown on the Plan.

4. The Applicants are the owners of three titles which adjoin or are close to the Disputed Land. First, the house known as "Higher Drift", together with its grounds, registered under title HD184921. The entrance to Higher Drift is at the north-western end of Allard Way. Second, two separate parcels of land together registered under title HD275646. One parcel of land ("the Green Land"), roughly square in shape, lies immediately to the west of Higher Drift and now forms part of its garden. The other parcel ("the Orange Land") is roughly triangular in shape, and is bounded to the east by the footpath running north of Allard Way, to the south by Higher Drift, and to the west by the Disputed Land and title HD513879 which is known as "the Blue Land". The Blue Land forms an elongated L-shaped parcel, adjoining the northern boundary of Higher Drift and then running northwards along the western boundary of the Orange Land. Its northern boundary abuts the southern boundary of the Disputed Land claimed by the Applicants in these proceedings.

5. The history of the Applicants' titles is as follows. Higher Drift was first acquired by Ms Pallett's father in 1955, and first registered in 1985 in the names of the Applicants and Hilda May Ellick, now deceased, Ms. Pallett's mother. HD275646 – the Green Land and the Orange Land – were transferred to the Applicants and Ms. Ellick in 1989 by virtue of a consent order made in possession proceedings brought against them by Redland. At the same time and as part of that agreement they entered into a Lease from Redland dated 5th March 1990 ("the Redland Lease"), whereby it demised to them *"all that land and buildings known as Broxbournebury Riding School, Allards Way, Broxbourne..."* The demised premises were shown *"for the purpose of identification only"* on Plan 1 annexed to the Redland Lease. The context within which the Redland Lease was made, is that the Applicants and Ms. Ellick had claimed that they had acquired title by adverse possession to the Green Land and the Orange Land and it seems all the land comprised in the Redland Lease. The land subject to the Redland Lease has been referred to in these proceedings as the "Grazing Land" or "the Riding School Land". It was determined by break clause in December 1994. The Blue Land previously formed part of the Council Land. However, in 2011 Ms. Pallett made an application to the Land Registry in form ADV1 for a possessory title of the Blue Land, based upon alleged adverse possession. The facts relied on in support of the application were set out in a Statement of Truth. The application succeeded, and she was registered with a possessory title on 4th January 2012. In evidence, Mrs. Boateng, the Respondent's Head of Legal Services, said that there was no record in the Respondent's files of any notice having been received from the Land Registry at the time of this application. Whether or not notice was served, however, the fact remains that Ms. Pallett obtained a registered possessory title to the Blue Land with effect from January 2012.

The physical appearance of the disputed land.

6. The Disputed Land is fenced on all four sides. To the east is a substantial wooden panel fence, running diagonally south-west from the footpath (to the north of Allard Way) and joining the northern boundary of Higher Drift. This fence encloses the Disputed Land to the west and divides it from the Orange Land. To

the south is another wooden fence that divides it from the Blue Land. There is a gate in this fence giving access from the Blue Land to the Disputed Land.. To the west is a substantial wooden panel fence which is the rear garden fence forming the boundary of the property known as 73 Pulham Avenue, owned and occupied by Mr. and Mrs. Barnes, who gave evidence. The northern boundary is formed by a post and wire fence ("the Wire Fence") that runs across the top of the Disputed Land from the fence enclosing the Orange Land west to intersect with the Barnes's fence. There are a number of mature trees and shrubs on the Disputed Land, which has the appearance of natural woodland. To the north of the Wire Fence there are more shrubs and mature trees, and a series of newly planted saplings protected by cylindrical containers. From the edge of these saplings northwards is an area of mown grass, which forms part of the Council Land. This extends northwards alongside the footpath and runs into the much larger piece of open land at the northern end of the Pulham Estate. The Orange Land contains a shed and is kept as a chicken run. It has a beaten earth floor and various enclosures. There are sheds and a wood store on the Blue Land.

The issues.

7. The principal issue in the case is whether the Applicants have been in adverse possession of the Disputed Land for a continuous period of 10 years ending at the date of the application, namely 12th May 2017. They must therefore prove that they have been in adverse possession since 12th May 2007 at the latest. There are two sub-issues, which are relevant to the claim. First, the extent of the land demised by the Redland Lease. If the Disputed Land was demised to the Applicants in a Lease expiring on 31st December 1994, the earliest date on which the period of adverse possession could start was 1st January 1995. Although that provides a sufficient period for the purposes of claim under Schedule 6 of the Land Registration Act 2002, it would clearly not allow sufficient time for a claim to be made under the transitional provisions of the 2002 Act, for a period expiring on 13th October 2003. However, the Applicant contends that the Disputed Land was excluded from the Redland Lease, and on that basis has made the AP1 application, contending that the registration of the Council was made in error since the paper title had been barred before 13th October 2003. Strictly, for the

purposes of the ADV1 application, and this reference, I do not need to decide this issue, although it would obviously be helpful to the parties and the Land Registry to do so. Furthermore, a finding as to the land demised by the Redland Lease will have a bearing on the credibility, or at least reliability, of the Applicants' evidence of adverse possession. It is their case that the Red Land, together with the other parcels of land I have referred to, have been in the exclusive and undisturbed possession of the Pallett family since 1962, it was fenced separately from the Riding School Land and did not form part of the land demised by the Redland Lease. Second, the Respondent contends that the whole of the Council land, including the Disputed Land, is public open space, subject to various bye-laws. These bye-laws render certain claimed activities by the Applicants on the Disputed Land – such as the erection of fences, and the burning of fires – illegal. As such, the Respondent argues, these acts cannot form the basis of a claim to adverse possession.

Adverse possession – the law.

8. There is no real controversy between the parties as to the requirements of a claim to adverse possession. A person seeking to establish a title by adverse possession must prove two things: (a) exclusive factual possession, and (b) an intention to possess. Both these phrases have, fortunately, received considerable judicial exposition, most notably in the first instance case of Powell v McFarlane (1979) 38 P & CR 452 and the decision of the House of Lords in JA Pye (Oxford) Ltd v Graham [2002] UKHL 30 which adopted much of the reasoning in Powell's case. As to exclusive factual possession, the following passage (taken from Powell v McFarlane at 470-471 and approved in Pye v Graham at para.41) is definitive:

"(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. .... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

9. The second element to be proved in an adverse possession claim is the requirement of an intention to possess. This is perhaps a more difficult concept to define, but fortunately the authorities mentioned above also contain helpful guidance. These passages from Powell v McFarlane are particularly helpful:

> "What is really meant, in my judgment, is that, the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow..... The question of animus possidendi is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner. A number of cases illustrate the principle just stated and show how heavy an onus of proof falls on the person whose alleged possession originated in a trespass." (at pages 471-472)
>
> In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner. The status of possession, after all, confers on the possessor valuable privileges vis-a-vis not only the world at large, but also the owner of the land concerned." (at page 476)
>
> "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. The plaintiff however, did none of these things in 1956 or 1957. The acts done by him were of a far less drastic and irremediable nature. What he did, in effect, was to take various profits from the land, in the form of shooting and pasturage, hay and grass for the benefit of the family cow or cows and goat, and to effect rough repairs to the fencing, merely to the extent necessary to secure his profits by making the land stockproof. On many days of the year neither he nor the animals would have set foot on it. These activities, done, as they were, by a 14-year-old boy who himself owned no land in the neighbourhood, were in my judgment equivocal within the meaning of the authorities in the sense that they were not necessarily referable to an intention on the part of the plaintiff to dispossess Mr. McFarlane and to occupy the land wholly as his own property. At first, surely, any objective informed observer might probably have inferred that the plaintiff was using the land simply for the benefit of his family's cow or cows, during such periods as the absent owner took no steps to stop him, without any intention to appropriate the land as his own.

In these circumstances the burden must fall fairly and squarely on the plaintiff affirmatively to prove that he had the requisite intent in 1956–57. I adopt the approach followed in Convey v. Regan, an Irish decision to which Mr. Wakefield, on behalf of the second defendant referred me. Black J. said :

> "The basis of the principle seems to be that when a trespasser seeks to oust the true owner by proving acts of unauthorised and long continued user of the owner's land, he must show that those acts were done with *animus possidendi*, and must show this unequivocally. It is not, in my view, enough that the acts may have been done with the intention of asserting a claim to the soil, if they may equally have been done merely in the assertion of a right to an easement or to a *profit à prendre*. When the acts are equivocal—when they may have been done equally with either intention—who should get the benefit of the doubt, the rightful owner or the trespasser? I think it should be given to the rightful owner." (at pages 477-478)

The Applicants' evidence

Ms. Pallett

10. In the Statutory Declaration made on 12th May 2017 ("the 2017 Declaration"), lodged in support of the ADV1 application, Ms. Pallett set out the facts upon which she relied. She exhibited the plan (BCP1) to which I have already referred, on which she had identified the parcel of land in dispute, and the other parcels of which she was proprietor. The land subject to the claim for adverse possession is coloured red and referred to as "the Red Land", and is registered in the Respondent's name under title HD442184. Higher Drift, registered as HD184921, is the "Green Land". Land which she acquired with possessory title under HD513879 is the "Blue Land". The land acquired as part of the

compromise of the possession proceedings brought by Redland Aggregates Ltd, registered under HD275646, is the "Orange Land". In the 2017 Declaration, she describes the Blue Land and the Disputed Land as "*the chicken garden*". She says: "*We have confined [sic] to use the said Red Land title number HD442184 which is fenced to keep our chickens in and predators out and is included as part of my garden and always treated as my own land and in the belief that it was my own land. The exact boundary between the adjoining land to Orange land has never been determined.*" At paragraph 10 of the she itemised the acts of possession relied upon. These are: "*Fenced and gated by the proprietors of Higher Drift from December 1989. Put on a water supply pipe from Higher Drift over the Orange land for the benefit of water for Chickens and watering existing trees and newly planted trees installed by myself and Mr Michael Mahoney. Established bonfire site always used to burn surplus garden materials. Made and using a compost enclosure. Stored sand and garden implements. Planted over a period from December 1989 to date (28 years) Malayou Stone Pine, Crab Tree, Privet, Hawthorn, Blackthorn, Cherry. Used the adjoining Red Land in conjunction with the Orange land in which to keep the Free Range Chickens.*"

11. In their Statement of Case, the Applicants state that "*The [Red Land] was originally fenced in 1962 using post and wire and chain link fencing. It was maintained throughout the years and when the Applicant entered the riding school lease for the grazing land in 1990 the fences were renewed and strengthened to prevent horses from entering the garden area..... From the entire period from 1962 up to the present day the only access and entrance to the red land has been through the gate attached to Higher Drift.....*" Under the heading "*Acts of Possession*", the Applicants said this (at paragraph 11): "*Since 1962 all activities on the red, orange and blue land has been on one area of land ..... and in 1962 the Applicants enclosed the outer boundary to all the land using fencing posts, wire and chain link fencing for the benefit of Higher Drift.*" In paragraphs 12 to 16, the Applicants repeat the acts of possession referred to in paragraph 10 of the 2017 Declaration, but adding a further item (at paragraph 17) as follows: "*In or about late 2012 the Applicants replaced the polytunnel used for growing seedling flowers and vegetables stored bags of compost, flower pots,*

small tools and chicken food containers in the tunnel." Various photographs of "*the area of land*" were attached to the Statement of Case. Most of these photographs are views of the Blue and Orange Land.

12. As I have mentioned, in December 2011 Ms. Pallett had applied to be registered with a possessory title to the Blue Land. This application (also in Form ADV1) was supported by a Statutory Declaration made on 29th December 2011 ("the 2011 Declaration"). There was attached to the 2011 Declaration a coloured plan, identical to the Plan, save for the omission of the Red Land. At paragraph 8 of the 2011 Declaration, she stated that all registered proprietors of Higher Drift had made use of the Blue Land *"both prior to and following its registration in 15 June 2005 in favour of Broxbourne Council"*. In paragraph 9 she continued as follows: "*Such use continues to date and [the Blue Land] has always been used as an adjunct to Higher Drift, the said orange land HD275646. When the [Redland Lease] expired in December 1994 we continued to use the [Blue Land] which was always fenced both to keep horses out of the garden and to keep household pets within. I always included it as part of my garden. I always treated it as my own land and in the belief it was my own land."* In paragraph 10 she adds further details of the alleged user, stating that: "*We ..... erected a 6 foot panel fence around it in 1996..... The said garden strip HD442184 was always fenced and we excluded all others land it was gated to the front and rear and we installed security lighting and CCTV cameras*."

13. The 2011 application for possessory title was successful, and Ms. Pallett (Mr. Mahoney was not an applicant) was registered as proprietor with effect from January 2012. Mrs. Boateng, the Respondent's Head of Legal Services, gave evidence, in which she said that there was no record of any Notice having been served on the Council by the Land Registry. It appears certainly that no objection to the application was received, and the application was therefore uncontested. By 2017 the Council was certainly aware that Ms. Pallett had obtained possessory title to the Blue Land – the letter from Ms. Pallett to the Respondent dated 28th June 2017 refers. However, none of the documentation relating to the application had been disclosed by the Applicants. Ms. Pallett said in cross-examination that

she no longer held any of these documents and could not therefore disclose them. However, shortly before the hearing the Respondent was able to obtain such disclosure from the Land Registry itself, and applied to adduce that evidence at the hearing. I allowed the application, and the material, including the Form ADV1 and the 2011 Declaration, formed part of the evidence before me.

14. Mr. Eaton, for the Respondent, cross-examined Ms. Pallett on the 2011 Declaration, and in particular on the fencing of the Blue Land at the time of the 2011 application. She was asked to confirm that the Blue Land was fenced on its northern boundary – that is, between the Orange Land and the fence which encloses the Pulham Estate (the rear of 73 Pulham Avenue). She did confirm this. It was put to her that this meant that the Blue Land was fenced off from the Disputed Land, which was contrary to her evidence that the Blue, Disputed and Orange Land were always treated as one combined part of the Higher Drift garden. Her response was that the application made in 2011 was intended to include the Disputed Land, that the plan was a mistake and that it should have shown both the Blue and Disputed Land. The fence was on the northern boundary of the Disputed Land, not the Blue Land. She said that she had entrusted the 2011 application to a "friend" and this person had evidently got her instructions wrong.

Mr .Mahoney

15. Mr. Mahoney signed the Applicants' Statement of Case, although the statutory declarations in support of the ADV1 were made by Ms Pallett alone. He made two further joint statements, and a final statement in response to a second witness statement by one of the Respondent's witnesses, Mr. Barnes, essentially disagreeing with his evidence.

16. In cross-examination he accepted that Ms. Pallett had a much better knowledge of the history of the land than him. He was in full-time work until 2007. He had nothing to do with the 2011 application in relation to the Blue Land. He said that there was a three-strand barbed wire fence all around the Disputed Land when the riding school was in use, to prevent the horses from lying on the fence.

Mr. Levey:

17. He recalled that the riding school was fenced, with a post and wire fence all around the gallops. He said it followed the red line drawn around the riding school in the Lease plan at p.157. He was shown the photograph at p.208 and asked if the fencing looked like the Orange Land fence. In re-examination he said that the fence enclosing the Riding School Land was on the right hand side of the Disputed Land – i.e where the diagonal wooden fence enclosing the Orange Land now stands.

Mr. Jaques:

18. He was involved with the 2011 adverse possession application, since he took the 2011 Declaration from Brenda Pallett. Initially he said he had been to the Disputed Land "a few times". Subsequently, he said that he became friends with the Applicants and went to Higher Drift regularly, but did not actually enter the Disputed Land. He said the Disputed Land was always fenced with a wooden fence. He did not remember a post and wire fence.

Mr. Townsend:

19. In his witness statement he says he has known the Applicants for 43 years. He kept 5 ponies at their riding school until 1994 when it closed. He has continued to visit their property as a friend. He has used the garage at Higher Drift and stored his trailer there. He says that he is "*very familiar with the "Land" and can confirm it was always fenced and included as part of the Applicants' garden at Higher Drift*". He said that he did not go onto the Disputed Land when he visited Higher Drift. He kept a trailer on the Green Land (i.e the main part of Higher Drift").

Mr.Wheeler:

20. He is a neighbour at Shieling in Allard Way. He wrote a letter in which he stated that: "*We have lived in the house opposite for 25 years and can confirm that the residents of Higher Drift have looked after that piece of land for the entire time that we have lived in Allard Way and as far as I am aware the land is inaccessible to the public.....*" He was asked in cross-examination what land he was referring to. He said it was the land to the right of Higher Drift and to the left of

the bridle path. He was shown the photograph at p.206 of the Bundle. He said that the fence has been reinforced in recent years, originally chain link fence but now a wooden fence, by which he must have been referring to the Orange Land fence. His dogs used to sniff up against the fence. In re-examination he did say that there was a fence enclosing the Disputed Land.

Mr. Bond:

21. He had originally written a letter, in which he says that: "*Brenda Mahoney [sic] .... has used and looked after the wedge shape piece of land to the north of her house for as long as we have lived in Allard Way...*" In cross-examination he was asked to be more specific. He said that it was the land "*inside the wooden fence – its wooden now.*" He also said that there used to be a chain fence where the Red and Blue land met and barbed wire where the horses were kept. He went on to say that the Blue and the Red land was the wedge-shaped land referred to. He was very confused about the location of the fences, and at one point said that the chain link fence was replaced by the wooden fence. He also said that there were two fences, both wooden. He was shown a photograph of the Applicants standing next to the existing post and wire fence that now runs across the front of the Red Land. He was unable to say how long that fence had been there.

The Respondent's evidence.

22. Evidence was given by three neighbours of the Applicants – Mr. and Mrs. Barnes, who live at 73 Pulham Avenue, and Mr Gladwell, who lives at 75 Pulham Avenue. 73 Pulham Avenue backs directly onto the Disputed Land, 75 Pulham Avenue backs onto the Blue Land. Evidence was also given by various employees of the Respondent, namely (a) Mrs. Boateng, Head of Legal Services, (b) Mr.. Renouf, Green Spaces manager, and (c) Mr Whalley, grounds maintenance operative.

Mr. Barnes.

23. He and his wife have lived at 73 Pulham Avenue since 2005. He has a direct interest in the outcome of these proceedings since he has agreed a price to purchase the Disputed Land from the Respondent, which has engaged the statutory notification procedures applicable to the disposal of land held as open space. His evidence is that he did not notice any activity by the Applicants on the

Disputed Land until 2016 at the earliest. No fence was erected until approximately April 2017. He recalled that in 2012 he replaced his rear garden fence (forming the western boundary of the Disputed Land) along its entire length. The contractors deposited the dismantled fence panels on the Disputed Land – in cross-examination he recalled that they re-used them (presumably on the Applicants' instructions) to create the fence which still stands along the western boundary of the Orange Land. Mr. Barnes himself went onto the Disputed Land to strengthen the fixings between the posts and the fence panels, since he was concerned about security to his property. He first noticed activity on the land in 2016 – the Applicants burnt two bonfires and placed a roll of wire fencing and a large terracotta pot on it. Activity increased in the early part of 2017, with Mr. Mahoney planting some trees, and clearing some of the scrub and undergrowth from the land, which caused him great concern since it exposed his garden fence with the attendant security risk. Installation of the wire fence that now runs across the northern end of the Disputed Land began in or about April 2017.

Mrs. Barnes

24. Mrs. Barnes confirmed her husband's evidence. She referred to a specific occasion in late 2015 when she noticed Mr.. Mahoney lighting a bonfire on the Disputed Land. She was concerned that it was too close to her property and tried to attract his attention through her bedroom window but he did not hear. He left the fire unattended, and she was so concerned that she went down onto the Disputed Land to check the fire. There was no fence and no obstruction to entry at that time.

Mrs. Boateng

25. She had no direct knowledge of the Disputed Land and the Applicants' activities on it. Her evidence was mainly directed to the status of the Council Land and whether or not the Disputed Land was comprised within the Lucy Warren Open Space. It was her evidence that there was no definitive plan of the open space, but she understood the open space to include everything shown on the registered title plan as included within HD442184. The entire title was subject to a covenant to use the land as an open space and it was this covenant which determined the nature of the land.

Mr. Renouf

26. He is the officer responsible for managing the Council's open space, including the Council Land. He says that he has personal knowledge of the Disputed Land and would visit it perhaps once per year. He did not notice any fencing or other activity by the Applicants on the Disputed Land over the years. In 2017 a member of his team, Mr. Rivett, drew to his attention that a wire fence had been erected to enclose the Disputed Land. His staff are trained to look for "*Land grabbing or encroachment*" but nothing of that nature was reported until then.

Mr. Whalley

27. Mr. Whalley has since 2015 been part of the team that looks after the 54 parks and open spaces that are within the Council's ownership, including Lucy Warren Open Space. His main duty is to mow the grass. His recollection is that the first time that he noticed a fence on the Disputed Land was in 2017. This was a single strand of wire fence. He also noticed that some trees and shrubs had been planted. Prior to this time he did not see or hear any chickens on the Disputed Land.

Mr. Gladwell

28. Mr.. Gladwell has since 2000 lived at 75 Pulham Avenue, which lies to the north of Higher Drift, his rear garden fence backing onto the Blue Land. His evidence was that when he first moved there, an alleyway ran along the back of his property, leading to the open land– i.e the Council Land. He recalled an occasion when his cat had gone missing, and in the course of collecting it from the alleyway he had walked from the open space at the north of Allard Way and entered the alleyway. There were no gates or fences to impede him. On a later occasion, possibly in 2013, he recalled that Mr. Mahoney had mentioned to him that he was proposing to plant some bamboo along the south side of Mr. Gladwell's garden fence. He readily agreed to it, believing that it would enhance security (as a police officer that was a matter of which he was very mindful). He remembered wondering what had happened to the right of way but gave it no further thought.

29. In addition to the witnesses who gave "live" evidence, the Respondent also relied on statements from Maureen Peel, David Gaze and Nicolas Rivett.

Assessment of the evidence.

30. The principal evidence in support of the application is that of the Applicants themselves. Although other witnesses were relied upon, their evidence either contradicted the Applicants' or was vague or equivocal. Perhaps understandably, as friends or neighbours of Ms. Pallett, they were anxious to assist her. However, under cross-examination they displayed considerable confusion as to the area of land which Ms Pallett was claiming. Some of their difficulties arose because their very brief statements or letters simply referred to the land claimed by Ms. Pallett, without identifying its features or boundaries. When they were asked to be specific their evidence appeared to relate more to the Blue and Orange Land rather than the Disputed Land. None of them had any firm recollection of the existence of a wire fence to the north of the Disputed Land in its present position.

31. The present application was supported by a number of statutory declaration and witness statements by Brenda Pallett. I think it is fair to say that although she and Mr. Mahoney are co-Applicants, and both signed the Statement of Case, the main evidence in support of the application was given by her. It is in that context that 2011 Declaration is so damaging to her credibility. If that statutory declaration is taken at face value, it seriously damages the current application, and casts doubt on her overall credibility. As she confirmed, she claimed in 2011 that the Blue Land was fenced off from the Disputed Land. If that is right, the Disputed Land cannot possibly have been treated as part of her garden, indistinguishable from the Orange and Blue Land. It was fenced outside the Higher Drift garden land. Her only explanation for this manifest contradiction is that the 2011 application should have included the Disputed Land, and its omission was a mistake. The 2011 Declaration would then have stated not that there was a wooden fence to the north of the Blue Land, but that the Blue Land and the Disputed Land were enclosed by the same fence.

32. I cannot accept this explanation as being at all credible. The 2011 Declaration was detailed and quite unequivocal, with a plan (annotated by Ms. Pallett herself)

which clearly identifies the Blue Land. The Disputed Land is manifestly not included in the application. Furthermore, the activities relied upon as demonstrating factual possession of the Blue Land could not possibly have applied to the Disputed Land – for example, the installation of CCTV, and security lighting. Furthermore, she declared that the Blue Land was enclosed by a 6 foot wooden panel fence – whereas her case is that the Disputed Land was enclosed to the north by a post and chain link fence. Nor is there any reference in the evidence in support of the present application to suggest that the Disputed Land had been omitted from the 2011 application by mistake, which, if that had been the case, would have been the natural thing to do. I regret to say that the obvious conclusion to be drawn from the inconsistency between the 2011 Declaration and the 2017 Declaration is that Ms. Pallett's evidence cannot be relied upon. It is very likely that she no longer retains copies of the documents supporting the 2011 application, which explains the failure to disclose them. She had no doubt forgotten what she had previously said.

33. It may also be noted that her depiction of the area included in her application – the Disputed Land shown on the Application Plan – is materially different from the actual area enclosed. A comparison of the Land Registry notice plan with the Application Plan shows that the Disputed Land extends farther north than the land coloured blue on the notice plan. This discrepancy should have been obvious when she came to make the 2017 Declaration and prepare the Application Plan, which shows the northern boundary of the Disputed Land, purportedly enclosed by the post and wire fence, to run into the apex of the Orange Land. In reality, the existing post and wire fence terminates some way south of the northernmost point of the Orange Land fence. At the very least this demonstrates that Ms. Pallett was prepared to sign a statement of truth without regard to accuracy. Furthermore, since the Applicants' witnesses made their statements by reference to the Application Plan, it also calls into question the accuracy of their recollection.

34. As to the Respondents witnesses, the quality of the evidence was somewhat variable. Mr and Mrs Barnes were the witnesses who had the most reason and were best placed to observe the Disputed Land, and the Applicants' activities on

it. Their house backs onto it, and it is clearly visible from the upper floor. Of course I take on board that they have a personal interest in the outcome of the application. If the Applicants succeed, that would prevent them from acquiring the site from the Council. However, I found them both to be impressive witnesses. They answered the questions put to them in a measured and thoughtful way, and did not exaggerate. They appeared to have a very clear recollection of the appearance of the land, and given their proximity to it I have no doubt that they would have noticed the erection of a fence and other activities relied on by the Applicants, such as keeping chickens, if they had occurred on the Disputed Land before 2016. For the same reason they would have been aware if the Applicants had been in the habit of lighting bonfires. Mrs Barnes's reaction in late 2015 when she was disturbed by a bonfire on the Disputed Land suggests to me that this was the first time that she had been aware of a bonfire which casts considerable doubt on Mr Mahoney's evidence in particular. Equally, Mr Barnes's evidence that he walked round the back of his fence in order to fix extra metal straps to the posts was compelling. The Applicant's suggestion that this could have been done from the other side of the fence, by climbing up on a ladder and hanging over the Disputed Land, is palpably absurd. I am satisfied that the evidence of Mrs and Mrs Barnes was reliable and I have accepted it in full.

35. The evidence given by Mr. Whalley, one of the Council's team with responsibility for the maintenance of the Lucy Warren Open Space, was problematic in some respects. He was quite vague with regard to the occasions that he actually went onto the open space, and his recollection of the site of the Disputed Land was somewhat confused. However, there had clearly been occasions during 2015 and 2016 when he had cut the grass up to the edge of the wooded area, and he would have been able to see if a fence was in place. The fact that he did not notice one until 2017 suggests that no fence was in place.

36. The evidence given by Mr. Renouf was not seriously challenged. He had visited the site annually, and was clearly familiar with it since he had noticed some of Mr. Mahoney's recent planting. Given his position, and the fact that he was aware of "*land grabbing and encroachment*" on Council land, it seems quite improbable that he would not have noticed the Applicant's fence across the

Disputed Land if it had been erected prior to 2017. Equally, if a sign had been installed identifying the Disputed Land as private property it is inconceivable that he would not have reacted.

37. Mr. Gladwell's evidence was particularly interesting. He can be regarded as an independent witness. He was quite unscathed by Mr. Clarke's manful cross-examination, and I regard him as a wholly truthful and reliable witness and I accept his evidence, which is seriously damaging to the Applicants' case as regards the Disputed Land. Clearly, if he was able to walk unimpeded through from the Council Land to the rear of his property, the Disputed Land cannot have been fenced as the Applicants claim. His evidence is also entirely consistent with and provides an explanation for the original boundaries of HD442184. The "alleyway" was shown as the narrowing strip of land running along the back of 73,75 and 77 Pulham Avenue, leading into the open space adjacent to Allard Way. Unfortunately, his evidence necessarily casts considerable doubt on the credibility of the 2011 Declaration which led to Ms. Pallett's registration with title to the Blue Land. The alleyway occupies the Blue Land, or most of it, and was clearly not enclosed by Ms. Pallett "*a few years after*" Mr. Gladwell moved in to his property (in 2000), when he went in search of his cat. An application for possessory title in December 2011 could only have succeeded on the basis of at least 10 years' adverse possession prior to that date. Given Mr. Gladwell's evidence, that does not seem possible.

Conclusions on the evidence

38. I conclude that the activities relied on by the Applicants in support of the claim did not begin prior to 2015. I reject the evidence given by the Applicants and their witnesses to the extent that it refers to activities taking place on the Disputed Land prior to 2015 or thereabouts. The main fact relied on, the enclosure of the Disputed Land by the Wire Fence, did not occur until 2016 or 2017. This was a two-stage process, with a more temporary fence being erected initially, followed by the more permanent fence that now exists. It seems that the Applicants began to set up a claim to adverse possession of the Disputed Land – lighting bonfires, planting trees and shrubs (some of which are in fact outside the Disputed Land but within the Red Land), placing a compost heap on it, erecting a "Private" sign

– probably in or around 2015. These activities accelerated, culminating in the installation of the Wire Fence in 2017, perhaps in reaction to Mr Barnes's attempt to buy the land from the Council. On any footing, however, they had not been in exclusive factual possession of the Disputed Land for 10 years prior to the lodging of the ADV1.

The area of the demised premises under the Redland Lease.

39. In my judgment, and having regard to the evidence of the situation on the ground at the date of the Redland Lease and the plans attached to it, it is clear that the Disputed Land was included within the Demised Premises. I have rejected the Applicants' evidence that the Disputed Land had until very recently been fenced off from the Council Land (which formed part of the Riding School Land). The Redland Lease plan is entirely consistent with the position of the western boundary of the Orange Land and the northern boundary of Higher Drift. It is fanciful to suggest that the Red Land was in some way excluded from it. It follows that the Applicants were the lessees of demised premises which included the Disputed Land.

The extent of the public open space

40. Mr. Clarke, for the Applicants, submits that there is no evidence that the Disputed Land is included within the Lucy Warren Public Open Space. He says that there is no plan which purports to show the limits of the open space, apart from the plan (at p.139). This appears to exclude the Disputed Land. He submits that it is incumbent on the Respondent, since it has made bye-laws relating to the Lucy Warren Open Space which potentially criminalise certain activities, to prove that the Disputed Land forms part of the open space. Mr. Renouf was cross-examined on this plan. He explained that it had been drawn up for the purposes of putting the maintenance contract out to tender, and had no significance beyond that. Mrs. Boateng confirmed that there was no separate plan of the Lucy Warren Open Space, beyond the Land Registry title plan relating to HD442184. It was her view that the limits of the open space were defined by the restrictive covenant limiting the use of HD442184 to use as public open space, and, therefore, that the title plan was the only plan defining the area. I agree. There is no requirement on a local authority to keep a separate register or plan of its open spaces. The

Council Land is obviously accessible by the public, and its physical boundaries are perfectly apparent on the ground, since (certainly at the southern end where the Disputed Land is situated) it is bounded on all sides by substantial fencing. The Disputed Land forms part of a belt of woodland which surrounds the open area but it is also accessible by the public and no reasonable bystander could conclude that it was anything other than part of the same open space.

41. However, since I have held that the Applicants have not been in adverse possession of the Disputed Land for the required period, it is not necessary to consider the illegality issue raised by the Respondent. That spares me from the necessity of attempting to apply the guidance given in Best v Chief Land Registrar [2015] EWCA (Civ) 17, with regard to cases such of this where some of the activity relied on may be illegal.

The substantive order.

42. I shall therefore direct the Chief Land Registrar to cancel the Applicants' application dated 12th May 2017. I propose to order them to pay the Respondent's costs, and I direct the Respondent to file and serve on the Applicants within 14 days of the service of this Decision a Statement of Costs incurred since the date of the reference. The Applicants will then have 14 days to file submissions both as to the incidence and quantum of the costs, and the Applicant may respond 7 days thereafter. I will then consider the matter further.

Dated this 27th day of August 2019

Owen Rhys

BY ORDER OF THE TRIBUNAL