[2019] UKFTT 0594 (PC)

REF/2018/0730

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

BETWEEN

JOHN TIMBRELL

APPLICANT

and

(1) JILL HARVEY
(2) NICOLA JONES & ROGER WILLIAM JONES
(3) ALAN GODBER
(4) GRAHAM MEEK
(5) MARY TRIGG

RESPONDENTS

Property address: Land lying to the north-east of Cider Mill Cottage, Drybrook, Gloucestershire
Title Number: GR418442

Before: Judge Owen Rhys
Sitting at: Gloucester Civil and Family Courts

On: Friday the 12th July 2019

O R D E R

IT IS ORDERED that the Chief Land Registrar shall cancel the Applicant's application in form FR1 dated 28 September 2017.

Dated this 7th day of August 2019

Owen Rhys

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL

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Applicant representation:	In person
2nd to 4th Respondents:	In person
5th Respondent:	Mr Gale of Counsel instructed by Harrison Clark Rickerbys

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D E C I S I O N

Introduction – the application and the land in dispute

1. This dispute arises out of the Applicant's application to the Land Registry in form FR1 dated 28 September 2017, for first registration of a parcel of unregistered

land on the basis of claimed adverse possession. Objections were received from the Respondents, the Fifth Respondent Mary Trigg being the paper title owner, and the other Respondents adjoining owners. The dispute was referred to the Tribunal on 31st August 2018.

2. Mr Timbrell, the Applicant, is the owner and occupier of property known as Cider Mill Cottage, Drybrook, registered under title number GR232622 ("Cider Mill"). There is a field known as "Prossers"[1] immediately to the north of Cider Mill and its associated land, and this is the land subject to the Applicant's application ("the Disputed Land"). To the north of the Disputed Land is another field which is in the ownership of the Fourth Respondent, Mr Meek. To the north of Mr Meek's field is a house known as The Oaks, which is in the ownership of the Second Respondents, Mr and Mrs Jones. Mrs Jones is the daughter of Mr Meek. To the west of the Disputed Land is a farm known as Mannings Farm, owned by the Third Respondent, Mr Godber. It shares a boundary with both Cider Mill and the Disputed Land. The Second Respondent, Ms Harvey, is the former wife of the Applicant, and jointly owned Cider Mill with him until it was transferred into the Applicant's sole name in 2012 following their divorce.

3. I visited the site together with the parties and Mrs Trigg's Counsel and solicitor, and, helpfully, there is included with the papers a survey carried out by the Land Registry on 28th February 2018 with some 28 photographs. The surveyor describes the land as follows: *".... an area of grassland marshy in places with scrub and brambles growing on it. Some of the scrub and brambles have been cleared within the last 12 months. There was an area W fenced off which is being used as a vegetable patch. This appears less than 12 months. There is a wooden structure V which is crossing a marshy area also appears less than 12 months."* The only permanent structure is a small stone barn – more or less derelict – in the north-eastern corner close to the boundary with Mr Meek's field. Although there have been some changes in the 18 months since the date of the report, the surveyor's description of the Disputed Land is broadly accurate today.

[1] There is some confusion about this name, since Mr Meek also described his field – to the north of the Disputed Land – as "Prossers".

4. The current boundary features are as follows. On the northern boundary (with Mr Meek's field) there is a wooden post and wire sheep fence. The Land Registry surveyor estimated this as being in excess of 10 years old. The fence has been replaced by a large sheet of metal where the boundary adjoins the stone barn. The eastern boundary of the Disputed Land is formed by a thick line of trees and shrubs, in which is placed a post and wire sheep mesh fence. There are two openings in this boundary. At the point marked "Y" on the Land Registry survey plan – about half way along this boundary – there is a metal farm gate attached to wooden posts. At point "Z" on the plan – close to the northern boundary – there is another opening, secured by a metal gate which is wired shut. This gate – essentially a section of metal fencing wired in place – is not capable of being opened, and there is a section of the post and wire sheep mesh fencing lying on the ground in front of it. A metalled road ("the Road") runs alongside this boundary. The southern boundary is formed by several different features. The south-eastern section (about one-quarter of the total length) consists of a 2 metre wooden close-boarded fence into which a wooden gate is set, leading into the grounds of Cider Mill. There is a short section of post and wire fencing (marked H-J on the Land Registry plan) just to the north of the wooden fence. The remainder of this boundary consists of a bank with a line of overgrown shrubs on top, the ground level of Cider Mill being higher than that of the Disputed Land. I should make clear that Mr Timbrell does not accept that the fence and bank mark the legal boundary. He asserts that the actual boundary lies a little to the north, in line with a metal post which stands in the south-eastern corner of the Disputed Land – more or less in line with the remnants of the post and wire fence at H-J. The western boundary – shared with Mannings Farm – comprises a wooden post and wire fence, running alongside a belt of overgrown shrubs and tree. There is a gap in these shrubs and trees more or less in the middle of this boundary.

The legal requirements of an adverse possession claim

5. In summary, 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."*

6. 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 Applicant's case

7. Mr Timbrell made a Statement of Truth in support of his FR1 application, dated 28th September 2017, in which he set out the facts relied on in support of the application. He says that he went onto the land in 2002 initially to pick fruit. He considered that land had been abandoned. "*In the Autumn of 2003 I picked the fruit and decided to go on to the land to keep the scrub from growing. I formed the intention to occupy the land from then on. I have an interest in encouraging wild flowers... Therefore I decided in the Autumn of 2003 to take possession of [the Disputed Land] and from then on regularly cut a large area of the ground but left areas about 4 to 5 metres wide joined to all boundaries except*

the boundary adjoining my property...." He says that Adam Batten and his brother used to play on the Disputed Land A stream known as Drybrook runs through the Disputed Land. After a flood on the Road in or about 2003 he entered the Disputed Land and removed stones from the culvert which had collapsed and which had caused the flooding. In 2005 he built a pond on his own land, and to facilitate that removed trees within the Disputed Land along the boundary together with Mr David East. In 2009 he contracted to clear out the Woolworths store in Cinderford, which was closing down. In order to dispose of large quantities of cardboard, paper and fibre board he made bonfires on the Disputed Land to burn them. Adam Batten regularly used to take bags of cuttings onto the Disputed Land in order to burn them. As regards Adam Batten he says this: "*In 2010 I was then 65 and Adam was a young man I thought that he would find the land a useful asset if no one claimed it within 12 years. I explained the law regarding adverse possession to Adam, and we agreed to continue possess and occupy the land as tenants in common.*" In other statements, and confirmed in his oral evidence, he says that he will pass the title to the Disputed Land to Adam Batten of he succeeds in this application.

8. He also made a Statement of Case on 15th October 2015 in accordance with the Tribunal's directions. He largely repeated the facts which he set out in the Statement of Truth, but added some details. When he entered the land in 2003, the boundaries had become overgrown to such an extent that it was only possible to enter the field from his land to the south. Between 2003 and 2010 he cut the grass with his electric mower. After 2010 the grass was cut by Adam Batten, who came to live at Cider Mill. Adam Batten was a landscape worker and had the use of heavy machinery. In 2010 Adam Batten came to live in the cabin within the Cider Mill grounds. He continued to burn hedge cuttings on the Disputed Land and as previously stated, to cut the grass.

9. In a subsequent statement, Mr Timbrell corrected the date on which Adam Batten was said to have come to live at the cabin, from 2010 to 2012. In his oral evidence, he also stated that he had planted 2 oak trees on the Disputed Land, which he pointed out at the site view. These were quite small trees, barely larger than saplings. He also relied on a number of Google Earth photographs, purporting to show that he had kept central area of the Disputed Land clear of scrub and bracken over the years.

10. In addition to his own evidence, Mr Timbrell relied on witness statements from David East and Adam Batten. David East did not attend to give evidence, but Adam Batten did come to the hearing and was cross-examined on his statement. Mr East is. I think, the Applicant's brother in law, and Mr Batten is his nephew. In his first statement, he

recalled helping the Applicant construct a pond close to the boundary with the Disputed Land, in or about 2005. They went into the Disputed Land to cut down trees growing along the boundary, so as to be able to seal the edge of the pond. He noticed that the grass had been cut, and the Applicant told him that he had cut it *"to encourage wild flowers and that he had taken over the land because if nobody claimed it would become his."* He mentioned that Adam Batten had been living at Cider Mill since 2010 and they would both burn cuttings on the Disputed Land. He subsequently corrected his statement to state that Adam Batten had not moved to Cider Mill until 2012.

11. Adam Batten made several statements, essentially supporting the Applicant's own evidence. He was born in 1992, and is a relative of Mr Timbrell by marriage. In his first (undated) statement he says that he went to live at Cider Mill in 2010 – he remembers the year because he had his 18th birthday there. He recalls that the Disputed Land was cleared by Mr Timbrell, and the boundary was impenetrable on 3 sides due to the thick plant growth. *"Since the Summer of 2010 I have used my machines to keep the area John cleared because I understand that he previously kept down the brambles and scrub by hand."* He also said that he used to play on the Disputed Land as a child, and never saw anyone other than "my family" on the land. In a subsequent statement, he corrected the date on which he had moved into Cider Mill. The Applicant's ex-wife had pointed out that she was still living at Cider Mill until January 2012, when they were divorced, and he accepts that he did not move into the cabin at Cider Mill until after she had left in 2012. Mr Batten accepted that the Applicant has promised to transfer the Disputed Land to him of he is successful in the claim to a possessory title.

The Respondents' case

12. For the Respondents, the following persons made statements and gave evidence.

    a. **Jill Harvey**. She is the ex-wife of the Applicant and lived at Cider Mill until their divorce in 2012. She stated *"with absolute certainty"* that there were sheep on the Disputed Land from 2002 onwards and at least until 2007. In that year a cabin was built at Cider Mill (close to the boundary with the Disputed Land) in which her son lived. There was a clear view of the field from Cider Mill. She recalled that the metal field gate gave access into the Disputed Land from the Road.

    b. **Phillip Harvey**. He is the son of the Applicant and Jill Harvey's and lived there between 2007 and 2012. He occupied the cabin close to the northern boundary of Cider Mill. He too recalls seeing sheep on the Disputed Land when he lived

there, and also recalled that the metal field gate leading to the Disputed Land from the Road was in place in 2007 and allowed access into the field.

c. **Mrs Nicola Jones.** She made a witness statement and also verified her Statement of Case (made jointly with her husband). She recalled seeing Lee Ward's sheep on the Disputed Land in 2005 and 2006, although she could not say when the sheep ceased to be grazed there. She says that the first time that she could recall being aware of a bonfire on the Disputed Land was in 2017.

d. **Roger Jones.** He verified his statement of case, but did not make a separate witness statement. The statement largely covers the events of 2017 and 2018. According to him, the first time that he became aware of the Applicant's activities on the Disputed Land was in July 2017, when he saw smoke coming from it. They (he and his wife) entered through a gap in the northern boundary where it abutted the field of Mr Meek (his father in law). There was subsequently a series of confrontations between the Applicant and various of the Respondents, in which Mr Timbrell claimed the Disputed Land was his, and on two occasions physically assaulted Mr Jones. Both these assaults led to criminal prosecutions and a restraining order against Mr Timbrell remains in place, preventing him from approaching the Respondents or entering the Disputed Land[2].

e. **Graham Meek.** He confirmed that he was able to access the Disputed Land via a gap in the fence. He stated that he had dug Mr Timbrell's pond using a JCB. However, the machine broke down and a friend, Mr Pemberton, completed the work. He was aware of a dispute in 2011 between Mr Timbrell and Mr Baldwin, the then owner of Manning Farm, due to flooding from the pond. Mr East did not help with the construction of the pond – he never saw him there. He did see Lee Ward's sheep on the Disputed Land.

f. **Mr Allan Godber**. He has been the owner of Mannings Farm since February 2014. He walked the boundaries with the vendor, and they came across the Applicant who seemed very agitated. Mr Godber understood that there had been litigation between the owners of Mannings Farm and the Applicant, who had removed a Mannings Farm hedgerow in the course of constructing a pond on his land. On another occasion the Applicant asked Adam Batten to take down part

[2] The order allowed for Mr Timbrell to enter the Disputed Land, with the Tribunal's permission, for the purposes of participating in the site visit.

of Mr Godber's hedgerow along the boundary with the Cider Mill without his permission. Mr Godber never saw any activity by the Applicant on the Disputed Land until 2017, when he began to burn bonfires on the field. Prior to that the land was unkempt and overgrown, and clearly had not been maintained as the Applicant now suggests.

g. **Mary Trigg.** She verified her Statement of Case, and made a witness statement. In her Statement of Case, Mary Trigg stated (see paragraph 10) that "*Between 2002, when Mr Timbrell first came onto the land and 2010, the Prossers was in fact used, with my permission, by a local farmer, Lee Ward, to graze his sheep. In order to contain his sheep and ensure the field remained stock proof, Mr Ward also installed a metal gate, in front of an old wooden gate, on the Prossers. The land was not, as Mr Timbrell claims, inaccessible except for from his property, as Mr Ward clearly accessed the land when moving, checking on and feeding his sheep, between 2002 and 2010.*"

h. **Lee Ward**. He confirmed that he rented fields on Mannings Farm, including the field immediately to the west of the Disputed Land. He knew Mr Baldwin, the owner, through his grandfather. He started to run sheep there in 2002, after the foot-and-mouth outbreak, and continued to do so until 2009 or 2010. There was a gap in the fence between the Mannings Farm field and the Disputed Land, protected by a movable hurdle, so sheep could be taken from one to the other. He also put a metal gate into the eastern boundary, where it abutted the Road, in front of an old wooden gate, to make the field stockproof. The sheep were not present on the land constantly, but were moved around from one field to another throughout the year. However, he would take them to the field around once a month.

13. Some months after the service of the witness statements, the Applicant objected that Mr Ward's statement had been served late – on 25th February 2109 and not on the due date of 22nd February 2019. This was denied by the 5th Respondents' solicitors. On any footing, however, he had received the statement no more than one working day out of time. Furthermore, both Mr Meek and Ms Trigg in their Statements of Case had referred to Lee Ward running sheep on the Disputed Land. However, the Applicant eventually applied to the Tribunal to exclude the evidence on the grounds that it was served out of time. The application was refused, but he was given the opportunity of making a statement in

response, with further statements allowed from the Respondents. In this way, a second round of witness statements was introduced.

14. The Respondents' evidence was largely of the negative variety. They did not claim to have done anything on the Disputed Land until recently, but were adamant that they had not been aware of any activities by the Applicant on it. They say that his use of the land dates back to the summer of 2017. The only person who claims to have actually used the Disputed Land other than the Applicant is Mr Lee Ward, between 2002 and approximately 2010. This is of course a critical period in the Applicant's claim. If that evidence is accepted, it would prevent him from being able to show 12 years' exclusive factual possession prior to 2017.

Conclusions on the evidence

15. There is a complete conflict of evidence between the parties as to the Applicant's possession of and activities on the Disputed Land prior to 2017. There is also undisguised hostility and animus between some of them. Jill Harvey and her son Phillip gave evidence against him. He accused both of them of lying, in robust terms, and wanted to challenge them in cross-examination with previously undisclosed material apparently relating to an earlier criminal prosecution against him that was withdrawn. He did not submit any such material to the Tribunal prior to the hearing, but applied for permission to adduce these unspecified documents during the course of the cross-examination. I refused the application. He accused Phillip Harvey of making false calls to the emergency services, and accused his ex-wife of attacking him with a knife. On the other side, it is common ground that the Applicant physically attacked Mr Jones on two occasions, once with a baseball bat and was convicted of assault. There is no love lost between the Applicant and the Respondents, that is clear, and this animus must be taken into account in assessing the evidence and resolving the conflict.

16. At its highest, the evidence of the Applicant and Mr Batten comes to this. They regularly cut the grass, but left untended a wide strip beside the hedges around the Disputed Land to act as a barrier to entry by wild boars. On his case there was a gate giving access onto the Road but it was overgrown and disused. He unblocked a culvert which had caused flooding on the Road. He planted two trees. He used to burn commercial and other waste on bonfires. Mr Batten and Mr East burnt plant cuttings. He opened a new gated access into the Disputed Land from Cider Mill. He (together with Mr East) removed some trees along the boundary to facilitate the construction of a pond on his adjoining land. Mr Batten constructed wooden structures on the land, but these do not appear on

aerial photographs prior to 2018, and were in the view of the Land Registry surveyor constructed around that time.

17. Set against that evidence is the evidence given by and on behalf of the Respondents. Apart from Lee Ward, to whom I refer below, none of these witnesses claim to have done anything on the Disputed Land until recently. However, Ms Harvey and her son were living full-time at Cider Mill until 2012, and they deny that the Applicant carried out the activities on the Disputed Land that he now claims. Mr Harvey accepts that a gate was placed in the fence by the Applicant but says that it was never used while he was living there. Most witnesses recall seeing sheep on the land after 2003. None of the witnesses recall bonfires being lit on the Disputed Land until 2017 – indeed, it is this activity which seems to have brought matters to a head. Mr Godber – who owns the field to the west – does not recall seeing any activity on the land until 2017.

18. It might be said that the only truly independent witnesses are Mr Lee Ward and Mr Allan Godber. Neither seems to have no connection with any of the parties, and Mr Ward was compelled to attend the hearing having been served with a witness summons. I found him to be an impressive witness, who answered questions put to him by the Applicant with clarity and candour. His evidence, which I accept in its entirety, was that he regularly grazed sheep on the Disputed Land, with Mary Trigg's permission, between 2003 and 2009 or 2010. He did not notice any activity by the Applicant on the Disputed Land during that time. Although the sheep were not a constant presence on the land, because he would rotate the grazing throughout the year, nevertheless they would be grazed there at intervals in each year. The sheep could be moved to and from Mannings Farm through a gap in the hedge to the west. He placed a metal gate in front of an old wooden gate to make the field stockproof. This gate gave access into the Disputed Land from the Road.

19. If Mr Ward's evidence is accepted, necessarily it calls into question much of the evidence of the Applicant. If (as I have found) sheep were regularly grazed on the Disputed Land between 2002 and 2009 or 2010, he could not have cut the grass and cleared the bracken as he says. The sheep themselves would have kept down the grass and scrub. Nor could bonfires have been set. If, as he says, he never saw sheep on the land, either he was not telling the truth, or he was not present on the land often enough to notice them. It is of course possible that the Applicant entered the land to clear trees along the boundary in 2005 when he was constructing his pond. He might also have entered in order to clear

the Drybrook culvert. It is possible that he did so at a time when the sheep were not on the land.

20. Mr Batten's use of the Disputed Land did not start in 2010, as he originally stated, but no earlier than 2012. By this time, Mr Ward's sheep were no longer grazing the land. It is therefore possible that he entered from time to time to burn cuttings, as he said in his evidence. However, for the reasons stated below, I do not think it probable.

21. Mr Godber only came onto the scene in 2014, having bought Mannings Farm in that year. Although he seems to have taken a mild dislike to the Applicant (having taken execption to the Applicant's removal of his hedge without permission), he is also essentially independent. He did not witness any activity by the Applicant on the Disputed Land until 2017 and described its condition as essentially completely untended. Furthermore, he recalled a conversation with Mr Batten in this way: *"After 2014, we have worked in the fields adjacent to the disputed ground, I met with Adam [Batten] at some point in that year whilst fencing the hedgeline next to the disputed ground, and he suggested that I fenced the disputed ground as well. I replied that I hadn't bought it so I couldn't do that and he said nobody else was using it so I could if I wanted."* Mr Batten denied that this conversation took place, but I cannot see that there is any reason why Mr Godber would invent it. Mr Batten, on the other hand, who has been promised the Disputed Land if the Applicant succeeds, has every reason to deny it. I find that this conversation did take place, and it completely undermines the Applicant's case in two ways. First, because clearly Mr Batten was not in 2014 himself intending to *"possess and occupy the land as tenants in common."* as stated by the Applicant. Secondly, because he acknowledged that *"nobody else was using it"* – including the Applicant.

22. I think it is far more probable that the Applicant and Mr Batten did not begin to start using the Disputed Land until 2017, when his neighbours began to notice that bonfires were being lit. Historically, the Applicant used to burn material on the Forestry land closer to his home (and further from the Joneses), as he accepted. Given the close proximity of the Respondents such as Mr Meek, Mr Godber and the Joneses, it is very unlikely in my view that they would not have been aware of regular burning of commercial and horticultural waste on the land. The speed and ferocity of their reaction to the bonfire in July 2017 suggests that they would not have stood idly by of this was regular occurrence. Bearing in mind that, on his case, the Applicant took a conscious decision in 2003 to lay claim to the Disputed Land, it is noteworthy that there are no photographs of any activity on the land prior to 2017, when the dispute arose. Where a

squatter believes that he is in possession of his own land, and is unaware that the land belongs to a third party – a relatively frequent situation in adverse possession claims in this Tribunal – it is not surprising if there is no photographic or other corroborative evidence available. However, where a squatter is consciously trespassing with a view to establishing a possessory title, it is very surprising (and unusual) that the acts of possession relied on are not in any way recorded or documented. It must be borne in mind that the Applicant, in his evidence, said this: "*I explained the law regarding adverse possession to Adam, and we agreed to continue possess and occupy the land as tenants in common.*" This conversation is alleged to have taken place in 2010 (although given the correction to the date on which Adam Batten came to live at Cider Mill this must be in doubt). However, if that conversation had really taken place, it is very difficult to see how the Applicant's activities on the Disputed Land were so discreet (see below) and so undocumented. There is no evidence to show the date of construction of the wooden structures on the Disputed Land, other than a photograph taken in 2017, and I find that these constructions date from that year. The Google Earth photographs, as is usually the case, do not assist in determining the extent to which the grass and scrub was cut from time to time.

23. Furthermore, there are serious inconsistencies in the Applicant's evidence. Although the particular date is not critical, it is very curious that the Applicant, Mr Batten and Mr East all placed the commencement of his occupation of Cider Mill at 2010. This was also said to be the date of the conversation between the Applicant and Mr Batten regarding adverse possession. In his first witness statement Mr Batten went so far as to say that he could remember the specific year because that was when he turned 18. When Ms Harvey pointed out that she had lived at Cider Mill until 2012, Mr Batten, Mr East and Mr Timbrell all corrected the date. At the very least, this casts doubt on the accuracy of their recollection. In his written statement, Mr Timbrell said that he had regularly cut the grass on the Disputed Land between 2003 and 2010 with an electric mower, until Mr Batten began to cut it with a heavy machinery. Under cross-examination, however, the Applicant accepted that the surface of the Disputed Land was "*ridge and furrow*" – a rough surface that was difficult to mow. It is quite improbable that an electric mower would be adequate, and when this was put to him he changed his evidence and said that he had cut the grass and thistles by hand. Indeed, that was the evidence of Mr Batten.

24. For all these reasons, I prefer the evidence of the Respondents to that of Mr Timbrell and Mr Batten, where they conflict. Mr East did not give oral evidence and I do not accord it much weight, particularly where it conflicts with that of Mr Meek. I find as a fact that

the Applicant, whether himself or through Mr Batten and Mr East, never took exclusive factual possession of the Disputed Land. There may have been occasional acts of trespass over a number of years, but that is not the same as the assumption of possession. Indeed, even if the Applicant had satisfied me that he had carried out all the activities that he claims, I would have held that these did not amount to exclusive factual possession.

25. Nor, in my view, would he have been able to establish the necessary intention to possess. The words of Slade J in Powell v McFarlane are particularly in point: "*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.*" Even on his own case his use of the land, even if established, was essentially covert. He did nothing to enclose the land, indeed quite the opposite - he deliberately left the hedges to grow. If he did mow the grass behind "*impenetrable scrub*", in his words, it is difficult to see how his intention to possess was made clear to the world. I do not accept that he burned fires on the land prior to 2017. If he had done, this would have made his trespass clear to his neighbours, and the true owner, and they would have reacted as vigorously as they did in the summer of 2017. No structures were placed on the land until 2017. Even these structures are essentially temporary. I cannot see how anything claimed to have been done by the Applicant "*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.....*" It is axiomatic that the activities that lead to a finding of adverse possession "*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. ....*" For the reasons I have stated, I am not satisfied on the balance of probabilities that Mr Timbrell took exclusive factual possession of the land in

2003 or at any time thereafter, nor did he at any time have the necessary intention to possess. His own evidence as to intention is self-serving and I reject it.

The substantive order.

26. In order to succeed, Mr Timbrell had to prove, on the balance of probabilities, that he went into adverse possession of the Disputed Land no later than September 2005 and remained there continuously until the date of the application. I have found that he has never been in exclusive factual possession of the Disputed Land, with the necessary intention to possess, for a continuous period of 12 years prior to the date of the application or indeed for any other period. His application for title must be rejected, and I shall therefore direct the Chief Land Registrar to cancel the Applicant's FR1 dated 28 September 2017. I see no reason why he should not pay the costs of the successful Respondents. If they wish to claim costs, they should file with the Tribunal and serve on the Applicant a statement of costs within 14 days. The Applicant may file and serve on the Respondents any objections 14 days thereafter. I shall then consider the matter further and in all probability make a summary assessment of the costs.

Dated this 7th day of August 2019

Owen Rhys

PROPERTY CHAMBER LAND REGISTRATION

BY ORDER OF THE TRIBUNAL