

REF/2014/0899

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

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY  
LAND REGISTRATION ACT 2002**

**BETWEEN**

**MARK BRUCE GODFREY**

**Applicant**

**- and -**

**G F COLE & SON LIMITED**

**Respondent**

**Property Addresses: Land on the North Side of Low Road, Tibenham  
Provisional Title Number: NK439165**

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**SUBSTANTIVE DECISION**

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**Introduction**

1. This is an adverse possession case. The Applicant appeared in person. The Respondent appeared through its counsel, Graham Sinclair.
2. The Applicant claims to have been in adverse possession of Land on the North Side of Low Road, Tibenham ("the Disputed Land") for a period of more than 12 years expiring before the coming into force of the Land Registration Act 2002. The Disputed Land is a small piece of open farmland and is presently part of the Respondent's registered title (title number NK178492). The Applicant seeks to have the Disputed Land removed from the Respondents' registered title and registered in his name. The Disputed Land has been given a provisional title number: NK439165.

### **Background and Outline of Dispute**

3. The Applicant is the owner and occupier of part of Willow Farm, Cowgate Common (title number NK271139). His title does not presently include the Disputed Land, but the Disputed Land is adjacent to Willow Farm. I visited the site on 24 May 2016. At present, the Disputed Land appears in all respects to be part of Willow Farm to which it is entirely open. It is fenced off from Low Farm, which is the neighbouring farm. The Applicant says that this has been the case throughout the material period, even before the recent removal of some trees. The Respondent says that the Disputed Land was not part of Willow Farm before the removal of the trees, because it was screened off and rendered effectively inaccessible by those trees.
4. It is an unusual feature of this case that the Respondent does not presently own Low Farm, the land which is on the other side of the Disputed Land from Willow Farm. The Respondent has not owned Low Farm since 1999. The owners of Low Farm play no part in this dispute and in fact the Disputed Land is not accessible from Low Farm. When the Respondent sold Low Farm in 1999, the Disputed Land was deliberately retained in order to be used as a ransom strip in future. Essentially the Respondent wanted to be able to offer the Disputed Land for sale to the Applicant at an enhanced sale price.
5. The Respondent now finds that the Applicant is claiming to have acquired title to the Disputed Land by adverse possession, without having to pay a ransom price to the Applicant. The Respondent does not claim to have used the Disputed Land since 1987, and does not allege that anyone else has done so. The Respondent simply denies that the Applicant has been in possession of the Disputed Land with the requisite intention for the required period.

### **Paper Title**

6. The paper title to the land is not seriously in question. There is a suggestion by the Applicant that the registration of the Disputed Land within the Respondent's title in 1995 was a mistake, because it was intended to be included within Willow Farm in an earlier conveyance, but there is no application before me to alter the register, nor am I aware of there being any such application. In those circumstances I must proceed on the basis that the paper title is as shown in the register. In any event, a plan attached to the

particulars for the sale by auction of Willow Farm in 1961 shows clearly that the Disputed Land was excluded from the Willow Farm plot and that is reflected in the way the respective titles are registered at HM Land Registry (“HMLR”). It is notable that the conveyance of Willow Farm on 14 May 1987 attaches a plan which shows only a small kink in the boundary where the Disputed Land should be. It is not suggested that the appearance of the boundary on that plan has any effect on the paper title, but it is notable for the fact that someone seeing that plan might be likely to come to the erroneous conclusion that the Disputed Land was part of the paper title to Willow Farm.

### **The Application and the Objection**

7. The Applicant applied to HMLR in form AP1 under paragraph 18 of Schedule 12. In other words, the Applicant’s case is that he and his predecessor in title were in adverse possession of the Disputed Land for a period of at least 12 continuous years before the coming into force of the relevant parts of the Land Registration Act 2002 in September 2003.
8. Specifically, the Applicant claims to have accrued a period of adverse possession from 14 May 1987 (when his father and mother purchased Willow Farm) to date. That would, if correct, amount to a period of 12 years adverse possession by about 14 May 1999 on which date the Respondent’s title would have been extinguished by adverse possession.
9. It is not clear whether the Applicant also puts the case on the basis of a claim under Schedule 6 to the 2002 Act. For that purpose, he would have to satisfy one of the three conditions set out in paragraph 5 of that Schedule. He alleges that he would satisfy the third condition, namely that he reasonably believed that the Disputed Land belonged to him for at least ten years ending on the date of the application.
10. The Respondent’s objection is based on an allegation that the Applicant’s predecessor in title (the Applicant’s father, Brian) sought to buy the Disputed Land from the Respondent in around 1999. The Respondent invites the Tribunal to infer from this that Brian was aware that he did not own the Disputed Land.
11. The Respondent also denies that the Applicant or his father Brian were in factual possession of the Disputed Land for the period claimed. The Respondent claims that the Applicant has been in possession of the Disputed Land only since

October/November 2013. That is the date on which (it is agreed) the Applicant felled some trees on or at the edge of the Disputed Land. The Respondent says that prior to that date, the Disputed Land was effectively inaccessible from Willow Farm.

**Site inspection**

12. On 24 May 2016, I visited the site in the presence of both parties and the Respondent's legal representatives.

**Relevant Legal Framework**

13. The relevant law of adverse possession for this case is contained in Paragraph 18 of Schedule 12 to the Land Registration Act 2002. That paragraph effectively applies the old law of adverse possession to registered land where the alleged period of adverse possession expired before October 2003. The Disputed Land was registered at all material times.

14. The fundamental principles of the law of adverse possession are based on limitation. See Limitation Act 1980 section 15(1):

"No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it accrued to some person through whom he claims, to that person."

15. Because a simple barring of right of possession would have the effect of stultifying land use and land transfer, section 17 of that Act extinguishes the title of a person who is statute barred after 12 years as a result of adverse possession and section 75 of the Land Registration Act 1925 provided a mechanism in relation to registered land.

16. Schedule I of the Act provides a statutory definition of adverse possession:

8(1) No right of action to recover land shall be treated as accruing unless the land is in possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as "adverse possession"). . .

17. The test for adverse possession was set out by the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. Lord Browne-Wilkinson at para 40 and 41 expressly approved Slade J in *Powell v McFarlane* (1977) 38 P&CR 452, 470-471 who formulated the requirement for (1) factual possession and (2) the intention to possess.
18. In paragraph 41 of *Pye*, Lord Browne-Wilkinson approved the following explanation of factual possession by Slade J in *Powell*:

"(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

19. Lord Browne Wilkinson at paragraph 40 of *Pye* reformulated the definitions of factual possession and *animus possidendi* as follows:

"To be pedantic the problem could be avoided by saying there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")."

20. Intention to possess is usually to be implied from the acts of the squatter. In other words, the squatter's acts must unequivocally amount to possession. If they could be

attributable to some other purpose, then the squatter will not have the necessary intention

21. Intention to possess, which is necessary, is not the same as intention to own, which is not necessary – see *Buckinghamshire County Council v Moran* [1990] Ch 623 at 643E. It is irrelevant whether the adverse possessor believes that he is already the owner of the land in question or not – see *Newlands v Langran* (14 July 1989, CA as cited in Adverse Possession by Jourdan and Radley-Gardner, 2<sup>nd</sup> edition, para 9-41). It is not even relevant what he says to anyone about the land (including to the true paper owner) about his belief. The only time such a communication can affect the running of time for the purposes of adverse possession is if it is an acknowledgement of title made by the squatter to the paper title owner in writing. There is no such allegation in this case.
22. Intention to possess means that the Applicant (or his predecessor) was occupying the land with the intention of taking sole control of it as an owner would do. It also means that the Applicant's occupation of the land cannot be attributed to belief in some interest other than ownership (such as a tenancy agreement or easement).
23. In the event that the Applicant is not able to show 12 years' adverse possession expiring before September 2003, he will need to satisfy the requirements of Schedule 6 to the 2002 Act. The part which he would rely upon, in that instance, seems to be the Third Condition in paragraph 5 of that Schedule which provides the following criteria:

“(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.”

24. I have considered the evidence in the light of that legal framework.

**Evidence**

25. There is a large amount of agreement between the parties about the relevant facts. It is agreed that:

25.1. Brian and Anne Godfrey, the Applicant's parents, purchased Willow Farm on 14 May 1987. On 16 October 2001, Brian and Anne Godfrey transferred to the Applicant the part of Willow Farm which is adjoins the Disputed Land.

25.2. On 1 April 1999, the Respondent sold Low Farm to Mr & Mrs Remfry and retained title to the Disputed Land.

25.3. There has not been, at any material time, a manmade boundary feature (like a fence or wall) between Willow Farm and the Disputed Land.

25.4. There was until late 2013 a line of trees in the area between Willow Farm and the Disputed Land. The number and density of the trees is in dispute as is the date on which they first appeared.

25.5. There has been at all material times a wire fence separating the Disputed Land from Low Farm. The wire fence was already in place before Brian moved into Willow Farm in 1987.

25.6. In addition, on the Willow Farm side of the line between Low Farm and the Disputed Land is a wooden post and rail fence which was erected by the Applicant's predecessor in title, his father Brian.

26. The main areas of factual dispute between the parties centre around the following issues:

26.1. Was the Disputed Land capable of serving as a horse paddock between 1987 and 2001?

26.2. Was there an impassable line of trees between Willow Farm and the Disputed Land before the Applicant removed some trees in 2013?

- 26.3. Did the Applicant offer to buy the Disputed Land from the Respondent in about 1999?
27. Evidence for the Applicant was given by the Applicant himself and his father, Brian.
28. The acts of possession relied upon by the Applicant were as follows:
- 28.1. Upon moving into Willow Farm in 1987, Brian used the Disputed Land as a dumping ground. He thought it was part of Willow Farm, because the wire fence separating it from Low Farm was already in place.
- 28.2. There were no trees (save for a few spindly ones at the edges) on the Disputed Land when he first arrived in 1987. He produced photographs taken in 1987 which showed that. Brian planted some of the trees which later grew and others were self seeding.
- 28.3. Brian cleared the brambles and undergrowth from the Disputed Land in order to create a paddock for the family horse.
- 28.4. In about 1987, Brian arranged for the wooden post and rail fence to be erected in order to prevent the horse from injuring itself on the wire which already separated the Disputed Land from Willow Farm. Brian Godfrey was not challenged on that evidence, although he was asked to confirm that Mr Barrett (who put up the fence) was a family friend who is now Brian's son-in-law.
- 28.5. Brian and his family used the Disputed Land as a paddock for horses once it was cleared. I was shown two photographs of a horse. One showed a horse lying down on or at the Willow Farm edge of the Disputed Land. The other showed a horse trotting on Willow Farm land next to the wooden fence. The Disputed Land can be seen in both photographs. There is frost on the ground and there is very little vegetation on the ground, which is fairly flat. Brian explained that the nettles and weeds died back in the winter and that the surface growth would be thicker in the summer. There are a few small young trees dotted around the Disputed Land and at its edge, but there is clearly plenty of room for a horse to run, walk and graze. There is certainly nothing like a barrier preventing entry from Willow Farm onto the Disputed Land. The Disputed Land looks in the photographs like it is part of the rest of the Willow



Farm land. There are other photographs showing horses, but they are very poorly reproduced and it is not possible to see anything useful. The photographs were taken in the late 1980s. He was not challenged on the date of the photograph.

- 28.6. The Applicant gave evidence that about 10 different horses used the Disputed Land up to 2012. All of the horses belonged to Anne Godfrey, the Applicant's mother who was one of the joint owners of Willow Farm before 2001.
- 28.7. Throughout the period since 1987, Brian and then the Applicant maintained the Disputed Land for the purpose of using it as a paddock. They trimmed the grass and hedges and applied weed killers. They managed growth on the Disputed Land by allowing some vegetation to grow for the purposes of allowing the horses to graze. Brian said that the horses did not graze on the Disputed Land all year round. He explained that, as with all grazing land, the paddocks were rotated to allow some vegetation to grow back for grazing. He said that horses need nettles to feed on as they have a medicinal function for them.
- 28.8. Consistent with the use of the Disputed Land as a horse paddock, Brian and then the Applicant kept the horses off the Disputed Land to allow it to lie fallow for parts of the year to allow vegetation to grow back for grazing.
- 28.9. The Applicant claims to have maintained the Disputed Land since it was transferred to him in October 2001, by cutting brambles and weeds and mowing grass. He allowed his mother to continue to use the Disputed Land as a paddock for her horses until about 2012. He stopped allowing horses onto the Disputed Land in 2012 because a horse had chewed a window frame in the Applicant's newly built house on his part of Willow Farm near to the Disputed Land.
- 28.10. A number of trees had been damaged when horses ring-barked them. In 2013, the Applicant removed several trees, because some of the branches had become dangerous. It seems that it was the removal of the trees which sparked this dispute.

29. The Applicant's father also gave evidence that he intended to transfer the Disputed Land to the Applicant when he sold part of Willow Farm to the Applicant in 2001 and thought he had done so. He said that he believed that the Disputed Land was his up until then, but the family conveyancing solicitors discovered that the Disputed Land was part of the Respondent's title at that point. Brian gave evidence that he had asked the solicitors to rectify the title issue, but they did nothing about it as far as he was aware. There had been a planning application by Brian in 1998-1999, but the question of title to the Disputed Land did not come up and was not relevant for planning purposes.
30. Evidence for the Respondent was given by Eric Cole. His evidence contained the following assertions which are relevant to the issues in dispute:
  - 30.1. The Disputed Land has never been part of Willow Farm.
  - 30.2. It was a fairly dense copse with trees of various ages until autumn 2013.
  - 30.3. Mr Cole inspected the Disputed Land in 1999 and was satisfied that there was a line of trees and hedging plants along the line between Willow Farm and the Disputed Land which "were sufficiently close together to form a boundary". As a result, he decided not to fence the boundary between Willow Farm and the Disputed Land.
  - 30.4. In 1999, the floor of the Disputed Land itself was covered with other trees and with brambles and weeds.
  - 30.5. In 1999, Brian Godfrey approached Mr Cole to offer to buy the Disputed Land. Mr Cole suggested a price of £10,000 and Brian Godfrey refused. Brian Godfrey agrees that something similar happened, but according to him it was Mr Cole who approached him first and the whole event took place in 2013, not 1999.
  - 30.6. Thereafter, Mr Cole periodically looked at the Disputed Land (without going onto it) and satisfied himself that the tree-line boundary was still intact and that there was no evidence of the Applicant using the Disputed Land.
  - 30.7. In November 2013, the Applicant had all but two of the trees removed from the Disputed Land and the boundary line.

31. Evidence for the Respondent was also given by John Vernon who works for the Respondent as a farmhand. Mr Vernon said that he has had a look at the Disputed Land at almost daily intervals for 6 months a year since 2002 at the request of Mr Cole. He reported that the Disputed Land was covered with nettles and trees and was not suitable for grazing by a horse. He says that he did not see a horse using it. It is important to point out that Mr Vernon's main involvement with the Disputed Land starts only in 2002. He did say that he visited friends at Low Farm from 1968 to 2000, but it is fair to say that he did not pay any special attention to the Disputed Land on those visits.
32. The Respondent also relies on a number of Google images which were taken before November 2013 (mostly between 2005 and 2009) and which, he says, show that the Disputed Land was a dense copse. As far as I can see, the aerial photographs appear to show a canopy of trees covering an area in the vicinity of the Disputed Land. There are also street view photographs taken from the lane outside Willow Farm. They show the tops of trees in the approximate area of the Disputed Land. But those photographs also show telegraph wires in an unnatural bow shape across the sky, thus indicating that there is a significant degree of distortion in the photograph. Some unnatural curvature is also apparent in the buildings shown in those photographs. That makes them less reliable as evidence of the what the Respondent wants me to infer from them.

### **Discussion**

33. I have considered all the evidence and listened to the parties' submissions in the light of the legal framework which I set out above.
34. I gained the impression that all of the witnesses were doing their best to give a truthful recollection to the best of their ability. It is however the case that the Applicant and his father had the best knowledge of the day to day use of the Disputed Land. Brian Godfrey's recollection of dates was not particularly strong, but that is hardly surprising as he was being asked to remember the use of a piece of land since 1987. His lack of clarity on dates did not lead me to believe that the substance of his evidence was not credible.
35. Mr Cole himself only took proper notice of the Disputed Land on one occasion in 1999 when he inspected it prior to the sale of Low Farm. He formed the view at that time that there was an adequate barrier preventing entry to the Disputed Land from Willow

Farm. It is not clear why he formed that impression. Perhaps he visited at a time when the Applicant's family had left the brambles and nettles to grow back before returning the horse to the paddock? For whatever reason, the impression he formed was an erroneous one. There was not a natural barrier which would prevent the occupiers of Willow Farm from using the Disputed Land after 1999. We know that, because the Applicant and his father gave evidence, which I accept, that they continued to graze horses continuously on the Disputed Land until about 2012.

36. Mr Vernon was also doing his best to remember, but his evidence (a) only related to the period from 2002 and (b) was an impression of the Disputed Land formed by looking through a gateway and a hedge as he drove past it. His observation that he did not see a horse does not mean that a horse was not there.
37. I also accept the evidence of the Applicant and his father that they fenced off the Disputed Land in about 1987 with a wooden fence thereby incorporating it within Willow Farm and that they maintained that fence subsequently, replacing where necessary so that it was still there when I visited the site. I find as a fact that they maintained the Disputed Land itself for the purpose of using it as a horse paddock by clearing vegetation or allowing it to grow back as and when necessary for that purpose.
38. I find as a fact that the Applicant, his father and mother used the Disputed Land as a horse paddock continuously from the late 1980s or early 1990s until 2012.
39. I therefore find that they were in factual possession of the Disputed Land throughout that period. Even though the use was intermittent (in the sense that horses were not using it continuously), the intensity and frequency of use was commensurate with the type of use they made of the land. They used it as a paddock in the same way as an owner would do. They excluded all others, including the Respondent, in the sense that no-one else used the Disputed Land during that period. The fact that Mr Cole climbed through the hedge, to inspect the Disputed Land once in 1999, does not affect that conclusion and neither side submitted that it should.
40. I also find as a fact that both the Applicant and his predecessors in title, his parents, had the requisite intention to possess the Disputed Land. They intended it to form part of their ownership of the relevant part of Willow Farm and there was nothing equivocal about their possession of it.

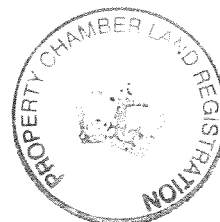
41. In my judgment, the conversation about a possible sale of the Disputed Land for £10,000 is not relevant. As discussed above, it is not necessary for the Applicant to believe that he owns the Disputed Land and an oral discussion cannot amount to an acknowledgment of title to affect the running of time under the Limitation Act 1980. Both parties accept that such a conversation occurred, but they differ significantly as to its date. It is also common ground that by about 2001 at the latest, the Godfrey family all knew that there was a problem with title to the Disputed Land, which means that they could not rely on the Third Condition in paragraph 5 of Schedule 6 to the 2002 Act in any event. It is therefore not necessary for me to make a finding as to the date of the conversation in question.
42. It is not clear exactly when the period of use started. The Applicant and his father gave evidence that they spent some time clearing and tidying the land before it was used for horses at some point in the late 1980s or early 1990s. They were, as I have observed, understandably not particularly accurate about the precise year when things happened. It is, however, clear that by the time the 2002 Act came into force in September 2003, the Applicant and his predecessors in title had between them accumulated at least 12 continuous years of adverse possession. It therefore seems to me that (a) this application should be allowed under paragraph 18 of Schedule 12 to the 2002 Act and (b) the Disputed Land should be registered in the name of the Applicant as the successor squatter to his predecessors in title.

### **Conclusion**

43. It follows that I direct the Chief Land Registrar to allow the Applicant's application as if the Respondent's objection had not been made.
44. Information about the process for making costs applications will be sent out to the parties with this judgment.

Dated this 1 August 2016

*Timothy Cowen*



BY ORDER OF THE TRIBUNAL



REF/2014/0899

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**SUBSTANTIVE ORDER**

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The Chief Land Registrar is directed to allow the Applicant's application as if the Respondent's objection had not been made.

Dated this 1 August 2016

*Timothy Cowen*

BY ORDER OF THE TRIBUNAL

