



[2023] UKFTT 00569 (PC)

**PROPERTY CHAMBER  
FIRST –TIER TRIBUNAL  
LAND REGISTRATION DIVISION**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY**

**LAND REGISTRATION ACT 2002**

**REF 2021/0144/0145**

**BETWEEN**

**JOHN CROTTY**

**MIRANDA MAY KARAM**

**Applicants**

**and**

**EDWARD JAMES CRESSWELL DEAN**

**WALTER WEST CORBET**

**Respondents**

**Property address: Land adjacent to Cleugh Head Cottage, Hallbankgate, Brampton,  
Cumbria**

**Title number: CU322302**

**Before: Judge Wear**

---

**DECISION**

Cases referred to:

*R (Smith) v Land Registry* [2010] EWCA Civ 200

*JA Pye (Oxford) Limited v Graham* [2003] 1AC 419

*Dyer v Terry* [2013] EHC 209

1. The Applicants are the registered freehold proprietors of Cleugh Head Cottage, Hallbankgate in Cumbria. They were registered as proprietors of the cottage on the 16 February 2016 under Title No. CU128189, having bought it earlier in the year. Cleugh

Head Cottage faces onto the public highway running between Hallbankgate and Kirkhouse. Opposite Cleugh Head Cottage on the other side of the road is a small parcel of land with a stone building on it. The building itself has been referred to in these proceedings as “the Bothy”. The curtilage of the Bothy is a grassed area of which part forms the verge of the public highway.

2. When the Applicants bought the cottage they were told that it included the Bothy. The Applicants say they were also told it included the curtilage of the Bothy, but this is disputed.
3. In the course of their purchase it became clear that whereas title to the cottage was registered, the seller had no paper title to the Bothy. Despite the title difficulties, the transaction proceeded without any reduction in the price and it was agreed that the seller, Lindsay Ann Wannop, would provide evidence of her use of the Bothy and would pay any Land Registry fee for it to be registered with Cleugh Head Cottage.
4. The Bothy is currently used by the first Applicant as an office and for related purposes. It is a single storey building which, from the plan prepared by the Ordinance Survey Surveyor in September 2020, measures some 4 metres by 3.4 metres at its widest points. The Bothy is at the apex of the junction of the road from Kirkhouse with the road running between Hallbankgate and Talkin. The curtilage of the Bothy surrounds it on all four sides. There is a grassed area separating the north-eastern and south-eastern sides of the Bothy from the public highway. On the south-western side is a strip of rough ground which was referred to as the walkthrough in the proceedings. On the north-western side of the Bothy is an area where the Applicants have been in the habit of parking their car. Adjoining the north-western side of the curtilage is a farm track which is used by the first Respondent for the passage of farm traffic and other vehicles. This was referred to as the Lonning in the evidence. There is also a public footpath over the Lonning.
5. On the 3 August 2020 the Applicants applied for first registration of their title to the Bothy and its curtilage based on their adverse possession. The Land Registry served notice of the applications on the first and second Respondent as the adjoining freehold proprietors. The first respondent is the registered freehold proprietor of Kirkhouse Farm and his title includes the Lonning. The second Respondent is the registered freehold proprietor of Cleugh Head House which abuts the curtilage of the Bothy on its south west side. Both Respondents objected through their solicitor, Cartmell Shepherd Limited.
6. On the 4 March 2021 the Land Registry referred the dispute about the first registration to the Tribunal. I conducted a site visit on the 3 March 2023 and the matter was heard in Carlisle on 6-8 March 2023. The Applicants appeared in person. The first Applicant presented the case and gave evidence on which he was cross-examined. Both Respondents were represented by Mr Adams of Counsel.

#### **Preliminary matters**

7. Before turning to the parties’ respective cases it is helpful to deal with some preliminary matters. First, the Applicants title to the Bothy is not disputed by the Respondents. Their objection is solely concerned with the curtilage surrounding it.

8. Secondly, it emerged from an email from the highways and traffic lawyer at Cumbria County Council sent on the 9 January 2023 that part of the curtilage is highway maintained at public expense. (Page 372 of Trial Bundle). The email is accompanied by a plan and the Applicants have accepted, on the strength of *R(Smith) v Land Registry [2010] EWCA Civ200*, that they cannot establish a title by adverse possession to any of the land so shown on the plan with the email. The reference therefore concerns that part of the curtilage which is not dedicated as public highway. This has been shown by the Tribunal hatched in black on the copy of the surveyor's plan attached to this decision. I will refer to this as the disputed land.
9. Thirdly, at the start of the hearing the Respondents asked permission to adduce in evidence a copy of an email from Cumbria County Council dated 15 February 2023 regarding the useable width of the Lonning. This was not opposed by the Applicants and the Tribunal gave permission.
10. Fourthly, on the 7 December 2022 the Respondents applied for an Order against the Applicants that they disclose all correspondence between the Applicants and Cumbria County Council regarding a fence erected by the Applicants along the north-eastern and south eastern perimeter of the curtilage where it abuts the metalled highway. On the 15 February the Tribunal questioned the relevance of a discussion with the Highway Authority some two years after the referred application for first registration was made. Disclosure was not ordered against the Applicants and the matter was not pressed by counsel at the hearing.
11. On the 8 March, the third day of the hearing, Mr Crotty asked for permission to present further evidence. He handed up a bundle of fourteen documents. They include:
  - (i) A discussion of hay meadows in the North Pennines.
  - (ii) A copy of a text message between Mr Crotty and the second Respondent.
  - (iii) Some records compiled under the Finance (1909-1910) Act 1910 concerning increment value duty.
  - (iv) A Grant of Administration dated 8 May 1916 of the Estate of Robert Grant of Cleugh Head.
  - (v) Some minutes of a meeting of Farlam Parish Council held on the 10<sup>th</sup> November 2021 and on the 12<sup>th</sup> January 2022 at which obstruction of the highway and parking at Cleugh Head were discussed.
  - (vi) A photograph of the retaining wall behind the Bothy.
  - (vii) A witness statement made by Mr Hinton on the 1 February 2022. This statement is already in the Trial Bundle at page 239. On the 26 September 2022 the Tribunal ordered the two passages be deleted from that statement on the grounds they were not relevant. The copy statement within the instant application includes those passages.
12. At the hearing I refused Mr Crotty permission to present the further evidence on the ground that it gave no time for the Respondents to counter it and was therefore unfair to

them. Additionally, I consider permission ought to be refused because paragraphs (i) to (v) do not contain any material relevant to the issues in the case which the Tribunal has to consider.

13. Paragraph (vii) is an attempt to side step the Order made on the 26 September 2022 and ought not to be allowed. The photograph at paragraph (vi) adds nothing to what was visible at the site visit.

#### **Issues in the reference**

14. The first and second Respondents both object to the application on the grounds that the evidence of the Applicants' possession is insufficient for the Land Registry to register the disputed land with any class of title. Mr Adams referred in his skeleton argument to Land Registry Practice Guide 5.
15. An application for registration has in this case been made under section 3 Land Registration Act 2002. The relevant part reads:

#### ***3 When title may be registered***

*(1) This section applies to any unregistered legal estate which is an interest of any of the following kinds—*

- (a) an estate in land,*
- (b) a rentcharge,*
- (c) a franchise, and*
- (d) a profit a prendre in gross.*

*(2) Subject to the following provisions, a person may apply to the registrar to be registered as the proprietor of an unregistered legal estate to which this section applies if—*

- (a) the estate is vested in him, or*
- (b) he is entitled to require the estate to be vested in him.*

16. Section 9 creates three classes of title and fixes the circumstances in which each class is available. It reads:

#### ***9 Titles to freehold estates***

*(1) In the case of an application for registration under this Chapter of a freehold estate, the classes of title with which the applicant may be registered as proprietor are—*

- (a) absolute title*
- (b) qualified title, and*
- (c) possessory title;*

*and the following provisions deal with when each of the classes of title is available.*

- (2) *A person may be registered with absolute title if the registrar is of the opinion that the person's title to the estate is such as a willing buyer could properly be advised by a competent professional adviser to accept.*
- (3) *In applying subsection (2), the registrar may disregard the fact that a person's title appears to him to be open to objection if he is of the opinion that the defect will not cause the holding under the title to be disturbed.*
- (4) *A person may be registered with qualified title if the registrar is of the opinion that the person's title to the estate has been established only for a limited period or subject to certain reservations which cannot be disregarded under subsection (3).*
- (5) *A person may be registered with possessory title if the registrar is of the opinion—*
  - (a) that the person is in actual possession of the land, or in receipt of the rents and profits of the land, by virtue of the estate, and*
  - (b) that there is no other class of title with which he may be registered.*

17. In the present case the Applicants have applied for registration with absolute title. This means that sub-sections 2 and 3 are engaged.

18. The question which arises is how these sub-sections operate in the case of an application based on long adverse possession. Paragraph 5.4 of the Practice Guide draws a distinction between an application for first registration with absolute title based on adverse possession and the like application where only possessory title is sought. The former will only proceed if the paper title is known to the Land Registry and there are:

‘...no valid grounds for objecting to the squatter being registered as proprietor of the land’.

In the present case the paper title owner is unknown. Further, the Land Registry must be taken to consider there is a valid objection to the registration or they would not have referred the case to the Tribunal.

19. These circumstances would normally entail the cancellation of the application. However, this did not happen. Instead, pursuant to Rule 30 Land Registration Rules 2003, the Land Registry served notice of the application on the Respondents on the 7 October 2020. This elicited an objection from Cartmell Shepherd dated 26<sup>th</sup> October 2020 and from the second Respondent dated 27<sup>th</sup> October 2020. It is these objections which have been referred to the Tribunal. Given that the application was, on the Land Registry's guidance, ineligible for absolute title the case will be treated by the Tribunal as an application for possessory title.

20. The Tribunal will therefore consider the case put by each party by reference to section 9(5) of the 2002 Act and the associated legal commentary. Mr Adams drew attention to the statement at paragraph 9 of Practice Guide 5 to the effect that 12 years adverse possession is required before the Land Registry will give effect to the application. Mr Crotty did not dispute this at the hearing. This means that the commentary at paragraph 21-37 of Jordan and Radley-Gardner: Adverse Possession (2<sup>nd</sup> Edition) is relevant. The authors submit that if the conditions in section 9(5) are met there is a discretion in the

Land Registry to register the application with possessory title. That discretion has to be exercised:

“...with due regard to the purposes for which it was conferred. It is arguable that, where the conditions in sections 9(2), (4) or (5) are satisfied, then in the absence of a good reason to the contrary, the Registrar ought to register the Applicant with the relevant class of title. It maybe that the purpose of Section 9(5) is to allow a person who has been in undisturbed possession of unregistered land for a reasonable period and who therefore has a title good against the whole world other than someone with an earlier and better right to possession to be registered as proprietor. Against that, it can be said that the purpose of Section 9(5) is only to allow the registration of persons who have a title which is probably good against the whole world, and it would be inconvenient to allow the registration of persons who may only have been in possession for relatively short periods of time. The Land Registry have clearly adopted the latter view and the only way of challenging that would be by way of an application for judicial review”.

I therefore approach the Applicants’ case on the basis that they have to show at least 12 years adverse possession.

#### **Case for the Applicants**

21. Mr Crotty relied on the Applicants’ own evidence of adverse possession in form ST1 dated 23 October 2019, which accompanied his application for first registration, and the Applicants statement of truth made on the 21 April 2021. The Applicants also rely on a statement of truth dated 30 September 2020 when they responded to a Land Registry requisition in connection with their first registration.
22. Two statements of truth from Lindsay Wannop were also relied on. Ms Wannop did not attend the hearing and her evidence is untested by cross-examination. Mr Crotty said he did not realise it was his duty to invite Ms Wannop to attend the hearing. At paragraph 6.1 of Property Chamber Land Registration Division: A short guide for users (July 2013) it is made clear that each side should attend the hearing with witnesses and present their evidence. This advice was not appreciated by Mr Crotty and the result is that Ms Wannop’s evidence is of very little weight. Mr Adams indicated that had Ms Wannop attended he would have wanted to test her evidence.
23. The burden is on the Applicants to show factual possession of the disputed land and the intention to possess it over the requisite period of time. See further *JA Pye (Oxford) Limited v Graham* [2003] 1AC 419. The position has to be looked at on the day the application for first registration was made viz. 3 August 2020. Mr Crotty relies on the following:
  - (i) The placing of moveable dustbins on part of the disputed land.
  - (ii) The placing of a recycling box on part of the disputed land.
  - (iii) The installation of a water butt on part of the disputed land.
  - (iv) The placing of a sandstone paving slab on part of the disputed land.
  - (v) The placing of plant pots on part of the disputed land.
  - (vi) The creation of a wildflower meadow on part of the disputed land.

- (vii) Fitting of a secure gate to the enclosure where the bins are placed.
  - (viii) Car parking on part of the disputed land.
24. Mr Crotty was challenged in cross-examination about these activities. Mr Crotty was a credible witness and I accept the accuracy of his evidence save as hereafter stated. He was tenacious in the promotion of his case and this may perhaps have caused him to overstate the significance of some matters.
25. The second Applicant did not attend the hearing and was not cross-examined on any of her evidence. For this reason it does not carry the same weight as the first Respondent's evidence.

### **Case for the Respondents**

26. This can be stated quite shortly. Neither Respondent made any claim to the disputed land. Their case was that the Applicants had not produced sufficient evidence to mean that their application should proceed. They did this by questioning the quality of the Applicants adverse possession since February 2016. They also point out that there is no convincing evidence of adverse possession prior to February 2016.
27. The Respondents called five witnesses. Both Respondents also gave evidence and were cross-examined. The witnesses called were:
- (i) Mr J Bainbridge
  - (ii) Mr T M Nelson
  - (iii) Mr R J Hinton
  - (iv) Ms H Waugh
  - (v) Mr S W McHale

### **Findings of Fact**

28. The Applicants bought Cleugh Head Cottage in February 2016 from Ms Wannop. They had been living in rented accommodation until then but that arrangement was not satisfactory. This background to their purchase meant that they were keen to move into their own property and leave their former home.
29. The Applicants ascertained that Cleugh Head Cottage was for sale from a perusal of the website run by Rightmove, the online estate agency. Wragg Mark and Bell, solicitors, acted for the Applicants in the purchase.
30. In the course of the transaction it emerged there was no paper title to the Bothy or the disputed land. The Applicants were buying with the assistance of an advance from their Bank. This was to be secured by a legal charge. The absence of a paper title caused the Bank to have a second survey/valuation carried out before proceeding with the advance. No reduction in the price was negotiated as a result of the defective title. The compromise reached was that the seller would pay the fee for registering the title to the Bothy and the disputed land. There is no evidence of an express transfer to the Applicants of the seller's estate or interest in the disputed land.
31. I base these findings on the answers to questions put to Mr Crotty at the hearing and the contents of his witness statement at page 9 of the trial bundle.

32. The Bothy has been used by Mr Crotty and his family since their purchase as, inter-alia, an office, pantry and for storage. There is a telephone connection to the Bothy. It is still in use today.
33. A water butt has been situated outside the north-western flank wall of the Bothy since 2010. It collects water from the roof of the building and is used for that purpose by the Applicants. I accept Mr Crotty's submission that the inference is it was placed there by someone with an interest in the Bothy at some point prior to 2010. The evidence goes no further than this however. Ms Wannop's statement, such as it is, simply confirms its existence.
34. The Applicants have been in the habit of keeping their bins behind the Bothy since their purchase of Cleugh Head Cottage. At fortnightly intervals the bins are placed closer to the public highway so they can be emptied.
35. The Applicants have kept a potted plant on a paving slab against the north-western wall of the Bothy. Mr Crotty said there had been sandstone slabs in place since March 2010. I cannot accept that Mr Crotty had knowledge of the disputed land prior to his purchase in 2016. The photographic evidence only supports the existence of a single slab with a potted plant on it in 2010. The image is not clear enough to support any further finding.
36. The Applicants created a small wildflower bed on that part of the disputed land lying to the south-eastern side of the Bothy in Spring 2020. I accept the Applicants spent time selecting the seed to plant it in order to create a diversity of flowers and grasses.
37. At some point after August 2020 the Applicants fitted a wooden gate to the bin storage area at the rear of the Bothy. I base this on the photograph taken by the Land Registry surveyor when he visited the property in 2020 (page 90 of trial bundle) and the site visit prior to the hearing.
38. The Applicants took the piles of grit situated on the disputed land to be stored in a hopper provided by Carlisle City Council. They did this shortly after they purchased the cottage.
39. There has been intermittent parking of vehicles on the disputed lane to the north-west of the Bothy by the Applicants and their invitees since February 2016. This commonly, but not exclusively, arose in connection with a social event at Cleugh Head Cottage. The Applicants would park their vehicles on the disputed land to facilitate parking by their guests at Cleugh Head Cottage. Mr Nelson's evidence confirmed the practice of car parking on the north-western side of the Bothy.
40. I accept also that the first Applicant will have made use of the disputed land on the north-western and south-eastern sides of the Bothy in order to maintain the walls and the roof of the Bothy since February 2016.
41. Between the south-western side of the Bothy and the boundary of Cleugh Head House is the grassed area known as the walkthrough. The first Respondent and his employees were in the habit of using this area as a passage to get from the Lonning to the main road running between Hallbankgate and Talkin. The first Applicant said that this never happened during his period of ownership of Cleugh Head Cottage. He said that the



records from his close circuit television camera did not support the volume of traffic alleged by the Respondents. I prefer the evidence of both Respondents on this point. There has been intermittent use made of the walkthrough by the second Respondent and members of his family since 1978 when he moved into Cleugh Head House. The walkthrough provides a shortcut for pedestrians (including the first Respondent and his employees) and has at times been used by the second Respondent for the maintenance of his boundary wall. The implication of Mr Crotty's evidence was that this use ceased when he installed CCTV in 2016 because his camera never detected any movement on the walkthrough. This strikes me as improbable and I do not accept it.

42. I accept also the evidence of Mr Bainbridge that there was use of the walkthrough in the Autumn of 2009 in connection with drainage and other work carried out for the Second Respondent. Mr Crotty questioned the credibility of Mr Bainbridge. Mr Bainbridge gave a detailed statement of the substantial work he carried out. I do not consider that his connection with the First Respondent through shooting and deer management meant that he was untruthful.
43. Use of the walkthrough ceased to be possible when Mr Crotty erected a wooden fence enclosing it with the Bothy in 2021.
44. The only evidence of occupation of the disputed land prior to February 2016 is the statement of Ms Wannop dated 17<sup>th</sup> August 2021. Mr Adams contrasted the lack of detail about the disputed land in Ms Wannop's first witness statement in 2016 with the content of the 2021 statement made after the reference to the Tribunal. The later statement recites parking on the north-western side of the Bothy, the use of the water butt and the placing of plants in a pot. The land on the south-eastern side was strimmed and the litter was removed. The walkthrough, being the higher ground, was used to take the weeds in a wheelbarrow and put them in the rubbish bin. In my judgement a witness statement submitted without any cross-examination of the witness will carry no weight where it is silent about, or conflicts with, other oral testimony. Such is the case at the following points:
  - (i) The evidence of parking on the disputed land by the second Respondent and others (page 285 and 278 of trial bundle).
  - (ii) Use of the walkthrough by the second Respondent and members of his family (page 278 and 284 of trial bundle).
  - (iii) Ms Wannop's absence from Cleugh Head Cottage during the daytime because she was at work (page 283 of trial bundle).
  - (iv) Machinery crossing the north-western corner of the disputed land in order to gain access to the Lonning (page 258 of trial bundle).
  - (v) Placing of the water butt was with the consent of the first Respondent's father, his predecessor in title to Kirkhouse Farm.

### **Decision**

45. In approaching this case, the Tribunal bears in mind the comments of the High Court in *Dyer v Terry* [2013] EHC 209 at paragraph 14(10). The judge in that case noted how a particularist approach had given rise to widely different results in the decided cases. He continued:

“Each of the of these cases turned on the particular features which struck each Court in the context of other particular features present. They are an object lesson in the dangers of pointing to any particular case and using it as transposable authority. They are no more than illustrations of the wider principles in action. Accordingly, a tribunal of fact asked to determine whether factual possession and the requisite intention to possess has each been made out has a degree of latitude within the factual parameters of the case before it which the evidence properly establishes”.

46. In my judgement the Applicants have not shown 12 years adverse possession of the disputed land ending with the 3 August 2020 or with any earlier date for the following reasons: As regards to the period 2008 to 2016:

- (i) there is evidence that parking by third parties took place on the disputed land and the walkthrough was used by neighbours for access and, more generally, by others as a shortcut.
- (ii) the acts of possession relied on by Ms Wannop are insufficient to mean that custody of the disputed land was taken. Strimming the grass, picking up litter and transporting vegetation in a wheelbarrow do not in my judgement amount to factual possession. Use of the water butt is too slight, given there has been a challenge to the evidence of Ms Wannop.
- (iii) there is no evidence of the intention to possess.

47. As regards to the period February 2016 to 3 August 2020:

- (i) the acts of possession are open to the same criticism. In my judgement no significance can be attached to the fortnightly placing of wheelie bins or a recycling box on some part of the disputed land. Mr Crotty submitted that the creation of a wildlife meadow on part of the disputed land amounted to something more than the indiscriminate planting of bulbs. He said there needed to be a selection of seeds and a structured pattern to the planting. Even if this is so, the planting only began in 2020 and it does not assist the Applicant’s case in this reference.
- (ii) the continued use of a water butt on a small part of the disputed land is at best equivocal. The water collected was used to cultivate vegetables at Cleugh Head Cottage. Mr Crotty in his opening statement at the hearing referred to the common character of the parcels constituting the disputed land. But it is not possible, in my judgement, reasonably to infer from the use of the water butt that the remainder of the disputed land is in the possession of the Applicants. See further the commentary on this point at paragraph 10-09 of Jourdan and Radley-Gardener (2nd Edition).
- (iii) the installation of a hopper for the storage of grit did not take place on the disputed land. It is of no assistance to the Applicants case.
- (iv) the occasional parking of cars on a part of the disputed land by the Applicants is, in my judgement, not enough to amount to factual possession. The evidence is the

parking was transient, according to the number of guests visiting Cleugh House Cottage. There was no evidence of the frequency of the visits.

- (v) the use of the disputed land for the purpose of repairing and maintaining the Bothy is consistent with there being a prescriptive easement to this effect. In my judgement it does not support factual possession or the intention to possess the disputed land.
  - (vi) the work to the retaining wall behind the Bothy did not start until after the application for first registration was made.
48. There will be an Order directing the Registrar to cancel the Applicants application so far as it relates to the disputed land and to the land forming part of the public highway. The Registrar will be directed to give effect to the Applicants' application so far as it relates to the Bothy. I would ask for submissions on the correct order for costs by 5pm on the 19 May 2023.

*Michael Wear*

**Dated this 5 May 2023**



