



[2023] UKFTT 00526 (PC)

REF/2021/0031

**PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

**(1) MICHAEL HAMPTON
(2) SUSAN HAMPTON**

APPLICANTS

and

ARZEEN LIMITED

RESPONDENT

Property Address: Land at Wishing Well, Wheal Kitty, St Agnes, Cornwall TR5 0RE

Title Number: CL352623

Before: Judge Michael Michell

Sitting at: Truro Magistrates and Tribunal Hearing Centre

On: 12th and 13th September 2022

Applicant Representation: Mr Timothy Pullen, counsel, instructed by Nalders

Respondent Representation: Mr Khan, director of the Respondent

DECISION

*ADVERSE POSSESSION – LAND REGISTRATION ACT 2002 SCHEDULE 6 – WHETHER
APPLICANTS AND PREDECESSORS IN TITLE IN POSSESSION – WHETHER WAYLEAVE
RESPONDENT ENTERED INTO WAYLEAVE CONSENT FOR ELECTRICITY POLE ON
DISPUTED LAND- EFFECT OF SUCH WAYLEAVE CONSENT*

Cases referred to

Bligh v Martin [1968] 1 WLR 804 at 812F

Powell v McFarlane (1977) 38 P and CR 452

Prudential Assurance Co Ltd v. Waterloo Real Estate Inc [1999] 2 EGLR 85

J A Pye (Oxford Ltd) v Graham [2003] AC 419

Hopkins v Beacon [2011] EWHC 2899 (Ch)

1. The Applicants, Mr and Mrs Hampton are the registered proprietors of land known as “Wishing Well”, an area of land registered under title number CL103608. The land within that title adjoins on its northern side land called “Land on the east side of Wheal Kitty” and registered under title number CL150240. Mr and Mrs Hampton applied to HM Land Registry under paragraph 1 of Schedule 6 to the Land Registration Act 2002 to be registered with title based on adverse possession to part of the land within title number CL150240 adjoining Wishing Well. I shall refer to the land the subject of the application as “the Disputed Land”. The application is dated 7th October 2019. The Respondent, Arzeen Ltd. (“Arzeen”) is the registered proprietor of title number CL150240. Arzeen objected to the application by a form NAP dated 11th May 2020. The matter was referred to the Tribunal for determination.

The Objection

2. Mr and Mrs Hampton made their application using form ADV1. In panel 11 of the form, they placed an “X” in the box to indicate that they intended to rely on the condition in paragraph 5(4) of Schedule 6 to the Act. The marginal note beside panel 11 is as follows:
“Place “X” in the appropriate box or boxes if the applicant intends to rely on one or more than one of these conditions should a counter notice under paragraph 3 of Schedule 6 be lodged in response to the application”.
3. HM Land Registry gave notice of the application to Arzeen by letter dated 7th February 2020. The letter enclosed a copy of the form ADV1, a form NAP to be completed by Arzeen and a copy of HMLR Practice Guide 4. The letter stated that the notice was given so that Arzeen could
“consent to the application
object to it

give counter notice to the Chief Land Registrar requiring that the application be dealt with under paragraph 5 of Schedule 6 to the Land Registration Act 2002, or
object and give counter notice”.

The letter stated that the four options were explained in Practice Direction, that the relevant legislation did not allow HM Land Registry to extend the date by which it must have received a counter notice and that the form NAP must be used to give a counter notice and could be used for an objection. The letter further stated that if Nazreen wished to object to the application, give counter-notice requiring the application to be dealt with under paragraph 5 of Schedule 6 or both that the objection or counter-notice must be received by HM Land Registry “before noon on 13th May 2020”.

4. The NAP was completed, signed by Arzeen’s director, Mr Mohammad Razi Khan (“Mr Khan”), dated 11th May 2020 and sent to HM Land Registry by email. The email appears to have been received by HM Land Registry on 13th May 2020 but Mr and Mrs Hampton did not pursue at the hearing a point that the objection may have been received out of time. On the form NAP, Arzeen placed an “x” in box 5 against the words “I object to the registration on the grounds stated in panel 6”. The marginal note to panel 5 states

“Place “X” in the appropriate box(es). See Practice Guide 4 for further information”.

In panel 6 the Respondent stated that it “vehemently denied” that the Applicants or their predecessor in title occupied or had occupied the disputed land and went on to state

“The Land has been leased and in use by Western Power since it was bought by Mr Mohammad Razi Khan in 2000 and he has been receiving regular rent from Western Power for the land used by them for electricity poles and the adjoining land for the maintenance and access.

The electric pylon and the pole with the access can be clearly seen in the aerial pictures in the said land. I am sure that the Applicant would have realised this fact if they would have done their due diligence. Furthermore, the Applicant is acknowledging the presence of the electric pylon and the pole on the said land in their statutory declaration point 13, when they contacted Western Power and were informed the said land is owned by Arzeen Limited”.

Arzeen did not place an “x” against the words “I require the registrar to deal with the application under paragraph 5 of Schedule 6 to the Land Registration Act 2002”.

Schedule 6 Paragraph 6

5. Schedule 6 to the Land Registration Act 2002 has effect as regards applications to be registered as the proprietor of a registered estate in land. Paragraph 2 requires the registrar to give notice of an application under the schedule to certain categories of persons, including the proprietor of the estate to which the application relates. In this case, the registrar gave notice to Arzeen as proprietor of the estate to which the application relates. Paragraph 3 provides as follows:

“(1) A person given notice under paragraph 2 may require that the application to which the notice relates be dealt with under paragraph 5.

(2) The right under this paragraph is exercisable by notice to the registrar given before the end of such period as rules may provide”.

Land Registration Rules Rule 190 requires the notice to the registrar under paragraph 3(2) of Schedule 6 to be in form NAP. Rule 189 provides that the period for giving notice is “the period ending at 12 noon on the sixty-fifth business day after the date of issue of the notice”.

The NAP form completed by Arzeen was dated within the 65 business day period after the date of issue of the notice. No point was taken as to its timing. However, the Applicant’s case is that Arzeen did not require the matter to be dealt with under paragraph 5 of Schedule 6.

6. In *Hopkins v Beacon* [2011] EWHC 2899 (Ch), Vos. J. held that a failure to tick the box would not automatically remove the right to require the application to be dealt with under paragraph 5 of Schedule 6. It depends on whether a reasonable Registrar looking at the form and any accompanying statement together would have thought that the objector intended to invoke paragraph 5. In this case, there is nothing in the form NAP to indicate that Arzeen intended to require the application to be dealt with under paragraph 5 of Schedule 6 and there was no accompanying statement. Accordingly, the Respondent is not entitled to invoke paragraph 5.

The Site

7. I visited the site with the parties and their representatives during the morning before the start of the hearing. “Wheal” is a word derived from the Cornish language word for “mine” or “quarry”. Wheal Kitty was a mine where both tin and copper ore were mined. The mine ceased operations many years ago. Wishing Well and Arzeen’s land adjoins a

road leading to the former pumping engine houses used in the working of the mine.

Arzeen's land was the site of mine workings. The Ordnance Survey map on which the title plan is based shows on this land three disused mine shafts and two areas marked as "tip". A large mound or bank over 2 metres high runs approximately east – west from the road. It divides the Disputed Land (which is to the south) from the remainder of Arzeen's land to the north. The land to the north of the bank is rough waste land, covered largely with gorse bushes and scrub. It is possible to walk along the top of the bank. I was told that a public footpath runs along the top of the bank.

8. The Disputed Land and Wishing Well together form the area of land enclosed by the bank to the north, a Cornish hedge to the east, the hedge and fence to the south and physical features to the west. The physical features to the west, between the area of land forming Wishing Well and the Disputed Land on the one side and the public highway on the other, comprise wooden fences on each side of a splayed opening leading to a gateway. There are walls along each side of the splay. The gateway is wide enough to allow standard width motor vehicles to pass through. This gateway is the only access from the public highway to Wishing Well and the Disputed Land. A roadway leads from the gateway to a paved area and a block of garages beyond. The paved area and the garages are on the Disputed Land. A stone wall of the type used to construct Cornish hedges has been built along the southern face of the bank. On the ground between the bank and roadway and at a point about half-way between the highway and the garages, there is a wooden electricity pole. On the pole is a plate bearing the number "1442-15". Attached to the pole is steel cable stay, the bottom of which is set into the ground to the south of the pole. Cables from the pole run to another pole to the northwest on the side of the highway. There is no visible physical feature marking the boundary between the Disputed Land and Wishing Well. The land on each side of the roadway is largely level ground and, save for the area of hardstanding by the garages, is laid to grass. The front of the garage roof and the garage doors appear only a few years old. I went into the garages and it is possible to see inside the current building the walls of older garage buildings that have been incorporated into the current building. To the rear of the garage building, between it and the Cornish hedge there is a path leading to steps giving access up onto the bank. To the south-west of Wishing Well is a property comprising a bungalow and gardens called The Warren.

9. Wishing Well was purchased by Mr Christopher Vivian in [1993]. He sold to Mr and Mrs Hampton in [2012]. Mr and Mrs Hampton were registered as proprietors on 24th March 2014. CL150240 was purchased by Mr Khan, a director of Arzeen and he was registered as proprietor on 26th August 1999. Mr Khan transferred title to Arzeen and Arzeen was registered as proprietor on 28th July 2016. The title plans of Wishing Well and Arzeen's land show the northern boundary of Wishing Well and the southern boundary of Arzeen's land along the same line. The western end of that line adjoins approximately the western end of the bank but the bank runs towards the east at an angle to the boundary line on the title plans. There is a triangle of land between the bank and the title plans boundary line and this triangle is the subject of Mr and Mrs Hamptons' application.
10. Mr and Mrs Hamptons' case is that they and their predecessor in title Mr Vivian were in possession of the Disputed Land for a period of ten years up to the date of the application. Arzeen's case is that Mr and Mr Hampton did not have factual possession of the Land because Arzeen received payments for an electricity pylon that stands on the Land.

Law

11. Paragraph 1 of Schedule 6 to the Land Registration Act 2002 provides

“1(1) A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application”.

A person is to be regarded as having been in adverse possession of the estate where he is the successor in title to an estate, during the period of any adverse possession by a predecessor in title to that estate – Land Registration Act 2003 Schedule 6 para 11(2).

12. The question to be answered when considering whether a person occupying land is “in adverse possession” is

“...whether the Defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner...Beyond that...the words possess and dispossess are to be given their ordinary meaning.”

(per Lord Browne-Wilkinson in *J A Pye (Oxford Ltd) v Graham* [2003] AC 419 at paragraphs 36, 37).

13. Legal possession is comprised of two elements:

- (1) A sufficient degree of physical custody and control (“factual possession”); and
- (2) An intention to exercise such custody and control on one’s own behalf and for one’s own benefit (“intention to possess”). “What is crucial is to understand that, without the requisite intention in law there can be no possession. Such intention may be, and frequently is, deduced from the physical acts themselves.” (*ibid* paragraph 40).

14. Factual possession has been described as follows:

“It signifies an appropriate degree of physical control. It must be a single and [exclusive] possession...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.”

per Slade J in *Powell v McFarlane* (1977) 38 P and CR 452 at pp. 470-471, cited at paragraph 41 in *J A Pye (Oxford) v Graham*.

15. What is required for the intention to possess is the intention to exclude the whole world, including the true owner of the paper title, from the land so far as is reasonably practicable and so far as the processes of the law will allow – see per Slade J. in *Powell v. McFarlane* above. The intention must not only be the subjective intention of the squatter but the squatter must also show by his outward conduct that he has such an intention. The intention must be manifested by unequivocal action – see *Prudential Assurance Co Ltd v. Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87. The use of the land must be such that the true owner, if he took the trouble to be aware of what was happening on his land, would know that the squatter was in possession

“It would plainly be unjust for the paper owner to be deprived of his land where the claimant had not by his conduct made clear to the world including the paper owner, if

present at the land, for the requisite period that he was intending to possess the land” – per Peter Gibson LJ in *Prudential Assurance Co Ltd v. Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87.

Lord Hutton said in *Pye v. Graham* at para 80

“Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded”.

16. If the land is subject to an unregistered lease, adverse possession by a squatter may extinguish the tenant’s title to the lease but it will not be adverse possession against the freeholder until the lease comes to an end. Hence, here, if the Disputed Land or part of it is subject to a lease, adverse possession by Mr and Mrs Hampton may bring an end to the lease but would not give them a right to be registered with the freehold title unless the lease is brought to an end and they remain in possession for ten years after the end of the lease.

Mr Vivian’s evidence

17. Mr Vivian owned The Warren and Wishing Well from 1993. He thought he owned the land up to the bank to the north. There were travellers on the land when he bought it. After the travellers had moved off the land in 1993, he put up the gates leading from the highway and built the walls on either side of the gates. He kept the gates locked. He built the stone wall about 1 metre high along the bank. He sold The Warren to Mrs Rowlinson in 1994 and kept Wishing Well. He used the whole of Wishing Well and the Disputed Land for storage and as a garden. He stored cars and building materials on the land. He built two garages on the Disputed Land in 1993 and a third garage about 10 years later. He used the garages for storing his hill climb cars and engines and parts and also building materials. For a period of about 3 months in 2009, he stored two touring caravans on the

land. The electricity pole was on the Disputed Land when he first came to The Warren and Wishing Well. The track was also there then but Western Power Distribution did not use the track to access the pole. They came in through the gates to The Warren.

Mr Hamptons evidence

18. Mr Hampton gave evidence that he and Mrs Hampton agreed to purchase Wishing Well (including the Disputed Land) in 2012 but it took until 2014 for the conveyancing to be completed. Mr Vivian allowed the Hamptons to go onto the land in April 2012. Mr Vivian allowed Mr Hampton to use the garages and Mr and Mrs Hampton put a caravan on the land. They used the land from then on for the storage and parking of vehicles and caravans. When they left the land, they would shut and lock the gates. In 2014 Mr Hampton had a new electricity connection installed. He produced the invoice from Western Power Distribution for this work, dated 4th November 2014. At about the same time, he had a new mains water connection installed. He produced the invoice dated 30th October 2014 from South West Water for the connection fee. In his oral evidence, he said he had water pipes laid to the garage. He created a concrete hardstanding area beside the garages. He installed a concrete edging to the track leading to the garage. He mowed the grass on each side of the track. In his oral evidence, Mr Hampton said that in 2014 he took down the gates and walls that were there when he bought Wishing Well and built a stone wall and installed new gates. In 2015, he put in steps behind the garage building to give access to the footpath running along the top of the bank

19. Mr Hampton produced a letter from Ms Margaret Stait dated 23rd January 2015 and stating that when she first moved into No 2 Cottage, The Old Count House, Wheal Kitty, being directly opposite Wishing Well, in December 1992, 2 garages had been erected and 10 years later another was erected. No witness statement by Ms Stait was produced and Ms Stait was not called to give evidence.

Evidence of Paulene Rowlinson

20. Paulene Rowlinson has lived at The Warren since December 1994. When Mr Vivian owned Wishing Well, there were two garages on the Disputed Land and another garage was built in 2007. The first two garages were in situ when Mrs Rowlinson came to live at The Warren. Mrs Rowlinson did not know when the first two garages were built but she thought when she moved to The Warren, they were of an “old construction”.

Mr Khan's evidence

21. Mr Khan is the director of Arzeen. He said in his witness statement that Arzeen objected to the application on the grounds that there are wayleave agreements in place between Western Power "for which rental income and compensation for loss of crop" is being paid to Arzeen for the land with CL150240. He said Western Power was using a track it had created to access the electricity pole. The track "formed the demarcation" between Arzeen's land and Wishing Well. He said that Mr and Mrs Hampton did not have factual possession because Western Power "have rented the land from the Respondent and have placed their equipment on the Respondent's land". In cross-examination for the first time Mr Khan said that he had visited the disputed land after he purchased it and that he visited his land "quite a few times after 1999". He accepted that there were "structures" on the Disputed Land but disputed that they were garages. He said that he had been told that the structures were used by Western Power. He said that the track was built by Western Power to get to the pole and to the structures. He did not state what was the basis for his so saying.

Samina Hussain's evidence

22. Samina Hussain gave evidence. In her witness statement, Ms Hussain said that she visited the land in title CL150240 on 11th August 1999 when there was a solar eclipse, in 2007 and in 2015. In cross-examination, Ms Hussain said that she did not walk onto the Disputed Land in 1999 but to the best of her recollection, she did so in 2007. In cross-examination, Ms Hussain said that she visited with Mr Khan as a friend. She now has a "business interest" in Arzeen. Ms Hussain said in her witness statement that to the best of her knowledge there were no "garages or any other permanent construction/erection on this land" when she visited the Disputed Land. In cross-examination she said she recalled seeing "temporary wooden structures" on the Disputed Land.

Sales Particulars

23. The sale particulars prepared by Miller Countrywide, the estate agents who marketed Wishing Well for Mr Vivian when Mr and Mrs Hampton purchased it, were in evidence. The particulars describe the land as being approximately 0.27 of an acre and bounded by a mix of Cornish hedging and hedgerows. The particulars stated that the land had "three workshops/sheds positioned to the rear" and gave the measurements of each. The

photographs with the particulars show the Disputed Land with the adjoining land, the garages or workshops/sheds in the north-east corner and the gated entrance from the road. They also show the stone wall along the side of the bank.

Photographic Evidence

24. In evidence were Google Earth photographs taken in 2001, 2005, 2009, 2013 and 2017. A building can be seen in the 2001 photograph in the approximate area of the existing garage building. A vehicle track can be seen leading from a gateway by the public highway to the building. In the 2005 photograph, an additional building can be seen, to the west of the building visible in the 2001 photograph and adjoining the north edge of the track. The additional building can be seen in the 2009 photograph but it appears to have been removed by the time the 2013 photograph was taken. The 2017 photograph shows Wishing Well and the Disputed Land much as it was when I viewed the site. The hardstanding can be seen and the roof of the garage building looks different from how it appears in the earlier photographs. A shadow caused by the telegraph pole can be seen clearly in the 2017 photograph but is not clearly visible in the other aerial photographs.
25. Mr Hampton produced several photographs showing the entrance to Wishing Well and the Disputed Land with fencing, low concrete walls and gate posts as they were before he did works to them. They also show a rough track leading from the gateway to the garage building as it was before he did works to the garage building. The telegraph pole and stay can be seen in some of the photographs with a cable running from it to The Warren. Mr Hampton's evidence was that Mrs Hampton took these photographs in 2012 shortly after the Hamptons purchased Wishing Well.

Wayleave Documents

26. A Western Power Distribution map dated 17th June 2021 shows on the Disputed Land an electricity pole numbered "41-1442-15" with a cable running from that pole to pole 41-1442-10 to the northeast and on the east side of the highway. The only Wayleave consent form produced by Arzeen that could relate to pole numbered 41-1442-15 (or a pole in that position), is an unsigned standard form document headed "Wayleave Consent" on which the word "Dummy" is written in manuscript immediately below the heading. A person executing a document in this form consents by paragraph 4 to Western Power Distribution "(a) Installing the Works; and

- (b) Maintaining, repairing, inspecting, adjusting, renewing the works.
- (c) To the felling or lopping of any tree that interferes with Safety clearances.”

27. The word “Dummy” appears to be written in the same blue ink and by the same hand as other manuscript writing on the document, which includes the date (4/7/03), the numbers WC0300192 and 4115738, as the name and address of the second party, Mr Khan and his address, and beneath the printed heading “Schedule The Works”, the following

“Pole AJ41 + stay
AJ42 + 2 stays + E/W
Stay 1442-10
Pole 1442-15”.

The space left in the printed form for the entering of the amount of payments to be made by Western Power Distribution is left blank and the document is not signed. Beside the words “Pole AJ41 + stay” is written in a different hand and in black ink the words “covered on WC0300308”. In the bundle immediately after the “dummy” wayleave consent is a Western Power Distribution plan showing the positions of poles AJ41, AJ42, 1442-10 and 1442-15 with the stays. The poles, stays and cable running between AJ41 and AJ42 and between 1442-10 and 1442-15 are highlighted in yellow. Pole 1442-15 appears to be in the area of the Disputed Land.

28. There is in evidence a signed Wayleave Consent form for wayleave number WC0300308 dated 1st September 2003 made between Western Power Distribution and Mr Khan. Ms Hussein’s name and signature appears as the witness to Mr Khan’s signature. The works are described in the schedule as “The erection of 1 pole AJ41 3 stays and 22 mtrs of underground cable and earth wire”.

29. Arzeen produced copy Wayleave Payment Advices addressed to Mr Khan dated 1st June 2004, 1st June 2005, 1st June 2006, 1st June 2007, 1st June 2008, 1st June 2009, 1st June 2015, 1st June 2016, 1st June 2017, 1st June 2018, 1st June 2019, and 1st June 202 and a payment advice addressed to Arzeen dated 1st June 2021 (by which time the dispute between Mr and Mrs Hampton and Arzeen had been referred to the Tribunal. The advices all list payments made under agreement number WC0300192, being the number on the unsigned “dummy” Wayleave Consent. The payments listed on the 1st June 2004 to 1st June 2009 (inclusive) advices under agreement WC0300192 are for two poles, 2 first

stays, one additional stay and an underground earthwire. The payments listed on the 1st June 2015 to 1st June 2021 (inclusive) advices under the same agreement are for one pole, 2 first stays, one additional stay and an underground earthwire. The “dummy” Wayleave Consent dated 4th July 2003 lists in the schedule of works a total of 3 poles and four stays. The Schedule thus includes one pole and one stay for which according to the payment advices, payments were not made under WC0300192. However, the payment advices dated 1st June 2004 to 1st June 2009 (inclusive) and 1st June 2015 to 1st June 2021 (inclusive) also list payments under WC0300308 for 1 pole, 3 stays and underground cable.

30. Mr Hampton produced a document dated “Owner Wayleave Consent”. The date and agreement number are in manuscript and it is signed in manuscript but it is otherwise a printed or typed form. The number is WC1400194. The date is 24th November 2014. The parties are Western Power Distribution and Mr Hampton. Mr Hampton gives his consent to “retaining, maintaining, repairing, inspecting, adjusting, renewing and removing” “Apparatus”. The Apparatus is described in the Schedule 1 as “1 x Pole Numbered 411442-5 & Stay”. Mr Hampton signed the document and dated his signature the 21st November 2019. It was signed on behalf of Western Power Distribution by Mr Martin Bray, who gave his title as “Estate Specialist” and dated his signature the 24th November 2019. Attached to the document was a drawing bearing Western Power Distribution’s name and logo. In the box in the bottom righthand corner of the plan are the words

“Title

- POLE 1442-5
- WISHING WELL WHEAL KITTY
- ST AGNES TR5 ORE”

Shown on the drawing and in the area of the Disputed Land is a pole and a stay marked “1442-15”. The pole and stay are shown coloured pink, which the key on the plan indicates is the colour for “proposals”. No pole marked “1442-5” is shown on the drawing.

31. On 5th October 2021 Mr Martin Crasson, Estates Specialist – Cornwall Office for Western Power Distribution wrote to Ms Hussein in reply to her email asking him for a plan

locating the position of pole number 41-1442-5, saying “I’ve looked on our maps and pole number 5 does not appear on our system”.

Findings of Fact

32. From 1993 Mr Vivian used the Disputed Land together with the land forming Wishing Well as an extension of his garden. From 1993 he used the Disputed Land for storing motor cars, engines and spare parts. He built the splayed concrete walls leading to the gateway and installed the gates. He kept the gates leading onto Wishing Well and the Disputed Land locked. He built a stone wall along the side of the bank. This much of his evidence was not disputed or contradicted by any other evidence. As there had been travellers on the land before he purchased The Warren, Mr Vivian had reason to keep the gates locked to prevent the same or other travellers from returning.
33. The only part of Mr Vivian’s evidence that was challenged was his evidence that he built the first two garages. He said that he built them in 1993. Mr Khan disputes this on the basis that Mrs Rowlinson said that the garages were “of an old construction” when she moved to The Warren in December 1994. I do not consider Mrs Rowlinson’s evidence is to be preferred to the clear evidence of Mr Vivian that he built the garages in 1993. She cannot be expected to have a very clear and accurate recollection after 29 years of the appearance of the garages. She may well have formed the impression that they looked old but I do not consider this to be a reason for rejecting the evidence of Mr Vivian that he built them. Though Ms Stait’s letter says that 2 garages had been erected prior to December 1992, as she did not give evidence and her letter does not contain a statement of truth, I do not consider the letter should lead me to reject the clear evidence of Mr Vivian as to his building the 2 garages in 1993. I do not accept the evidence of Ms Hussain that the garages were “temporary structures”. Ms Hussain failed to make any mention in her witness statement of seeing any structures at all but only asserted that she did not see garages or “any other permanent construction/erection”. Whatever Ms Hussain’s judgment of the permanence of what she recollects having seen in 1999 or 2007, the photographs of the garages taken in 2012 show them to be substantial roofed structures.
34. Mr Hampton’s evidence as to Mr and Mrs Hampton’s use of the Disputed Land was not substantially disputed. Mr Khan’s assertion that the garages were used for storage by Western Power was unsupported by any other evidence. Had the garages been so used, I

would have expected to see a witness statement or at least a letter from someone at Western Power confirming this. I find that the Hamptons used the Disputed Land for storage from April 2012. They parked a caravan on the Disputed Land from 2012. They laid hardstanding in front of the garage. They rebuilt the walls by the highway frontage and installed new gates in 2014. Mr Hampton had electricity and mains water installed in 2014. They kept the gates onto the land locked when they were not there. They built steps onto the bank.

35. I am not satisfied on the balance of probabilities that Western Power Distribution paid Mr Khan or Arzeen a wayleave payment for the pole standing on the Disputed Land. Arzeen has not produced any signed wayleave consent relating to that pole. The document marked “dummy” is unsigned. There is no other document to show clearly that it paid Mr Khan or Arzeen a wayleave payment for pole 1442-15. There is no witness statement from anyone at Western Power Distribution that it did so. In contrast, I consider that it is clear that Western Power Distribution entered into a wayleave consent with Mr Hampton in November 2014 for the pole on the Disputed Land. The pole to which that consent relates is clearly shown on the plan accompanying the consent and is the pole that stands on the Disputed Land. It is pole 1442-15. There is no pole in the area numbered 1442-5. It appears that there was a clerical error in describing the pole in the wayleave consent as “1442-5” instead of “1442-15”.

36. One possible explanation for Western Power Distribution having paid Mr Khan a wayleave for 2 poles under WC0300192 from 1st June 2004 to 1st June 2009 but for only 1 pole under the same wayleave agreement number from 1st June 2015 to 1st June 2021 could be that one of the 2 poles for which payment was made between 2004 and 2009 was 1442-15 and that after entering into the wayleave agreement with Mr Hampton in 2014, Western Power Distribution stopped paying Mr Khan for that pole. However, this is speculation and I cannot say from the evidence before me that this is the correct explanation.

Conclusions

37. Mr Vivian until 2012 and Mr and Mrs Hampton since April 2012 have been in factual possession of the Disputed Land. They had an appropriate degree of physical control over

it. They used the Disputed Land as an occupying owner would have used it, constructing and remodelling garages, building walls by the road frontage and installing gates, storing items in the garages, keeping cars and caravans on the land and cutting the grass and, most significantly, erecting and keeping locked gates at the entrance to the Disputed Land from the highway. By erecting and keeping locked the gates, Mr Vivian and Mr and Mrs Hampton clearly demonstrated to the world at large an intention to possess the Disputed Land. That intention was further demonstrated by Mr Vivian erecting garages on the Disputed Land and by Mr and Mrs Hampton laying a hard surface on the land in front of the garages. The acts of erecting and locking the gates, erecting the garages and laying the hard surface taken separately or viewed together, were unequivocal acts manifesting to the world at large the intention to possess.

38. I do not find that Western Power Distribution had possession of any part of the Disputed Land under a lease. Had Western Power Distribution had a wayleave agreement with Arzeen (or Mr Khan) (and I have found that it did not) that would not have given them possession of any part of the Disputed Land but only a right in the nature of an easement to retain the pole and stay on the ground and to access the pole and stay for the purposes of maintenance and repair. The terms of the wayleave consents that have been produced in evidence do not give Western Power Distribution possession of the land to which they relate i.e., the right to exclude the whole world including the owner and to do anything on the land that is not expressly excluded; they give only limited rights to place and maintain the pole and stay and to access them for repair purposes.

39. Had Arzeen or Mr Khan given a right in the nature of a wayleave on the Disputed Land to Western Power Distribution, that would not have prevented Mr Vivian or Mr and Mrs Hampton from being in possession of the Disputed Land. In *J A Pye (Oxford Ltd) v Graham* [2003] AC 419, there was a right of way over the land but that did not prevent the claimant from being in adverse possession of it. If Mr Khan or Arzeen had signed a wayleave consent relating to the pole on the Disputed Land, it would not have meant that Mr and Mrs Hampton did not have a sufficient degree of exclusive physical control of the Disputed Land. Mr Khan or Arzeen could not have accessed the Disputed Land because the gates were locked. Western Power Distribution would have had to ask Mr and Mrs Hampton to open the gates in order for them to get to the pole.

40. Had Mr Khan or Arzeen entered into a wayleave consent for the electricity pole on the Disputed Land, that would not have sufficed to prevent Mr and Mrs Hampton from being in possession. They had effective control of the Disputed Land through controlling access by locking the gates. To take the land out of adverse possession, Arzeen would have had to taken possession of the Disputed Land to the exclusion of the Hamptons – see per Pennycuick J. in *Bligh v Martin* [1968] 1 WLR 804 at 812F.
41. Mr and Mrs Hampton have established a period of 10 years’ adverse possession by their predecessor in title, Mr Vivian and themselves prior to the date of their application. They are entitled to be registered as proprietors of the Disputed Land under paragraph 1(1) of Schedule 5 to the Land Registration Act 2002. I shall direct the Chief Land Registrar to give effect to the application as if the objection of Arzeen thereto had not been made.

Costs

42. The Tribunal has power to make an order as to the costs of the proceedings. The usual order is that the unsuccessful party pay the costs of the successful party. I am not aware of any reason why it would not be just to make the usual order in this case. If any party wishes to submit that some different order should be made as to the costs of the proceedings, that party should serve on the other party and file with the Tribunal written submissions by 5pm on 7th April 2023. If the Tribunal does not receive any such submissions by that date, I shall order that Arzeen pay Mr and Mrs Hampton’s costs of the proceedings, to be assessed on the standard basis if not agreed.

DATED THIS 17TH MARCH 2023

Michael Michell

BY ORDER OF THE TRIBUNAL

