[2025] UKFTT 00193 (PC)

REF/2022/0477

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

CLARENCE OATES

Applicant

and

GREYSTONE DEVELOPMENTS (LEEDS) LIMITED

Respondent

Property Address: Land at 215 Wakefield Road, Drighlington, Bradford BD11 1EB
Title Number: YY162210

Before: Judge Laura D'Cruz
Sitting at: Leeds Employment Tribunal
On: 8th & 9th October 2024

Representation: Mr Adams of Counsel for the Applicant, instructed by Ison Harrison Solicitors; Mr Clayton of Counsel for the Respondent, instructed by Williams & Co Solicitors

DECISION

1. The matter that has been referred to the Tribunal is the Applicant's application dated 24th December 2021 for first registration of land at 215 Wakefield Road, Drighlington, Bradford BD11 1EB ("the Disputed Land") based on adverse possession.

2. The Disputed Land is edged red on the plan below. Previously there were dwellinghouses on the Disputed Land (215-219 Wakefield Road), but they were cleared in the 1970s. Save as discussed below, the Disputed Land has remained undeveloped since then.

The Disputed Land

3. The Applicant is the registered proprietor of 249 Wakefield Road, registered under title number WYK212560. This is a short distance from (not adjacent to) the east of the Disputed Land. The Applicant has been the registered proprietor of this land since it was first registered in 1980, and has lived there since 1981.

4. The Respondent is the registered proprietor of land and buildings on the north side of Wakefield Road, registered under title number WYK32902. This is land to the west and north of the Disputed Land. The Respondent purchased this land in 2020.

5. The Respondent has made its own application for first registration of land including Disputed Land based on lost deeds, following a TR1 dated 29th November 2020 from Barbara Pickles and James Sugden. The Applicant has not objected to that application, meaning it is not a matter that can be referred to the Tribunal. HM Land Registry has not acted upon it as this application has priority.

6. There is no dispute between the parties that the Applicant must prove, on the balance of probabilities, both factual possession of, and an intention to possess, the Disputed Land for a continuous 12-year period. Once there has been a continuous 12-year period of adverse possession, the paper title owner's title is extinguished (section 17 of the Limitation Act 1980).

7. Generally, there is no disagreement as to the relevant principles. However, there is however a certain difference of emphasis and disagreement as to how the principles apply to these facts. I will refer to the principles in more detail once I have considered the facts.

Summary of the parties' cases

8. The Applicant's primary case is that he can demonstrate adverse possession of the Disputed Land from 1989, having been unable to locate the owner and having decided to tidy it up and make use of it himself. He avers that, at the time, it was fully enclosed, but he added padlocks to the gates. He avers that the north and west sides of the Disputed Land were bounded by brick walls, the south and southern section of the east sides by a stone wall, and the east side by a fence, with gates in the south wall and east

fence. He used it for gardening and storage, and carried out maintenance. However, he accepts that he would not be able to demonstrate adverse possession were it not for the enclosure and locked gates controlling access.

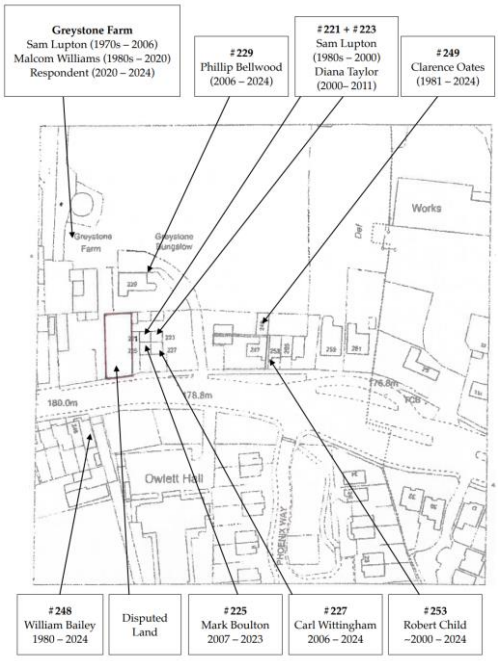
9. His secondary case is that he can demonstrate adverse possession of the Disputed Land from 2004, for reasons that will become clear.

10. The Respondent's case is that, when it came to the area in or around 2020, the Disputed Land was derelict and overgrown. The Respondent took steps to establish the paper title owner and purchase it, and also carried out site clearance works and site installations at the Disputed Land in preparation for development, including altering/removing some of the boundary features ("the Clearance Works"). The Clearance Works mean that the state of the land now is of no real probative value (though I did conduct a site visit).

11. The Respondent accepts the Applicant's case as to the enclosure of the Disputed Land, save that it avers the east fence was not installed until December 2004. It also accepts that the Applicant has been onto and made some use of the Disputed Land. However, it denies that the Applicant's acts are sufficient to establish either factual possession or the intention to possess, and questions whether it is possible to safely identify a 12 year period of continuous possession.

Evidence

12. The parties relied on evidence from a number of past and present owners and/or occupiers of neighbouring properties. Both Counsel very helpfully produced plans to depict all the relevant properties. The Applicant's plan, which I found to be slightly clearer, is reproduced below.



Location plan

13. I heard evidence from the Applicant himself, Phillip Bellwood, Malcolm Williams and Carl Whittingham, and for the Respondent from Paul Sharman (director), Diana Taylor and Robert Child.

14. By way of a preliminary observation, I note that none of the witnesses were cross-examined on the basis that they were being dishonest, or exaggerating their evidence, or (save in relation to the erection of the east fence) that they were mistaken. I found all the witnesses to be straightforward and measured, and all demonstrated a distinct lack of exaggeration or embellishment. This is a case which largely turns on whether the acts alleged by the Applicant are sufficient to amount to adverse possession, rather than whether they happened at all.

15. I also considered written statements from William Bailey and Mark Boulton, though I attach little weight to their evidence as they did not attend to be cross-examined and no reason was proffered for their absence.

Enclosure

16. By his own admission, enclosure is critical to the Applicant's case, and I will consider this first. I outline the relevant evidence below.

2004 survey

17. The Applicant previously applied for first registration of the Disputed Land by FR1 dated 12th November 2004, but that application was cancelled by HM Land Registry without being referred to the Tribunal. Early on in these proceedings, the Respondent applied to strike out the present application on the grounds that it was an abuse or process and/or had no reasonable prospect of success. The strike out application was unsuccessful for the reasons given in the Order of 31st July 2023, which will not be repeated here.

18. However, the previous application is not wholly irrelevant. In dealing with it, HM Land Registry conducted a survey of the Disputed Land on 15th December 2004, which provides some evidence of the state of the land at that time. The Report states:

"*I can confirm that the area of land sought to be registered is accessed by two padlocked gates. The applicant holds the key for these two gates. The land sought to be registered is bounded fully by post and rail fences/stone, brick walls 15 yrs +. There is a wooden shed on the land which is padlocked. The keyholder is again the applicant. The land itself is very overgrown, with no real evidence of occupation… although the surveyor has pointed out that it is being cleared at the present time".*

Diana Taylor

19. Diana Taylor gave evidence on behalf of the Respondent. She is the daughter of Sam Lupton, the owner of Greystone Farm at all material times until 2012, and 221 & 223 Wakefield Road until they were transferred to her in 2000. She says she has knowledge of the area due to visiting her father approximately 20 times a year, and also

particularly the period 2002-2004 when she spent a lot of time at 221 & 223 readying them to be let out.

20. Ms Taylor avers that the east side of the Disputed Land was not enclosed until the Applicant himself installed a fence in December 2004. She says that this was installed partly on the accessway leading to 221 & 223 and limited a turning area used by 221. She relies on letters sent to the Applicant in 2006 which detail these issues.

21. In her oral evidence, she explained that she remembered this happened in 2004 because she recalls giving the occupier of 225 permission to park on some land, and then coming back from a two week holiday to find that access issues had arisen.

22. When it was put to her that the 2004 survey describes the fencing as being 15yrs+, she agreed that the fencing was old but maintained that it had only just been erected. She could not recollect whether there was a fence there in 1989.

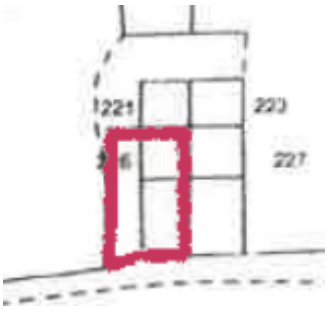
Aerial photograph

23. The Respondent relies on an aerial photograph from March 2002, extract below (there are some other aerial photographs, but this is the only one that is clear enough to be of any use). The Respondent avers that it is not possible to see a boundary feature on the east side of the Disputed Land; indeed, it appears to show a track encroaching onto the Disputed Land where any boundary feature would be.

2002 aerial photograph

OS mapping

24. The Respondent further relies on old OS mapping which it avers is consistent with a track encroaching onto the Disputed Land. If there were a fence along the east side of the Disputed Land, it would be depicted by a straight, solid line, rather than the curved, dashed line shown below. It is not clear when this mapping is from, but the Respondent relies on it in conjunction with the evidence of Ms Taylor and the aerial photograph.



OS mapping

2022 survey

25. HM Land Registry conducted a further survey of the Disputed Land in relation to this application on 7th February 2022. This describes the relevant parts of the east side of the Disputed Land as "*1.2m locked pedestrian and vehicular wooden gates over 20 years old*", "*1.2m wooden fence over 50 years old*", and "*0.8m wooden fence over 50 years old*".

The Applicant's evidence

26. The Applicant's case was clear in asserting that the Disputed Land was completely enclosed in 1989, although it is fair to say that this was simply a bare assertion of fact without any detail or supporting evidence.

27. When the aerial photographs were put to the Applicant, he gave evidence that at that time the fence was a post and rail fence with slim palings. When the 2002 photograph was put to him, he accepted that it looked like a driveway and that he could not see where the fence would be. He said that he did not understand, it did not make sense. He suggested that perhaps the fence had blown down and was flat on the floor.

28. He further suggested that perhaps Ms Taylor had come to the area when the fence had been blown over. He did not recall the letters and said he had not corresponded with her (although one of the letters is evidently a response). He did not have an explanation for the dashed line on the plans, he said no vehicles went down there to park.

Conclusion

29. In light of the evidence above, and in particular the aerial photograph, which is good contemporaneous evidence of the condition of the land in 2002, I cannot be satisfied on the balance of probabilities that the Disputed Land was enclosed until 2004.

30. I am, however, satisfied that the Disputed Land was fully enclosed from 2004 until the Clearance Works. I am also satisfied that the Applicant had keys to the two original gates in 2004, as set out in the 2004 survey. It is not in dispute that he was the only keyholder or that he controlled access until the Clearance Works took place.

31. Given that the Applicant accepts enclosure is critical, the period of adverse possession must therefore start in December 2004 or later, and I need not concern myself with any earlier period.

Use of the Disputed Land from December 2004

32. It is right to note that the Applicant's evidence of use is not very detailed or comprehensive. He very frankly admitted that he had not kept records, that he could not recall dates or periods.

33. Rather, the gist of his evidence was that he regularly accessed the Disputed Land and used it for different reasons: he kept hens, had a greenhouse and a cold frame, had a shed, grew fruit and vegetables. He also says that he maintained the boundaries by trimming the hedges and repairing the walls when required.

34. His evidence was that he would do different things at different times, that he might not always plant as it might be too cold, that he had to get rid of the hens because of trouble with foxes. He also said he would do different things in different places: the top half was used as a wildlife centre, with trees left alone for nesting, and the other half, where the grass was shorter, was mowed and gardened.

35. He said he had "*tended to*", and "*kept tidy*" the Disputed Land, and that it would look very different if he had not.

36. He accepted that there had been a dropping off in his use of the Disputed Land. He said that he "*had not been over well*" since 2011 and could not do things as before. His case was, however, that he did continue to make some use of the Disputed Land until 2021.

37. There is a considerable amount of evidence supporting the Applicant's case:

    (a) Mr Bellwood's evidence is corroborative in relation to the period 2006 onwards. Of all the witnesses, Mr Bellwood is perhaps the most likely to have noticed what was going on the Disputed Land as his property overlooks it (or did until a hedge was installed in 2018). He gave evidence that the Applicant regularly accessed the Disputed Land, and that he cleared, trimmed, maintained, and repaired walls and fences. He described the Disputed Land as not cultivated or gardened, but cut back. He said that the use had tailed off a couple of years before, and that he got the impression it was becoming a bit of a burden. He said something along the lines of, "*I would have wanted to make into garden. We're all different. His plan was just to keep it in check*";

    (b) Mr Williams' evidence is also corroborative (albeit he made a mistake about dates). Mr Williams was involved with Greystone Farm, which is neighbouring

land. he explained the Applicant had a key to the Farm to allow him access to maintain his boundaries;

(c) Mr Whittingham gave evidence that he saw the Applicant using the padlocked east gate at least once a year for hedge cutting. He was frank in saying he did not know anything about what happened inside the Disputed Land;

(d) whilst the Respondent's witnesses deny that the Applicant maintained the Disputed Land, some of their evidence is nonetheless corroborative:

i. Ms Taylor described there being a very open part of the Disputed Land but that the top end was overgrown. The top end is, I assume, the end nearest the road – this would be consistent with various photographs, including the aerial ones. She recalled a cold frame. She recalled the Applicant tipping garden waste onto the Disputed Land (although she never saw him on it);

ii. Mr Child accepted there was a shed on the Disputed Land and that he saw the Applicant on the Disputed Land it on occasion (albeit he had never seen him maintaining it);

(e) the 2004 survey confirms that there was a shed and that the Applicant had a key.

38. Mr Sharman's evidence was understandably limited, given that the Respondent only became interested in the area in around 2019. His evidence was that the Disputed Land was derelict and overgrown, and that there was no evidence of where anyone had walked on it. This is relied upon as evidence that there cannot have been much, if any, use in recent years, and that the Disputed Land had been abandoned some time before.

39. The Respondent also relies on the 2004 survey as showing that there was "*no real evidence of occupation*" at that time either.

40. I accept that the Applicant used the Disputed Land as he asserted from 2004 onwards. He did not cultivate or garden the whole of the plot, but tended to it, and kept it tidy/under control. That the Applicant had some use of the Disputed Land is not in dispute. Moreover, there is something in the submission that the Disputed Land would have been in a far worse state had nothing been done to keep it in check. As noted at the outset, the issue is whether this is sufficient to amount to adverse possession.

Discussion

41. Factual possession "*signifies an appropriate degree of physical control… 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 circumstance, 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" [Slade J in *Powell v McFarlane* (1977) 38 P & CR 452 at 470-1, cited with approval in *J A Pye (Oxford) Ltd v Graham* [2003] UKHL 30].

42. An intention to possess is the intention "*to exclude the world at large, including the owner with the paper title… so far as is reasonably practicable and so far as the processes of the law will allow"* [Slade J in *Powell* at 471-2, cited with approval in *Pye*].

43. The evidence of factual possession will often be sufficient to demonstrate the intention to possess, but this will not always be so: "*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*" [Lord Hutton in Pye at paragraph 76].

44. In those cases, an applicant must make it "*perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can*" [Slade J in Powell at 472]; he "*should be required to adduce compelling evidence that he has the requisite [intention to possess]*" [at 476].

45. The Applicant's case unsurprisingly emphasises the enclosure and control of access to the Disputed Land. He particularly relies on the following further excerpt from Slade J's judgment in *Powell:* "*There are a few acts which by their very nature are so drastic as to point unquestionably, in the absence of evidence to the contrary, to an intention on the part of the doer to appropriate the land concerned… The enclosure of land by a newly constructed fence is another. As Cockburn C.J. said in Seddon v. Smith "Enclosure is the strongest possible evidence of adverse possession," though he went on to add that it was not indispensable. The placing of a notice on land warning intruders to keep out, coupled with the actual enforcement of such notice, is another such act. So too is the locking or blocking of the only means of access*" [477-8].

46. The Applicant enclosed the Disputed Land in December 2004. He controlled access to it by padlocks on the two original gates. The enclosure and control of access continued for a period of at least 12 years. This is the strongest possible evidence of adverse possession.

47. Against this, the Respondent has several lines of argument. It argues that mere maintenance of existing boundary features is not an act which unequivocally asserts exclusive control over land (*SS Global Ltd v Sava* [2007] EWHC 2087 (Ch)). However, the Applicant's case here goes beyond mere maintenance.

48. The Respondent argues that enclosure is not invariably enough. This appears to be in reliance on comments made in the judgment of the Court of Appeal in *Smith v Fergus* (2000) 79 P&CR 398, that possession requires much more than a declaration of intention, and that "*Actual occupation and enclosure by fencing is the clearest, and perhaps the most classic, way of establishing exclusive possession (though even enclosure is not invariably enough: see Marsden v. Miller (1992) 64 P. & CR. 239)*".

49. *Smith v Fergus* concerned an entirely different set of facts. It was a claim in trespass. The declaration of intention referred to was the marking out of four parking spaces and the erection of signage. There was no enclosure.

50. The case in support of the Respondent's submission that enclosure is not invariably enough appears to in fact be *Marsden v Miller.* Again, this was a claim in trespass. This time, there was enclosure: fencing was erected, but was taken down within 24 hours. It is not hard to see that enclosure for less than 24 hours would not itself be sufficient to demonstrate possession.

51. The Respondent argues that trivial acts are not sufficient (*Boosey v Davis* (1988) 55 P&CR 83). Insofar as this case touches upon enclosure specifically, there was some fencing in that case, but it was not considered sufficient – it was a wire mesh fence erected as a reinforcement, and it did not enclose the land.

52. The Respondent's overarching argument is that the Tribunal should not conflate the intention to possess with the sufficiency of factual possession. I remind myself that an intention to possess is an intention to exclude the world at large so far as is reasonably practicable. There are certainly cases where factual possession is established, but, because the acts are equivocal, intention to possess is not. It seems to me it would be an unusual set of facts where the intention to possess, that is, the intention to exclude the world at large, was made out, but that the acts relied upon to demonstrate this would not also signify an appropriate degree of physical control.

53. I turn to the intention to possess. The Respondent argues that the use of the Disputed Land, that is, the acts done over and above the enclosure and control of access, are trivial and equivocal: they do not show an intention to exclude the true owner rather than an intention to derive some enjoyment of the land consistent with such use as the true owner might wish to make (*Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633).

54. I find it hard to see how the enclosure and control of access to the Disputed Land is equivocal, especially given that the Respondent did not put forward any alternative purpose that the Applicant may have had in doing the same.

55. Essentially, across both factual possession and intention to possess, the Respondent argues that the enclosure and control of access are not sufficient: further acts are required, and, due to the paucity of the Applicant's evidence, the Tribunal cannot be

satisfied of anything more, certainly not anything that goes beyond the trivial and/or is unequivocal.

56. The questions I have to ask myself are, firstly, whether there has been an appropriate degree of physical control over the Disputed Land, and secondly, whether the acts demonstrate an intention to exclude the world at large.

57. I accept that, from December 2004, the Disputed Land was enclosed, with the Applicant controlling access. Indeed, with the finding that the Applicant installed the east fence in December 2004, thereby fully enclosing the Disputed Land himself, it is arguable that the Applicant's case becomes stronger.

58. *Powell* also refers to dealing with the land as an occupying owner might be expected to. Although the Respondent did not put it in these terms, this seems to be the nub of its argument: in using the Disputed Land in the relatively limited way that the Applicant did, he did not use it as an occupying owner might.

59. The first response to this is that the acts of enclosure and controlling access are themselves exactly what an occupying owner might be expected to do. I remain unconvinced that, as a matter of principle, more is necessarily required.

60. The second is to consider this against the circumstances of this particular case, and particularly the nature of the Disputed Land. When the Applicant came to it, it was a derelict plot, overgrown, not attached to another property. An occupying owner might turn it into a cultivated garden plot. It might clear it for the purposes of development. It might also, it seems to me, tend to it and keep it in check without doing more.

61. I am satisfied that the Applicant can show an appropriate degree of physical control of the Disputed Land primarily through the acts of enclosure and control of access, but also supported by the use he made of the Disputed Land. I am also satisfied that this demonstrates the necessary intention to possess.

Conclusion

62. For the reasons given above, I am satisfied that the Applicant can demonstrate both factual possession and an intention to possess for a continuous period of 12 years from December 2004. I will direct the Chief Land Registrar to give effect to the Applicant's application as if the objection of the Respondent had not been made.

63. I turn to consider costs. Ordinarily, the unsuccessful party will be ordered to pay the costs of the successful party: see rule 13(1)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and paragraph 9.1(b) of the Practice Direction. Here, that would mean an order that the Respondent pay the Applicant's costs, unless there is some good reason to make a different order. I know of no reason why it would not be just to make the usual order in this case.

64. My preliminary view is therefore that the Respondent should pay the Applicant's costs of the proceedings (from the date the matter was referred, 15th July 2022), to be summarily assessed if not agreed. However, no order is made without first giving the parties the chance to make representations.

65. The parties should send to the Tribunal and the other side any written representations as to the principle of costs by 5pm on 18th February 2025. Any party seeking any costs should provide an estimate of their total costs to date. Directions as to the assessment itself (if appropriate) will come later.

Dated this Monday 20th January 2025

Laura D'Cruz

BY ORDER OF THE TRIBUNAL