[2023] UKFTT 00527 (PC)

REF/2021/0117

PROPERTY CHAMBER, LAND REGISTRATION DIVISION

FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) RICHARD JOHN RIDLEY

(2) SARAH LOUIS RIDLEY

APPLICANTS

- and -

ALISTDAIR BARCLAY BROWN

RESPONDENT

Property Address: land at Moonrakers, The Promenade, Consett

Title Number: : DU377633

Before: Judge Alexander Bastin

Sitting remotely via CVP

On: 7 and 8 February 2023

Applicants' Representation: **Mr Sam Healy (counsel)**

Respondent's Representation: **Mr Brynmor Adams (counsel)**

DECISION

Schedule 6 Land Registration Act 2002 application for adverse possession – paragraph 5(4)(c) 'third condition' relied upon – whether Applicants in adverse possession – whether Applicants had 'reasonable belief' – construction of paragraph 5(4)(c) as to period when reasonable belief had to be held – As found to be in adverse possession with intention to possess of garden land enclosed by fence and leylandii hedge from 2004 – As had not acknowledged R's title by solicitors' letter suggesting R transfer Disputed Land to As – As' belief was reasonable for at least a 10 year period from 2004 and did not need to continue until application made or shortly before

Cases referred to

Lemmon v Webb [1895] AC 1
Powell v McFarlane [1979] P&CR 452
JA Pye (Oxford) Lt v Graham [2003] 1AC 419
Balevents Ltd v Sartori
Zarb v Parry [2012] 1 WLR 1240
IAM Group plc v Chowdrey [2012] EWCA Civ 505
Allen v Matthews [2007] 2 P&CR 21
Edginton v Clark [1964] 1 QB 367 (CA)
Osborne v Lawton REF/2010/1066
Crook v Zurich Assurance Ltd REF/2019/1066
Davies v John Wood Property plc REF/2008/0528
Port of London Authority v Mendoza [2016] UKFTT 0087 (PC)
McLeod v Brown & Jones [2015] UKFTT (PC)

Introduction

1. Mr & Mrs Ridley ('the Ridleys') have applied pursuant to Schedule 6 Land Registration Act 2002 ('the 2002 Act') to be registered as proprietors of 'land at Moonrakers, The Promenade, Consett DH8 5NJ' ('the Disputed Land'). The Ridleys made their application by a Form ADV1 signed on 10 December 2019 in which they indicated an intention to rely upon paragraph 5(4) Schedule 6 (known as 'the Third Condition' – see paragraph 10 below). The Disputed Land is part of Mr Brown's title and by serving a Form NAP signed 8 December 2020 he objected to the application and required it to be dealt with under paragraph 5 Schedule 6. The dispute could not be resolved before the Land Registry and the matter was referred to the Tribunal on 18 February 2021. I conducted a site view on 6 February 2023 in the presence of the parties' counsel[1] and the trial took place remotely via CVP over the following two days.

The background facts

2. There is no dispute about many of the background facts and the parties' counsel helpfully provided me with an agreed chronology from which the following is taken.

[1] Mr Brown was present in the company of both counsel when I arrived, but he did not accompany us in viewing the site. I did not see the Ridleys.

3. The Ridleys bought their property, Valley View[2], in July 2004 from their predecessors in title John and Eileen Gailles. The Gailles had, in turn, bought Valley View from Keith Shaw in February 2000 and had it first registered under Title No. DU234551. Mr Shaw, of whom more later, had initially bought a rectangular plot in the early 1970s and then added to it by buying an adjacent triangular plot of land to the south with the combined plots forming Valley View.

4. In about September 2002 Mr Brown bought what is known as 'land on the west side of The Promenade' ('Mr Brown's Land') and was subsequently registered as proprietor under Title No. DU255518. Mr Brown's Land might be described as rough, uncultivated land that he had acquired with a view to development. The nature of the land was such that in October 2002 it was subject to an application to Durham County Council made by someone living locally that it be designated as common land. This application led to a public hearing held by Charles George QC whose decision and report rejecting the application was published in August 2005.

5. In August 2017, the Ridleys retained Hodgson Architectural Services to prepare a site plan and submit a planning pre-application to Durham County Council for advice on the construction of a second dwelling in Valley View's garden. This led to a topological survey in October 2017, a planning permission application in February 2018 and the grant of planning permission on 7 March 2018. In the summer of 2018, some preparatory clearance works were carried out and building work started in September 2018. This came to Mr Brown's attention and he, believing the Ridleys' construction work might be trespassing upon his land, gave notice to the Ridleys' architect by email sent on 21 October 2019 that the works were not authorised pursuant to the Party Wall etc Act 1996. This led to the Ridleys making their application to the Land Registry on 20 December 2019.

6. The current position is that the Ridleys have completed the second dwelling on Valley View, named it 'Moonrakers' and now occupy it. There is no dispute that Moonrakers is partly situated upon Mr Brown's Land as can be seen in the almost north-orientated plan at Figure 1 below. Mr Brown's Land is to the south-west (bottom left of page), the Ridleys' property is outlined in red (in the centre of the page with Moonrakers identifiable as black and white vertical stripes) and The Promenade runs north-south to the east (right side of page). The Disputed Land which the Ridleys claim adverse possession of is shaded/hatched green.

[2] So called, I surmise, because it is set on a hillside with a westward view out over a valley in the direction of Derwent Reservoir.

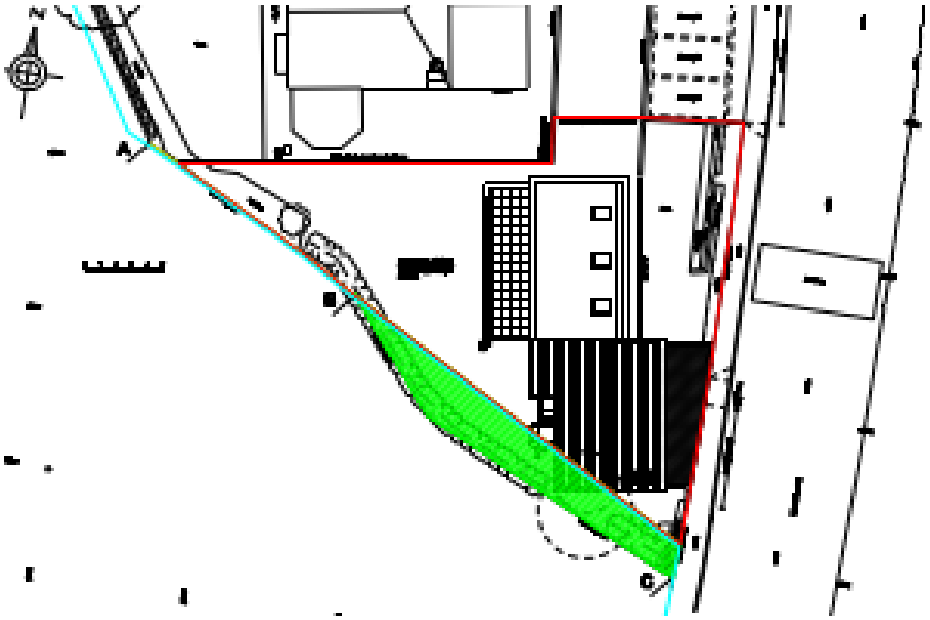

Figure 1: plan showing the Disputed Land taken from p.53 of the trial bundle.

The parties' cases

7. In summary, the Ridleys say that this is a classic case of adverse possession where the boundaries on the ground do not coincide with the boundaries as marked on the Land Registry title plan. The boundary on the ground when they acquired Valley View in 2004 was, they say, marked by a picket fence and a leylandii hedge (both cleared in summer 2018) that followed a zig-zag or dog-leg line[3], whereas the boundary is marked by a straight line on the title plan[4]. They claim to have used the Disputed Land as part of their garden throughout their ownership of Valley View and to have had no knowledge of any issue as to where the paper boundary lay until shortly after 21 October 2019, the day Mr Brown emailed their architect alleging trespass. Once they had been alerted to there being an issue, they proceeded to make this application within two months.

8. By contrast, Mr Brown says that (a) generally the evidence of adverse possession is ambiguous, (b) there was an approximately 11 month period following removal of the leylandii hedge when there was no evidence of adverse possession, (c) the Ridleys did not maintain the necessary intention to possess in October 2019 as demonstrated by plans that their architect sent Mr Brown, and (d) the Ridleys acknowledged his title by virtue of their solicitors' letter dated 11 November 2019. Mr Brown also asserts that the Ridleys fail to satisfy the Third Condition because they did not hold a reasonable belief that the Disputed Land was theirs from either February 2018 or, alternatively, October 2019.

[3] See the light blue line, which runs along the southwest of the Disputed Land, on Figure 1.
[4] See the red line, which runs along the northeast of the Disputed Land, on Figure 1.

The legal framework

9. Section 97 and Schedule 6 of the 2002 Act introduced a new regime for adverse possession claims in respect of registered land which effectively abolished such claims save for some limited exceptions:

    9.1 Paragraph 1(1) allows a person to apply to the Registrar to be registered as the proprietor of a registered estate if they have been in adverse possession of land for the period of 10 years ending on the date of the application.

    9.2 Paragraph 2(1) provides that where a person applies pursuant to paragraph 1(1), the Registrar is required to notify the registered proprietor who is then entitled to require the application to be dealt with under paragraph 5.

    9.3 Paragraph 5 provides that the applicant is only entitled to be registered if they satisfy any one of three conditions. This means that an applicant has to establish both adverse possession (see paragraph 11 below) and one of the three conditions (see paragraph 10 below).

    9.4 Paragraph 11(1) provides that the requirement of adverse possession is satisfied if a period of limitation under Section 15 Limitation Act 1980 would have run in his favour in relation to the estate.

10. The Applicants rely upon the Third Condition at paragraph 5(4) which provides that:

    'The third condition is that:

    (a) the land to which the application relates is adjacent to land belonging to the applicant,

    (b) the exact line of the boundary between the two has not been determined under rules under section 60,

    (c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and

    (d) the estate to which the application relates was registered more than one year prior to the date of the application.'

    Of these four requirements, only (c) is in issue. There is no dispute that the other three are satisfied.

11. The general legal principles applicable to adverse possession claims are well-established and perhaps best taken from *Powell v McFarlane*, *J A Pye (Oxford) Ltd v Graham* and *Balevents Ltd v Sartori*. Insofar as relevant to the present matter, they can be summarised as:

    11.1 The person with paper title is presumed to be in possession of the land which is the subject of the application.

    11.2 The burden is on an applicant to show that they (a) are in factual possession of the land, and (b) have an intention to possess the land.

    11.3 In order to establish factual possession, the applicant must demonstrate that they have an appropriate degree of exclusive physical control of the land. Their possession must be exclusive and they must deal with it as an occupying owner might have been expected to have done so and that no one else has done so. This is a matter of fact which will depend on all the circumstances which include, in particular, the manner in which the land is commonly enjoyed.

    11.4 In order to establish the requisite intention to possess, the applicant must show that they intended to possess (not own) the land to the exclusion of all others. The intention to possess must be manifested clearly so that it is apparent that the applicant was not merely a persistent trespasser.

The issues

12. The headline issues are as follows:

    12.1 Can the Ridleys establish adverse possession of the Disputed Land 'for the period of ten years ending on the date of the application' being 20 December 2019 as required by paragraph 1(1) Schedule 6 (see paragraph 9.1 above)? Subsidiary issues are (a) can the Ridleys show factual possession of all of the Disputed Land throughout the relevant 10 year period, (b) did they hold and manifest the requisite intention to possess, and (c) did the Ridleys acknowledge Mr Brown's title thereby re-starting the running of time?

    12.2 Can the Ridleys establish that they reasonably believed that the Disputed Land belonged to them for the relevant period of 10 years as required by paragraph 5(4)(c) Schedule 6 (see paragraph 10 above)? Subsidiary issues are (a) what is the test for reasonable belief, (b) do the Ridleys satisfy the test or did any reasonable belief they might have had end by February 2018 when they submitted their planning application, or, alternatively, October 2019 when Mr Brown pointed out the trespass?

13. Since it is the Ridleys who have brought this application, the burden of proof is on them to the civil standard (being the balance of probabilities).

The evidence

14. I heard oral evidence from Mr Ridley, Michael Stephenson (a neighbour of the Ridleys), Garry Hodgson (the Ridleys' Chartered Architectural Technologist) and Mr Brown. They all confirmed the truth of their Witness Statements and were cross-examined. The Ridleys also served Witness Statements by Mrs Ridley (she simply confirmed that she had read her husband's and agreed with its contents) and Keith Shaw (the Ridleys' predecessor in title but one) but Mr Brown's counsel elected not to cross-examine either of them. Mr Shaw's written evidence was that in the 1970s he bought a small bungalow with a strip of land alongside it at Valley View and that subsequently he bought an adjacent piece of land from council. He says the council did not bother measuring the area it was selling although there was a sketch with the deeds which he no longer retains. Around the outside of the area that he bought, the land fell away steeply. He was not interested in buying the steep hillside, so the boundary of the land he bought was to go up to its edge. He put up a picket fence around the agreed perimeter and then planted a leylandii hedge just inside the fence along the part of the perimeter nearest to the road. Mr Shaw might not have retained the conveyance but I was provided with a copy with plan in the trial bundle. It is dated 8 November 1976. At clause 3(1) Mr Shaw covenanted to:

> 'Within three months from the date hereof at his own expense and in a proper workmanlike manner and to the satisfaction in all respects of the County Land Agent and Valuer of the County Council erect and make forever thereafter maintain and keep in good repair a boundary fence (of a type to be agreed between the parties hereto) along the entire length of the Southern and Western boundaries of the piece of land hereby conveyed.'

15. The next evidence in time regarding the boundary was given by Mr Stephenson. He is very much a local having grown up in the area and bought his current home, a neighbouring property called West Mount, in the early 2000s. His written evidence was that three or four years before buying West Mount he had inspected Valley View as he was thinking of buying it and that he believed 'there might have been some sort of fence' in the proximity of small trees along the boundary where it joined the road. I will not relate his evidence in great detail because, I think it is fair to say, that he was far from confident as regards the existence of a fence along the whole boundary and conceded in cross-examination that he was probably referring in his Witness Statement to the boundary along the south-west corner of Valley View where there was a conservatory.

16. Mr Brown then bought his land in 2002. His written evidence is that at that time the boundary consisted of an old fence line along Valley View's western boundary that wrapped itself briefly around the southern boundary for a few metres before ending and a thick row of leylandii and other trees and bushes continuing until they met the footpath on The Promenade. He was, he writes, satisfied the garden area of Valley View, excluding the tree and bush line, which ran up close to the access drive to the house, was within the HMLR title plan red line marking. During cross-examination he said that the drop along the southwestern boundary towards The Promenade was not that severe but accepted that foliage on his land was dense enough that it

"wouldn't be comfortable" to walk through and that he had never accessed the Disputed Land from his side. Notwithstanding this, he maintained that he had not seen a fence along the southwestern boundary and that the fence along the western boundary could not have continued given the growth of the leylandii. When asked when it was that he first looked, he said in 2004 to 2005 when he first commissioned a chartered surveyor for the common land enquiry. He looked at in detail with the council and Charles George QC. When asked why, he replied that they were trying to identify encroachments. When then asked why did he look on his side of the leylandii hedge, he replied that he had not done so in detail for the common land enquiry. For that enquiry they were looking for encroachments that would undermine the applicant's case and activity on his land. When put to him that he was mistaken about the fence, he answered that he had looked at all the photographs and seen no evidence of the fence continuing through the hedge line. He had never trimmed the leylandii himself and when asked whether he had ever seen the Ridleys do so, he said "I am sure they have done." He had not paid any attention to the Ridleys use of the Disputed Land following the public enquiry's report in 2005 until October 2019.

17. The Ridleys arrived on the scene in July 2004, a few years after Mr Brown. Mr Ridley's written evidence is that at that time the western boundary was marked by a tall, dilapidated picket fence and the southwestern boundary by a thick, mature leylandii hedge with the picket fence running behind it such that the hedge was planted within the Valley View boundary. Beyond the picket fence the land fell away steeply. At paragraph 6 of his Witness Statement he explains what use they had made of the Disputed Land. They had used all the land up to the leylandii hedge as part of their garden. They had installed a children's climbing frame and football goalposts and kept a compost heap there. They maintained the leylandii hedge and mowed the lawn. No one had advised them that any part of what they considered to be their garden or the leylandii hedge was not within their title.

18. During cross-examination, Mr Ridley denied ever having been aware of the common land enquiry. They had bought Valley View just three or four months after moving to England from South Africa and they were focused on upgrading the property and settling their children in. He accepted that he did not mention the picket fence behind the leylandii hedge in the fifth paragraph of panel 5 of his ST1 but affirmed that it was there albeit falling to bits. He had had to repair the fence with chicken wire to stop the dogs from getting out. Mr Ridley also accepted that there were no photographs showing the fence behind the leylandii but explained that they took photographs from their side of the leylandii and the fence was on the far side.

19. Charles George QC's report on the common land enquiry application is dated 30 September 2004. It is almost 90 pages long and sets out the evidence that he heard about the use made of Mr Brown's land by people who may or may not have been living in the neighbourhood or locality. Mr Brown and his company Strathmore were the joint objectors. The application site is described at paragraph 7 as consisting of three areas, each with distinctive terrain. The first area, relevant to the Ridleys' application, is described as consisting of 'land sloping down steeply from east to west, which I shall refer to as "the slopes". For the northern half of the site the

eastern boundary of the slopes (running north to south) is provided by (a) the fence line behind the five most northerly properties in The Promenade (Fairbank… and Valley View)…'. Mr George QC's report found, at paragraph 14, that there had been two areas of encroachment neither of which were along the boundary of Valley View.

20. Nothing much then appears to have happened until the Ridleys instructed Garry Hodgson to submit a planning pre-application to the council in August 2017 and then commissioned a topological survey in October 2017. Mr Hodgson's written evidence was that he first met Mr Ridley on 17 August 2017 to discuss the construction of a new dwelling on land to the side of his current home. Mr Hodgson's initial thoughts were that an innovative design would be required because of the challenging topography. He says that the site area appeared to be a normal garden. The first plans that he submitted to the local authority were in the form of a pre-planning application for establishing the principle of constructing a new dwelling. As already covered above, planning permission was granted on 7 March 2018, the leylandii hedge and picket fence were cleared in July 2018 and the builders constructed Moonrakers between June 2019 and October 2020. There is no photographic evidence as to the state of the Disputed Land between July 2018 and June 2019.

21. It was Mr Brown's evidence that in October 2019 he noticed considerable activity around Valley View when driving past and this prompted him to take aerial photographs using a drone. These photographs show the works progressing with the "floor-pad" laid but "no significant walls" (to quote Mr Brown during cross-examination). When it was put to him that the photographs were clear evidence that the Ridleys considered themselves owners of the Disputed Land and that they could do with it as they wished, Mr Brown replied "I presumed that they did." Mr Brown then investigated and found that planning permission had been granted for a house that appeared to be partly on his land. He says he was surprised that the Ridleys had not given him notice under the Party Wall etc Act 1996 and that the council had not notified him of their planning application - he later established that the council had not sent him notice because his land did not have a postal letterbox.

22. On 21 October 2019, Mr Brown emailed Mr Hodgson giving notice that he considered the works to be in breach of obligations that he thought the Ridleys owed him under the Party Wall etc Act 1996. He required various pieces of information, including an overlay plan, and demanded that the trespass cease and that the fence line be re-instated as per the Ridleys' title plan. In cross-examination, he accepted that his request that there be no further trespass in the last paragraph of his email was with reference to the Ridleys' builders' materials. These were referred to in Mr Brown's fourth bullet point paragraph in his email. A little later that day Mr Hodgson forwarded Mr Brown's email to the Ridleys and that afternoon emailed Mr Ridley referring to their earlier telephone conversation and attaching three drawings the first of which was '001 Location Plan (Planning Application).pdf' and described in the body of the email as 'Drawing 001 - site plan boundary in red line as per official land registry'.

23. On 22 October, Mr Hodgson emailed Mr Ridley as follows: 'Please find attached a copy of your Land Registry title FYI, I'll overlay this on to the site plan.' Mr Ridley acknowledges receipt and on 23 October Mr Hodgson emails back: 'I've overlaid the land registry plan on to the site plan. Black line – Ordnance survey drawing. Green line – from topographical survey (inc new houses). Pink line – from land registry'. This overlay plan is at page 671 (and 511). Mr Ridley accepted – and, indeed, was adamant - that it was only at this point that he became aware that some of the land he was building on was not within his title.

24. On 25 October, Mr Hodgson emailed Mr Brown. He opened by apologising for his delayed response and wrote 'my client and I were under the impression this was council owned land and we made representations to this as part of the planning application.' He attached 'Drawing 201/C' and 'Drawing 001/A' (as well as some others) and confirmed that the Ridleys undertook to remove any waste, et cetera, from Mr Brown's land, make good and re-instate the fence line. Mr Ridley confirmed during cross-examination that he thought Mr Brown's land was owned by the council but directed Mr Adams to Mr Hodgson on the representations to the council. Mr Hodgson explains the representations at paragraph 5 of his Witness Statement where he says that he was referring to the area of land to the south and west of the hedge line. During cross-examination, Mr Hodgson accepted that they had made enquiries about ownership of the land beyond the hedge line and made representations during the planning process by making a declaration the Ridleys were the sole owners of the land on the planning application form. Although I was not directed to a copy of this form during the trial, Mr Brown sets out the relevant paragraphs at his paragraphs 41 and 42.

25. By letter dated 11 November 2019, the Ridleys' solicitors wrote to Mr Brown asking whether he would be minded to execute a TP1 transferring title of the Disputed Land to them. The second paragraph of the letter says '…it is evident that your questions address the fact that a small portion of your registered title has for many years been incorporated within the garden of our client's property, Valley View. Our client will have acquired title by adverse possession.'

26. It was both Mr Ridley and Mr Hodgson's evidence that that the first time they realised there was an issue as to where the paper boundary lay was when Mr Hodgson produced an overlay plan following receipt of Mr Brown's email of 21 October 2019. They were both cross-examined about this and various plans that Mr Hodgson had produced.

27. Mr Adams put to Mr Ridley and Mr Hodgson that there were a number of matters which pointed to the mistake having been discovered by the time of the planning application in February 2018. First, there was the last paragraph of panel 5 of Mr Ridley's ST1 as follows:

> 'This year we decided to remodel this area of land and submitted planning permission to build a new home with intentions of removing the hedge. It was only then we realised this area of our garden was not within the title of our property.'

In cross-examination it was put to Mr Ridley that if this was correct, the Ridleys had realised that part of their garden was not within their title when they submitted their planning application in February 2018. Mr Ridley explained that soon after submitting the ST1 they had realised that this paragraph was incorrect and asked their solicitor whether they should raise it. This was corrected by the Ridleys' solicitors in a letter dated 8 April 2020. Mr Ridley also accepted that Mr Hodgson had emailed him the title plan on 22 October 2019 and the overlay plan the following day and that, therefore, 'November' in this letter was also incorrect as it should have been 'October'.

28. Mr Adams then cross-examined Mr Hodgson closely as to the circumstances in which he would obtain a Land Registry title plan but Mr Hodgson was adamant that whilst he would always obtain the Ordnance Survey plan, it was incredibly rare for him to obtain a title plan and he had not done so on this occasion until October 2019 when Mr Brown first got in touch.

29. This led to Mr Adams questioning Mr Hodgson about some of the drawings of the site that he had produced which showed the boundary as a straight line as per the Land Registry title plan. The cross-examination went on for quite some time but the upshot was that Mr Hodgson denied that his location plans numbered '001' at pages S10 (dated 'Aug '17'), S14 (a version of S10 used for the planning application made on 7 February 2018) and S17 (the location plan 'updated to include new dwelling dotted' and marked 'Rev A' and dated 'Feb '18') - all showing a straight line rather than zigzag southwestern boundary - were based upon the title plan. Rather, he said, they were based on the Ordnance Survey map as he did not have the title plan until October 2019. Mr Adams asked Mr Hodgson for his original of the Ordnance Survey plan but Mr Hodgson doubted there was one and said that S14 was the Ordnance Survey plan to which he had added the title block and the red line boundary.

30. Mr Adams suggested that if S10, S14 and S17 were based on the title plan, it would explain Mr Hodgson's email to Mr Ridley dated 21 October 2019 (page 646) in which Mr Hodgson describes 'Drawing 001' as 'site plan boundary in red line as per official land registry'. Mr Hodgson acknowledged that the description in his email was wrong and said "I would have meant Ordnance Survey" and that he had not expect to be engaged in legal proceedings four years later.

31. Mr Adams also pointed out that the first pdf attached to the 21 October email at page 646 is titled '001 Location Plan (Planning Application).pdf'. Mr Hodgson conceded that there was a discrepancy in the naming of the pdf file, insisting that this pdf was the location plan at page 647 which he had produced on 21 October 2019 to show what the topographical survey would look like on the Ordnance Survey plan. It was not the drawing submitted with the planning application which was at S14. Whilst being cross-examined, he purported to open the email on his computer to confirm this. He accepted that the plan at page 647 does not match the description of it either in the email at page 646 ('site plan boundary in red line as per official land registry') or on its face (it was dated 'Aug '17' rather than 21 October 2019). At the time he did not think the date and time stamp would be important. The location plans used for the pre-planning advice and the planning application were the ones at S10 and S14: he created it in 2017 using the Ordnance Survey map and topographical survey data. When pressed on the fact that S14 does not show a zigzag boundary reflecting the topographical data, Mr Hodgson insisted that it was based upon the topographical survey recording features on the ground and that in his experience a deviation of a metre did not worry him.

32. Mr Hodgson also said that although paragraph 3 of his Witness Statement appeared to refer to the location plan at page 473 (with a zigzag boundary and dated 'Aug '17'), in fact the one submitted to the council for the actual planning application was at S14 (with a straight boundary taken from, he said, the Ordnance Survey map). He suggested that this could be confirmed on the council's website. The plan at page 473 was not created until 19 September 2019. He claimed to have the pdf with the 'meta data' stating this.

33. Mr Adams took Mr Hodgson to the email he sent to the Ridleys on 6 December 2017 at S9 which appears to attach, inter alia, the location plan at S10. In the email Mr Hodgson wrote "Following our meeting last week I have updated the plans and elevations…". Mr Adams suggested that the update to the location plan was to change it from the Ordnance Survey zigzag line to the Land Registry straight line. Both Mr Ridley and Mr Hodgson denied this; when they met in the Ridleys' kitchen it was to discuss changes to the house and they did not look at the plans as they were not interested in the borders. Mr Hodgson's evidence was that S10 was the original location plan and reflected the Ordnance Survey line.

34. Mr Adams then asked Mr Hodgson about S17 titled 'Rev A Plan updated to include new dwelling dotted Feb '18' showing the proposed building, Moonrakers, inside the Ridleys' title on Mr Brown's title plan. Mr Hodgson said that he produced S17 on 25 October 2019 using Mr Brown's title plan at S20 which he had bought that day – he said that he had the metadata and a receipt. He denied producing S17 based upon the Land Registry plan in February 2018. Mr Adams put it to Mr Hodgson that when Mr Brown challenged the building works in October 2019, Mr Hodgson had produced three plans with two showing Moonrakers built within the Ridleys' boundary (at pages S17 and S21) and one partially across the boundary (at page 671) and had only sent the former two to Mr Brown. Mr Hodgson denied that he had done this in an attempt to persuade Mr Brown and explained the difference as being due to his

having only bought Mr Brown's title plan on 25 October. He accepted that he had never compared the two properties title plans.

35. Mr Adams took Mr Hodgson to the overlay or comparison plan at page 671 that the latter had created on 23 October 2019 and emailed to Mr Ridley that day. When asked to confirm that the zigzag black line was the Ordnance Survey line, Mr Hodgson said it was the topographical line and that the Ordnance Survey line was not on the drawing. When Mr Adams corrected him, Mr Hodgson simply replied "Oh yes." Mr Hodgson agreed that 'Rev C' at the bottom of the page indicated that there would be an original and revisions A and B. But, he went on, 'Rev C' was an extract from a larger CAD file and the client would only see if printed. Revisions were only allocated when a drawing was framed and printed. There was no original or A and B, just revisions of the CAD file. He had not printed earlier versions of A and B. Rev C was the first extract ever produced. There were three earlier files but they were CAD drawings for which special software is needed to open. You would only get a document when printed and there was no A or B of that drawing.

36. Before moving on from the evidence I should add here that during the course of these proceedings Mr Brown's solicitors have sought further disclosure from the Ridleys. Mr Adams raised this at the Telephone Pre-trial Review and, in the absence of any formal application, I encouraged the parties to resolve this between themselves. This resulted in both Ridleys filing and serving Witness Statements dated 2 February 2023 exhibiting some further documents and confirming that they had both complied with their disclosure obligations.

Discussion

Adverse possession – exclusive possession

37. I am entirely satisfied that the Ridleys have established, on the balance of probabilities, that they had exclusive possession of all of the Disputed Land from 2004 until they made their application to the Land Registry. Mr Shaw's evidence, which was not challenged with cross-examination, was that he put up a picket fence around the perimeter and then planted the leylandii saplings just inside the fence along the part of the perimeter nearest the road. Mr Adams criticises Mr Shaw's evidence for not being specific enough, for being limited to the early 1980s and for not saying what happened to the saplings. I reject these criticisms. I found Mr Shaw's evidence to be specific enough (see paragraph 14 above) and to be consistent with the fencing covenant at clause 3(1) of the 8 November 1976 conveyance and there is no dispute that a picket fence was put up along the western boundary. Given the change in the level of the land, even if less precipitous along the southwestern boundary than the western boundary, it would have been the natural thing to run the fence along the entire perimeter. I should add here that on the site view I conducted on 6 February I could see a quite distinct falling away of the land along the southwestern boundary, even if not as pronounced or dramatic as along the western boundary. I also take into account Mr Hodgson's topographical survey of October 2017 on which the words 'Wooden Pailing Fence' are marked twice along the southwestern boundary, twice along the western boundary and then again along the southern end of the eastern boundary fronting onto the road. This survey was

conducted before this dispute arose and there is no reason to doubt that it is an accurate record of the features that were present.

38. My initial understanding of Mr Brown's written evidence was that he had personally inspected the boundary at the time of purchase in 2002 (see his paragraph 17) but this was not borne out in his oral evidence when he said that he had not accessed the Disputed Land from his side and that he had first looked at the boundary in 2004 to 2005 for the common land enquiry. I consider it more likely than not that Mr Brown never had reason to consider Valley View's southwestern boundary closely and that the vegetation and site topography would have prevented him from doing so. Interestingly, I note that Mr Brown's letter dated 21 October 2019 to Mr Hodgson demanded that the Ridleys 'Re-instate the fence line as shown in your clients' HMLR title plan.' Mr Brown's use of 'fence line' could be said to be consistent with his thinking that a fence did exist but he was not asked about this and I make no specific finding.

39. Whilst I accept that Mr George QC's report only found two areas of encroachment, neither being along Valley View's southwestern boundary, the passage that I have cited from paragraph 7 (see paragraph 19 above) is supportive of the fence running along the entire boundary. The report's description is detailed and I think it more likely than not that it would have stated if the fence did not run the length of the Valley View boundary as Mr Brown asserts. Given the focus of the enquiry and the particular topography and ground cover of this part of Mr Brown's land, it is unsurprising that encroachment was not identified.

40. Another important consideration is that the large number of photographs covering a broad period of time from 1985[5] onwards all show the leylandii hedge along the southwestern boundary following a zig-zag / dog-leg line. By the 2000s the landscape and flora were pretty mature and it is unlikely that anyone would have given Valley View's southwestern boundary a second thought. It is unsurprising that none of them show the fence along the southwestern boundary given that none were taken from Mr Brown's side of the leylandii hedge. The aerial photographs do not give a clear view and it is likely, in my view, that the leylandii – with a reputation for prodigious growth - would have to some extent subsumed the fence. The various aerial photographs show how the leylandii saplings planted by Mr Shaw grew into quite a substantial hedge, even if trimmed occasionally.

41. Further, there is no real challenge to Mr Ridley's evidence as to the use made of the Disputed Land. Indeed, Mr Brown conceded that he had paid no attention to the Ridleys' use of the Disputed Land after the common land enquiry concluded. I accept Mr Ridley's evidence as to their use of the Disputed Land and find that they had the requisite appropriate degree of exclusive physical control of the Disputed Land with their possession being exclusive and that they dealt with it as an occupying owner might have been expected to and that no one else, in particular Mr Brown, has done so.

[5] Page 351 of the trial bundle.

Adverse possession – intention to possess

42. Mr Adams made three submissions as to why the Ridleys did not maintain the requisite intention to possess up until the date of their application to the Land Registry.

43. The first is that the 11 month period between removal of the leylandii hedge and picket fence in July 2018 and the builders starting construction in June 2019 is a significant period of time during which the Ridleys would not have been manifesting their intention to possess the Disputed Land (see paragraph 11.4 above). Mr Adams countered this by submitting that there could have been no greater expression of the Ridleys' intention to possess than their unilateral removal of the fence and the substantial leylandii hedge (anything from 2 to 4 metres wide on the parties' respective cases) without interference by Mr Brown and then building over the site. I agree with Mr Adams. The Ridleys did not have to be using every part of the Disputed Land throughout the 10 year period let alone between July 2018 and June 2019 and although there is no photographic evidence as to the state of the Disputed Land it is highly likely to have been churned up by the process of removing the hedge and the fence. There would also have been the planning application drawings submitted to the local authority showing the Ridleys' building plans for the Disputed Land.

44. Mr Adams's second argument is that Mr Hodgson, on behalf of the Ridleys, wrote to Mr Brown on 25 October 2019 representing that the Ridleys' building works were taking place entirely within their own title. As a result, they were not manifesting an intention to possess to the world. Mr Adams' response was to point to Mr Hodgson's evidence that he was not trying to conceal anything and that Mr Brown could see the construction of Moonrakers taking place in October 2019 and that this was the Ridleys manifesting their intention to possess. Again, I agree with Mr Adams. Whatever Mr Hodgson was or was not doing, it was plain to Mr Brown that the Ridleys were building over the Disputed Land and thereby manifesting their intention to possess. Mr Brown accepted as much when cross-examined.

45. Mr Adams's last argument is that the Ridleys acknowledged Mr Brown's title in writing by virtue of their solicitors' letter dated 11 November 2019 (see paragraph 25 above). He says that as a result the limitation period under Section 15 Limitation Act 1980 would have begun to run afresh. Further, although the author of the letter writes that the firm has been instructed by Mr Ridley (making no mention of his co-registered proprietor) the reasonable recipient would have understood it to be sent on behalf of both Ridleys. Finally, that if the signature can take the form of initials, there is no problem with the letter being signed on behalf of the firm ('EMG') and, in any event, the author's name is at the bottom of the letter.

46. Mr Adams' response is that I should not entertain this argument because it was not pleaded in Mr Brown's Statement of Case and was only raised in a skeleton argument a few weeks before trial. If I am against him on that point, then he relied upon *Allen v Matthews*, a Court of Appeal matter in which it was held that for a document to constitute an acknowledgement of title, what was required is for the person in

possession to acknowledge that the paper title owner had better title to the land.[6] He went on to submit that, construed objectively in light of all the surrounding circumstances, the letter's author is not saying that Mr Brown has better title but that the Ridleys have adversely possessed the Disputed Land and, therefore, got better title, hence no consideration is offered for the transfer. Mr Adams also submitted that the letter was sent only on behalf of Mr Ridley (there is no mention of Mrs Ridley) and it is not signed by someone (as opposed to by the firm) as required by Section 30(1) Limitation Act 1980.

47. Whilst I agree with Mr Adams that in form the letter is signed in writing by the Ridleys' agent, once again, I prefer Mr Adams' submissions. The letter, construed objectively in light of all the circumstances, is not acknowledging that Mr Brown has better title. Rather, it is asserting that although Mr Brown is the paper owner, the Ridleys have the better title. That is the substance of the letter even if it is clumsily expressed in the words 'Our client will have acquired title by adverse possession.'

48. To conclude on adverse possession, I am satisfied that the Ridleys have demonstrated that they had an appropriate degree of exclusive physical control of the Disputed Land and dealt with it as an occupying owner might have been expected to given its character and that no one else has done so throughout the period of 10 years ending on the date of the application. I am also satisfied that the Ridleys had the requisite intention to possess the Disputed Land to the exclusion of all others and clearly manifested this throughout the period of 10 years ending on the date of the application. They did not acknowledge Mr Brown's title.

Reasonable belief

49. The Ridleys must establish that they themselves (not Mr Hodgson) actually believed (subjectively) that the Disputed Land belonged to them and that their belief was objectively reasonable – see paragraph 10(c) above. The first issue that I have to resolve on this issue is the test to be applied. This is attributable to the wording of paragraph 5(4)(c) Schedule 6 which has been the subject of considerable debate and divergence of views. Although the parties addressed this issue in their submissions at trial, I subsequently drew their attention to the Tribunal's Decision in *Crook v Zurich Assurance Ltd* and invited further submissions for which I am grateful. Unsurprisingly, Mr Healy's further submissions support the Tribunal's conclusion whilst Mr Adams' do not.

50. Mr Adams argued that the Ridleys must have held the requisite 10 years belief up until 20 December 2019, this being the date that the made their application to the Land Registry, disregarding any *de minimis* period that should be measured in weeks rather than months taking into account any special circumstances arising in any particular case. Mr Adams relied upon paragraph 17 of Arden LJ's (as was then) judgment in *Zarb v* Parry, an article by Stephanie Tozer KC and Kester Lees (available on Falcon Chambers' website) and two Law Commission consultation papers. He submitted that the Law Commissions' analysis should be preferred not least because

[6] In fact, the Court of Appeal cites *Edginton v Clark* as authority for this proposition. Megarry & Wade: The Law of Real Property cites *Allen v Matthews*.

it reflects the policy of the 2002 Act that Schedule 6 was intended to bring finality to adverse possession claims: once a person's reasonable belief ends, ownership should be resolved quickly, and claims should not be sat on indefinitely.

51. In contrast, Mr Healy argued that the Ridleys simply needed to establish 10 years reasonable belief at any time during their adverse possession of the Disputed Land and not that it continued up until the date of the application. In the alternative, if reasonable belief had to be maintained up until the date of the application, then there is a grace period for a squatter acting promptly or within a reasonable period of time from learning that the land is not his. This is, he says, consistent with *Zarb v Parry* and the Law Commission consultation papers. He also relies upon Megarry & Wade: The Law of Real Property at paragraph 7-098 where it is said that it cannot have been the intention of the legislature that a squatter submit their application on the very day that his belief ceases, or ceases to be reasonable.

52. The wording of paragraph 5(4)(c) is ambiguous as is evidenced by the debate that it has engendered and there is no clear authority on its construction. In both *Zarb v Parry* and *IAM Group plc v Chowdrey* it was found that the reasonable belief continued until the date of the proceedings and construction was not argued. I am, therefore, not bound by either of them. What is clear to me is that Parliament cannot have intended that a squatter makes an application on the day his belief ceases to be reasonable. Such a construction would render the provision virtually useless and, indeed, Mr Adams acknowledges this by conceding that any *de minimis* period should be disregarded.

53. I take the view that paragraph 5(4)(c) should be construed as meaning any 10 year period and not one that must end on or close to the date of an application to the Court or the Land Registry. This was, of course, the view taken in *Crook v Zurich Assurance Ltd* (in which the issue was argued at some length) and other Tribunal decisions such as *Davies v John Wood Property plc*, *Port of London Authority v Mendoza* and *McLeod v Brown & Jones*. Whilst I accept that these decisions are not binding on me, I do find them persuasive. Further, the any 10 years construction can be read from paragraph 5(4)(c) itself and, perhaps incidentally, is consistent with the wording of paragraph 1(1) where 'the period of ten years ending on the date of the application' also appears. The *de minimis* argument offers a solution that is not needed and throws up all the unsatisfactory and unwelcome difficulties and uncertainties of working out whether an application is made promptly in any particular case; something which this Tribunal sees this in practice and the Law Commission acknowledges in proposing a one year window for applications to be made. I also note that Dr Charles Harpum, who played a major role in the drafting of the Land Registration Act 2002, says that paragraph 5(4) was intended to allow an adverse possessor to rely on the facts "on the ground" until a dispute was inevitable since "no sane person wishes to initiate a boundary dispute".[7] It is, after all, the arising of a land dispute between neighbours that should prompt action by an adverse possessor, not a change in the adverse possessor's belief .

[7] See paragraph 17.54 of the Law Commission's Updating the Land Registration Act 2002 (Law Com No. 380).

54. If I am right that the 10 year period of reasonable belief can occur at any time within the Ridleys' period of adverse possession, then I am satisfied that the Ridleys have met this requirement. They bought Valley View in 2004 and the earliest date argued by Mr Adams for the ending of any reasonable belief is at some point after the Ridleys embarked upon developing their land. In other words, probably after summer 2017.[8] Nothing occurred during this period to tip them off that the title plan and the on-the-ground boundaries differed. There have been a number of garden land cases before the Tribunal in which it has been held that where an area of garden land appears to form part of a party's garden on account of the physical features around it, then that party is reasonably entitled to assume that 'what you see is what you get' (to cite Judge Mark in *Osborne v Lawton*). Further, I accept Mr Ridley's evidence that he was unaware of the common land enquiry. He had just moved to England from South Africa and was focussed on upgrading Valley View and settling his family in. It is entirely plausible that as newcomers to the country and the locality and with all that re-locating a family from the other side of the world entails, they would not have been aware of it. If this approach is correct, the requisite period would have been satisfied in 2014, about three years before the Ridleys consulted Mr Hodgson about developing Valley View. This means that the Ridleys application succeeds and I shall direct the Chief Land Registrar to give effect to it as if the Respondent's objection had not been made.

55. Although that disposes of this matter, in case I am wrong on the construction point I ought to address Mr Adams' arguments that the Ridleys' reasonable belief ended either by February 2018 or, alternatively, October 2019 and that, whichever it was, they did not make their application to the Land Registry quickly enough.

56. I am not satisfied that the Ridleys have established that they maintained their initially reasonable belief beyond the making of their application for planning permission in February 2018. On the one hand I have Mr Ridley and Mr Hodgson's evidence that the first time they realised there was an issue as to the paper and on the ground boundaries was about 23 October 2019 when Mr Hodgson produced the overlay plan at page 671 having obtained a copy of the title plan for Valley View from the Land Registry. On the other hand, the documentary evidence is, as Mr Adams submits, unsatisfactory for the reasons that follow.

57. First, there is the last paragraph of panel 5 of the Ridleys' ST1 filed in support of their application to the Land Registry (see paragraph 27 above). As Mr Adams submitted, this possibly unguarded statement comes from the Ridleys themselves is backed by a Statement of Truth and may have been made at a time when they did not appreciate the legal test that they had to satisfy. I say this because nowhere else in the ST1 or the ADV1 are the requirements of the Third Condition addressed. Then there is the Ridleys' attempt to explain this in their solicitors' letter of 8 April 2020 in which it was written that the Ridleys had not checked their title deeds until after receipt of Mr Brown's first letter in November 2019 when in fact they had checked their title deeds in October 2019. Both of these could be unfortunate lapses and I would not rule against the Ridleys based upon them alone.

[8] They first consulted Mr Hodgson in August 2017.

58. What gave me more concern was Mr Hodgson's attempt during cross-examination to explain his email to Mr Brown dated 25 October 2019 – see paragraph 24 above. What these representations to the council were and why they were necessary was not properly addressed. If Mr Hodgson's explanation really was, as I understood it to be, that the representations he was referring to was his certification on the planning application form that the Ridleys were the sole owners of the land, then I reject it. The making of representations goes well beyond certifying ownership on a planning application form.

59. There are also the early drawings at S10, S14 and S17 all dated prior to February 2018 and all showing a straight line boundary consistent with the title plan. More likely, it seems to me, is that Drawing 001 was based upon the title plan because (a) Mr Hodgson's email to Mr Ridley dated 21 October 2019 (page 646) describes 'Drawing 001' as 'site plan boundary in red line as per official land registry', and (b) Mr Hodgson's explanation that he meant to write 'Ordnance Survey' cannot be reconciled with the overlay plan that he emailed to Mr Ridley on 23 October 2019 in which the black zigzag line is taken from Ordnance Survey. Mr Hodgson's attempts to explain these were unconvincing and not helped by the fact that on a number of occasions he had to resort to referring to data or information that only he could see on his computer such as metadata in pdfs or emails that he had sent, none of which had been disclosed even though Mr Brown's solicitor had made quite an issue of disclosure. For example, the version of the location plan drawing 001 at page 473 dated 'Aug '17' showing a zigzag boundary. There was nothing before me to corroborate Mr Hodgson's claim that this was a later revision. There is also the fact that in October 2019 Mr Hodgson was telling Mr Brown one thing (that Moonrakers was being built within the straight-line Land Registry boundary – see plan on page 666) and Mr Ridley another (that the Ordnance Survey and topographical survey boundary lines did not match the Land Registry title plan boundary – see plan on 669).

60. Although Mr Ridley maintained in his oral evidence that it was only in October 2019 that he first learned of an issue with the boundary and that if he had learnt of this earlier, he would have applied for adverse possession, there was nothing other than Mr Hodgson's word to support this. What documentary evidence there is, suggests otherwise as I have indicated above.

61. On the above analysis, it seems to me more likely than not that by February 2018 the Ridleys knew of the discrepancy and so did not have a subjective belief that they were the registered proprietors of the Disputed Land. Similarly, their objective belief cannot have been reasonable. If the Ridleys had to make their application to the Land Registry promptly or within a reasonable period of time, then I find that they did not as it took them almost two years to do so with no explanation for the delay.

62. If I had to determine whether the Ridleys had made their application to the Land Registry promptly if it was not until October 2019 that their belief passed from being reasonable to unreasonable, then I would find the two months or so was prompt

enough. Such a period of time is not long when it comes to consulting professionals, confirming the true position and working out how to proceed.

Conclusion

63. Accordingly, I shall direct the Chief Land Registrar to give effect to the Ridleys' original application dated 20 December 2019 (made by Form ADV1 dated 10 December 2019) for adverse possession of land at Moonrakers, The Promenade, Consett.

Costs

64. As regards costs, paragraph 9.1(b) of the Land Registration Division's Practice Direction provides that if the Tribunal decides to make an order about costs, ordinarily the unsuccessful party will be ordered to pay the successful party's costs but that the Tribunal may make a different order.

65. My provisional view is that the Ridleys, having succeeded with their application, are entitled to their costs on the standard basis since HM Land Registry's referral to the Tribunal on 18 February 2021. Any party who wishes to submit that I make a different Order should serve written submissions stating what Order they seek and why on the Tribunal and the other party by 5 pm 16 March 2023 and then I will give directions.

Dated this 2nd day of March 2023

Judge Alexander Bastin

BY ORDER OF THE TRIBUNAL