



[2023] UKFTT 00250 (PC)

IN THE PROPERTY CHAMBER
LAND REGISTRATION DIVISION
FIRST TIER TRIBUNAL

Ref: 2019/0799 & 2020/0015

B E T W E E N:

GRAHAM EDWARD PHILLIPS

Applicant

and

(1) SAMEENA SABIR
(2) MOHAMMED ABID GHANI
(3) KARL ANTHONY DAVIDSON
(4) LISA DAVIDSON

Respondent

Property Address: Land adjacent to 23 Meadway, Bury BL9 9TY

Title Number: MAN334169

Before: Judge Max Thorowgood

By: CVP

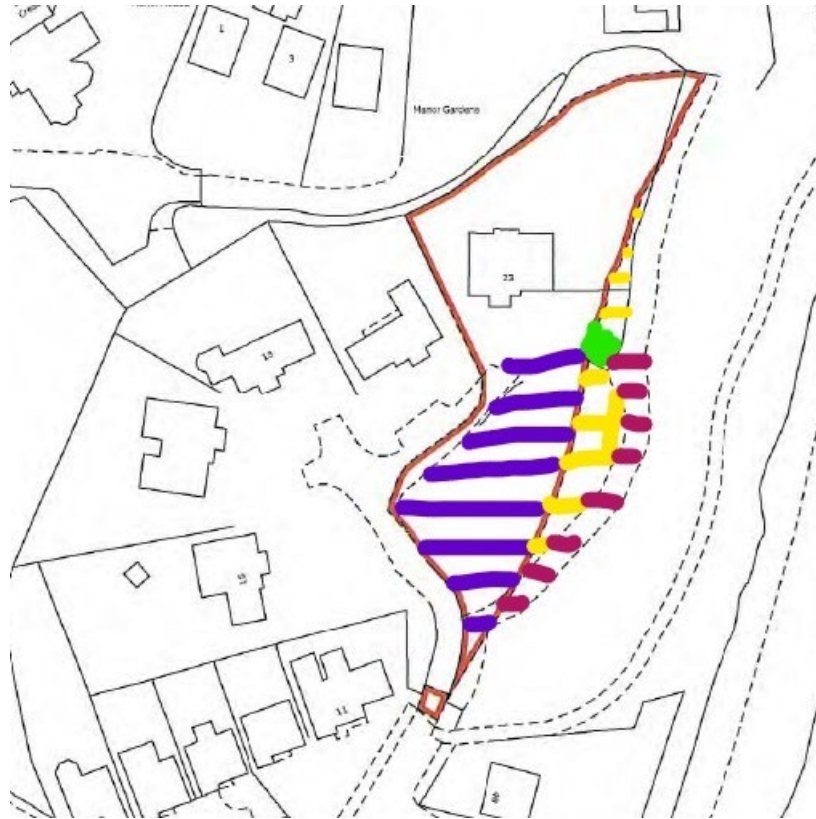
Date of hearing: 23rd and 24th September 2021

1. Introduction

- 1.1. The Applicant, together with his wife who is not an applicant, has been the registered proprietor of 23 Meadway, Bury since 6th December 2002. The title to 23 Meadway is registered under title number GM632248.
- 1.2. 23 Meadway is part of a residential development comprising the odd numbers from 15-23. The development, which appears to have been undertaken in the early 90's, is separated from the rest of Meadway and served by private road which is maintained, together with the streetlights and various other features, by the residents of 15-23 acting communally as the Meadway Residents' Association.



- 1.3. The layout of the site can be seen in the extract from the title plan to GM632248 below (“Plan”).



- 1.4. The following points of relevance are to be noted in relation to the Plan:
- 1.4.1. My coloured additions to Title Plan are for the purposes of exposition only.
 - 1.4.2. The red line on Plan describes the title which the Applicant and his wife purchased in 2002 but subject to adjustments made to its precise extent in July 2018.
 - 1.4.3. The title to 23 Meadway includes a substantial portion of the land to the south which is shown hatched purple on the Plan (“the Purple Land”). That area is ‘laid to lawn’. It is not enclosed. To the casual observer (and I had the benefit of viewing the site on 21st September 2021 and my observations on that occasion inform this decision) it has the appearance of a communal space for the benefit of the residents of 15-23 Meadway.



- 1.4.4. The green colouring indicates the position of 23 Meadway's garage. It was apparently constructed, in part at least, on land which was outside the title to the land to which it is appurtenant.
 - 1.4.5. On the ground, the area shown hatched yellow to the south of the garage appears to form part of the same grassed area as the Purple Land. The area to the north forms part of the rear garden to 23 Meadway.
 - 1.4.6. The area shown hatched magenta ("the Magenta Land") is now bounded by two pecked lines, representing a change of surface or a feature less than 12" in height or depth. The easternmost of those two lines was until July 2018 a solid line, indicating a feature more than 12" in height. What precisely those lines represent and whether they are accurately drawn are both issues which I need to consider. However, broadly speaking it is uncontentious that they represent part of an area of scrubby woodland which is not and has not, historically, been maintained to the same standard as either the Purple or Yellow Land.
- 1.5. The named objectors are the proprietors of 15 and 17 Meadway respectively. For reasons which are unclear Mr and Mrs Kernaghan, who are the proprietors of 19 Meadway, also attempted to object but their objections have not been referred. They only purchased 19 from Mr and Mrs Timperley in June 2019 but Mrs Kernaghan gave evidence before me and made it clear that she and her husband supported the named Respondents' objections to the application.

2. The initial application for first registration

- 2.1. In October 2017 the Applicant applied for first registration of what he believed was the Yellow and Magenta Land on the basis that he had been in adverse possession of both areas (as a single unit) since he completed his purchase of 23 Meadway on 6th December 2002.
- 2.2. HM Land Registry requisitioned a surveyor, Mr Kells, to survey the site and he visited on 19th February 2018.
- 2.3. Mr Kells reported that he was shown the site by Mrs Phillips in company with Mr Timperley. Mr and Mrs Timperley were, until June 2019, the owners of 21 Meadway, the longest-term residents of Meadway and prime movers in the Meadway Residents' Association. Mr Kells reported that he had also spoken with the Applicant on the telephone during the course of his visit.
- 2.4. By his survey report dated 21st February 2018 Mr Kells reported the following material observations:



- 2.4.1. That the boundary between the Yellow Land and the Magenta Land was demarcated by the, “edge of mown area of well-maintained lawn.”
 - 2.4.2. That the eastern boundary of the Magenta Land was the, “Top of broken feature which is the rough alignment of the top of a slope within extremely rough vegetation.”
 - 2.4.3. The Magenta Land he described as follows, “... rough vegetation. Garden refuse has been deposited here from the yellow tinted area. This strip is also under occupation by Mr Philips according to him and as stated by him has been occupied for 17 years, being used to deposit the garden refuse from the yellow tinted land. To the east of the lilac strip is a steep slope. East of the land tinted lilac is owned by Bury Council.”
- 2.5. On 28th July 2018 HM Land Registry wrote to the Applicant’s solicitors, Messrs Widdows Pilling & Co (who are the solicitors who acted for him in respect of this reference, specifically Mr Michael Kirkham), to inform him that in light of his declaration it had decided to:
- 2.5.1. Correct the existing title to 23 Meadway so as to make it more accurate; and
 - 2.5.2. To grant him a possessory title to what it described as, “... the remainder of the land in your declaration...”. Title to that land was registered under title number MAN300723 in the name of the Applicant alone.

Title number MAN300723 comprises to the land shown hatched yellow on the Plan. It does not include the land shown hatched magenta.

- 2.6. The Applicant’s solicitors seemingly took this failure to include the Magenta Land within the possessory title up with the Land Registry in a letter dated 15th October 2018 which they apparently supported by reference to a plan lodged on 29th October 2018. Neither of these documents have apparently been disclosed despite the fact that they must have been in the possession of the Applicant’s solicitor having apparently been sent by him.
- 2.7. HM Land Registry’s response, on 30th October 2018, was that the Magenta Land was not included within the land in respect of which first registration had been claimed save for a tiny sliver at the southern end.
- 2.8. On 11th December 2018 Mr David Broadbent (a planning consultant retained by the Applicant) sent an email to HM Land Registry in which he thanked Ms



Thayer for sending him a copy of Mr Kells' survey immediately following their telephone conversation under cover of a letter dated 29th November 2018 which has also not been disclosed.

2.9. The crucial passages from the email of 11th December 2018 are as follows:

"The print of plot MAN300723_6 shows the area tinted yellow as a well maintained lawn area and plot MAN300723_5 confirms the lawn boundary as between the points S-O. The possessory title agreed by yourselves for title MAN300723 now correctly includes the existing garage and the fenced land to the North of the garage, however, the possessory title of the land south of the garage is in line with the area of mown lawn between points S-O.

The area being claimed under possessory title should follow the line, from the back of the garage, in line with the points J-K on MAN300723_5, as stated by the surveyor (note 4) as the "Top of broken feature which is the rough alignment the top of a slope within extremely rough vegetation". The whole of this area, between points J-K, is also shown tinted lilac on plan MAN300723-6 and the "missing" possessory title claim relates to the tinted lilac area southwards from the back of the garage.

This land was part of the land edged red on the possessory land application.

I have attached your surveyor's plan MAN300723_6, upon which I have hatched the "missing" area in red. This area extends to "the rough alignment of the top of a slope" and was claimed under the possessory title application but has been omitted from the amended title. The surveyor's notes (5) for plot MAN300723_6 state that the land east of the land tinted lilac is owned by Bury Council.

In fact, the Council's ownership (GM890815) only extends to part of the land east of the land tinted lilac and most of my red hatched area is unregistered land.

In my opinion, it is a nonsense to only allow the possessory claim as far as the mown lawn only. *The red hatched area within the land tinted lilac is an integral part of the maintained lawn area and the natural boundary of bushes and trees, which has been cut back, trimmed and kept under control, as the possessory claim, **by myself** for many years.*" (My emphasis)

2.10. That email, despite being sent from Mr Broadbent's email account, was signed, "Graham Philips". Further, as the passage which I have highlighted makes clear, it seems to have been drafted, in part at least, by Mr Phillips after he had had the



benefit of seeing Mr Kells' survey. I do not believe that a professional person in Mr Broadbent's position would mistakenly have described the acts of his client as his own.

- 2.11. Despite this correspondence, HM Land Registry did not agree to include the Magenta Land within the Applicant's possessory title and so, in due course, the Applicant made this application supported, initially at least, only by the evidence which he had filed in support of his original application for first registration.
- 2.12. None of the material described above was disclosed by the Applicant in accordance with the Tribunal's order for 'standard disclosure' despite its obvious central relevance and despite the correspondence having been conducted either with the solicitor who had conduct of this matter on the Applicant's behalf or with him being copied into it.
- 2.13. When I suggested in the course of viewing the site that it was almost certain, on an application for first registration of this sort, that the Land Registry would have requisitioned a survey of the land, the Applicant and his solicitor affected to have no definite knowledge of such a survey but it was nevertheless agreed that urgent enquiries should be made of the Land Registry.
- 2.14. The day before the hearing I was informed by Mr Kirkham that he had still not received a response from the Land Registry and that he had also, "...asked Mr Broadbent if he has retained a copy he can provide."
- 2.15. By the day of the hearing an updated bundle, which still did not include all the relevant documents including some of the most pertinent photographs, had been prepared. That did include the survey although the source of the documents was unclear.
- 2.16. Whilst Mr Kirkham was attempting to collate the remaining documents the Applicant began to give his evidence at which point it soon became obvious both that there was someone in the room with the Applicant who was helping him with his evidence (Mr Payne) and that he had a large number of potentially relevant documents on his desk which had not been disclosed and to which he wished to refer. I agreed to break for a period in order to give Mr Williams an opportunity to sort things out with Mr Phillips which he attempted so far as he was able to do. His obvious difficulty, however, was that the Applicant appeared to have no thought other than to say whatever he believed to be expedient for the purpose of establishing his case and to produce only documents which might serve the same purpose. So brazen was his behaviour that it is tempting to think he had no consciousness that he was doing anything wrong; indeed, in his closing submissions Mr Williams came close to suggesting that was the case.
- 2.17. It was for those reasons of expediency that the Applicant had said nothing in his evidence as to the reasons for the Land Registry's rejection of his original application. Similarly, as I find, he deliberately suppressed disclosure of Mr Kells' survey and the subsequent correspondence with HM Land Registry. This

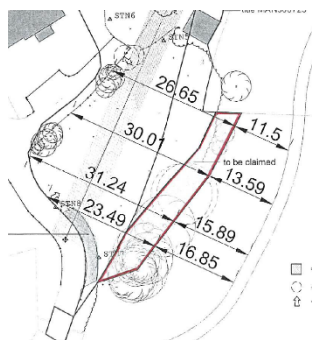


expediency extended even to his denial of any knowledge of the survey and of any involvement in the drafting of the email sent from Mr Broadbent's account. It is in my opinion clear that Mr Phillips had a hand (at least) in the preparation of that email and that he must have seen (or at the least been aware of the contents) of the survey in order to do so. He is not the sort of man, in my judgment, to let a matter such as that lie without his personal involvement. It is quite obvious that he has felt himself thwarted in his ambitions to develop the land by the Land Registry's decision and so I am sure he would have wanted to have a full understanding of the reasons for it.

- 2.18. For these reasons alone, I would find it extremely difficult to believe what I was told by Mr Phillips in his evidence about the matters which bear directly on the matter before me. However, I regret to say that there were a number of other instances in which I felt, an apparently unabashed, Mr Phillips simply had no interest in the truth of the evidence upon which he sought to rely in support of his claim.

3. The matter which I have to consider

- 3.1. As my commentary above makes clear, the Land Registry was willing to grant the Applicant's application insofar as it related to the Yellow Land. The boundary between the Yellow Land and the Magenta Land was demarcated by the edge of the cut grass area which was itself demarcated (insofar as such a 'line' can be precisely demarcated) by the westernmost of the pecked lines.
- 3.2. It is not the function of this decision to determine the precise position of the boundary, what can be said is that the Land Registry based the decision which it made in July 2018 to register the Applicant as the proprietor of a possessory title to the Yellow Land on Mr Kells' survey which (in terms of demarcation at least) was itself based upon the existing Ordnance Survey plan.
- 3.3. One notable feature of the site visit and the photographs taken recently of the site were the blue posts apparently inserted into the ground and apparently intended to represent the easternmost edge of Magenta Land and specifically the measured points on the plan inserted below. Unfortunately, there was no expert



evidence from a surveyor before me to support the accuracy of the



measurements on the inserted plan. Furthermore, there were five posts whereas there were only four measured points.

- 3.4. The primary evidence upon which the Applicant relied was the ST1 statement of truth which he made in support of his original application. That evidence consisted in the main in the following acts of the possession which were alleged to be referable to the Magenta Land:

“My maintenance consists of grass cutting, tree trimming, bushes and plant cutting and pruning, feeding and weeding, maintaining fencing and all boundaries. I have added new planting to many parts of the land since 6 December 2002. ...

The land has been used by me for recreational and enjoyment purposes, including ball games, parties, erection of tents and marquees.”

- 3.5. Those statements were repeated moreorless verbatim at paragraph 7 of the Applicant’s Statement of Case and paragraph 5 of his first witness statement.
- 3.6. The Applicant’s case was embellished by statements from Mr Lee Payne and Mr Michael McGarraghy. Mr Payne claimed to have worked as a gardener for Mr Phillips between March 2012 and February 2016. Mr McGarraghy to have done so since March 2016. Both say that a significant part of their work entailed looking after the borders, and the tree line of the lawn area, pruning and trimming overgrowth. The say very little if anything about work done on the Magenta Land.
- 3.7. The Respondents’ solicitors raised questions regarding the signature of Mr Payne’s statement, which were subsequently addressed by the filing of a further statement signed by Mr Payne. In evidence Mr Payne explained that he had more than one signature which would explain the apparent discrepancy. In respect of both Mr Payne’s and Mr McGarraghy’s witness statements, the Respondent’s solicitors queried the absence of invoices to evidence payment for the work done. This prompted denials by Mr Payne that he had received any payment and the withdrawal by Mr McGarraghy of his witness statement. Although Mr McGarraghy subsequently filed a second statement in which he explained that he is a friend of the Applicant’s and that he would do the gardening in exchange for benefits in kind, he did not submit himself to be cross examined. Mr Payne was cross-examined and said that, even though he had been a profession landscape gardener up until 2011 he was between work at the time he was working for the Applicant due to depression and he had just done what he did to get out of the house.
- 3.8. I do not believe what I was told by the Applicant, Mr Payne and Mr McGarraghy about Mr Payne and Mr McGarraghy having been paid only in kind. Nor do I believe that they undertook any significant work on the Magenta Land. I accept



that they cut the grass and cut overhanging branches if they impeded that work. I also expect, although they did not explicitly say this that they dumped grass and other cuttings in the area shown in photograph 29 taken by Mr Kells. I do not accept however that they did any significant work on any other part of the Magenta Land, at least not until after July 2018 when the Applicant's first application was determined against him so far as the Magenta Land was concerned on account of what HM Land Registry deemed to be his lack of activity on that part of the land. This conclusion is supported by the photographs of the Magenta Land taken by Mr Kells in 2018 as well as those taken in 2017 by Mr Ghani of the more open area in the region of the compost heap/bonfire site which I have described above. That evidence was supplemented most cogently by the oral evidence of Mrs Davidson and to a lesser degree by that of Mr Ghani whose oral evidence was far from convincing.

- 3.9. The Applicant claimed and I accept that he had planted some shrubs and trees in the vicinity of the compost heap. How long ago is difficult to say but not more than 10 years ago in my view. He said that he had trans-planted a good number over the years but many had died or failed to take due to the poor quality of the soil. He also produced evidence that he had recently treated the same area for an infestation of Japanese Knotweed.

4. The applicable law

- 4.1. The Magenta Land is unregistered, so the Applicant need only show that he has been in adverse possession of the disputed land for a continuous period of 12 years or more in order to succeed.
- 4.2. Adverse possession can be an elusive concept. It is comprised first of factual possession coupled with the requisite intention to possess (as opposed merely to trespass). Factual possession entails an appropriate degree of physical control of the land. The nature and extent of the control required to be shown will depend upon the nature of the land in question. Fencing or the complete exclusion of others (especially if those other have some right over the land) is not essential but control is. The intention to possess is a determination to exercise that control so long and by any means which the processes of the law allow to the exclusion of all others. The intention is a subjective one but it must be manifest from the acts done on the land or a part of it.
- 4.3. There is no real question in my mind that, until recently at least, the Applicant has done nothing on the Magenta Land which would suffice to say that he had been in adverse possession of it. It amounted, at the most to, the transplanting of a few small trees or shrubs in a small part of it, the dumping of garden waste and lighting of bonfires in the same small part and recently treatment for Japanese Knotweed. These I find were occasional acts and did not betoken control of the Magenta Land. As for the rest, he can show no more than occasional branch lopping for the purpose of preventing them overhanging the



land over which it is accepted the Applicant did exert control. This he would have been within his rights to do as an owner of the Yellow Land.

- 4.4. Equally, however, the Applicant plainly was in control of and intended to possess the grassed area and its boundary with the wooded overgrown area is not easily determined. No one else could reasonably be said to have been more in control of the Magenta Land than the Applicant and, at least in the northern half, the rough bank referred to by Mr Kells does provide some form of delineation or demarcation.
- 4.5. The authorities are clear that, for obvious reasons, it is not necessary for a claimant of title by adverse possession to show that he has actively possessed every inch of the land in question but that principle will only apply where the area which is said to be being possessed is sufficiently clearly defined, see *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85 @ p. 88 and even more pertinently *Higgs v Nassauvian Ltd* [1975] 1 All ER 95 where Sir Harry Gibbs explained the position as follows:

“It is clearly settled that acts of possession done on parts of a tract of land to which a possessory title is sought may be evidence of possession of the whole ... This rule is not applicable to a question of undefined and disputed boundary ... but this does not mean that acts done on part of the land are only relevant to prove possession of the whole if the land is enclosed by a wall or other physical barrier. The property claimed by possession may be sufficiently defined in other ways, e.g. where the claim is to trees in a belt of woodland [*Stanley v White*], to the bed or foreshores of a river [*Jones v Williams*, *Lord Advocate v Lord Blantyre*] or to the right to fish in a river [*Lord Advocate v Lord Lovat*]. In the present case, although the two tracts were not physically enclosed, their boundaries were well-known and undisputed, and possession of the whole tracts might have been established by appropriate evidence of acts done on parts of them. The question was one of fact and degree and depended on consideration of all the circumstances of the case.”

- 4.6. The question therefore is, was the Magenta Land a clearly defined part of the lawned area so that the Applicant's acts of possession of the lawned area should be taken to evidence his possession together with it of the Magenta Land, or is the Magenta Land so distinct from the lawned area that it must be treated separately ?
- 4.7. That question is one of fact and degree which I have not found it easy to resolve. In the end however it is my clear conclusion that, as a whole, the area which comprises the Magenta Land is: a) not clearly defined (certainly not in the southern part) as to its easternmost extent; but b) is clearly distinct from the lawned area.



5. Conclusion

- 5.1. For these reasons, I conclude that the Applicant has never truly been in possession of the Magenta Land and I therefore reject the his claim to have established title to it by adverse possession. I shall, therefore, direct that the Chief Land Registrar cancel his application.
- 5.2. Because it is the general rule in the Land Registration Division that “costs follow the event”, it will ordinarily follow from my decision that the Applicant should pay the Respondents’ costs of the reference. It may be, however, that other factors of which I am presently unaware militate against that conclusion. I shall therefore direct that the Applicant has permission to file and serve submissions setting out any reasons why the ordinary rule in respect of costs should not apply and that the Respondents should be entitled to file and serve submissions in response.

ORDER

UPON hearing counsel for the Applicant, Andrew Williams, and counsel for the Respondents, James Abernethy

IT IS ORDERED THAT:

1. The Chief Land Registrar cancel the Applicant’s applications dated 22nd February and 15th March 2019.
2. The Applicant has permission to file and serve such submissions as he may be advised in respect of the order which the Tribunal should make concerning the liability of the parties for the costs of this reference by 5 pm on 7th January 2022.
3. The Respondents have permission to file and serve such submissions as they may be advised in answer to any submissions made by the Applicant in respect of the parties’ liability for the costs of this reference by 5 pm on 4th February 2022.
4. The parties’ time for applying for permission to appeal against this decision is extended to 28 days after the date of the Tribunal’s decision concerning their liability to pay (as opposed to the amount of) the costs of this reference.



Dated this 28th day of November 2021

Max Thorowgood

BY ORDER OF THE TRIBUNAL

