REF/2017/0641

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

CHRISTOPHER ROBIN STEVENS

APPLICANT

and

IAN MICHAEL SEIFERT
IRENE CHRISTINE SEIFERT

RESPONDENTS

Property Address: Land adjoining Lauriston Court, Yarm Way, Leatherhead, Surrey KT22 8RQ

Title Number: SY841395

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

On: 8th and 9th November 2018

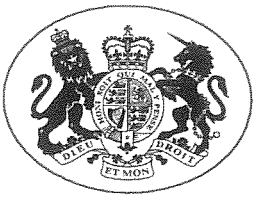
O R D E R

IT IS ORDERED THAT the Chief Land Registrar shall cancel the Applicant's application in Form FR1 dated 14th November 2016.

Dated this 7th day of January 2019

Owen Rhys

BY ORDER OF THE TRIBUNAL



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Applicant representation: In person
Respondent representation: In person

D E C I S I O N

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1. The Applicant applied in Form FR1 dated 14th November 2016 for first registration of an area of land lying to the south of Lauriston Court, Yarm Way, formerly owned by the Applicant's parents, and latterly by the Applicant in his capacity as their personal representative ("Lauriston"). Lauriston has recently been sold, and it appears that if the Applicant is successful in his application he

will transfer the land in question to the purchasers for an additional consideration. The Respondents are the registered proprietors of the property known as Beechmead, Yarm Way, registered under title number SY675955 (Beechmead"). They have been resident there since 2013. Beechmead lies immediately to the north of Lauriston

2. The land in dispute ("the Disputed Land") has been allocated provisional title number SY841395. It is triangular in shape, with the widest part to the east and its apex to the west. It is enclosed on the north by the boundary fence of Lauriston, and to the south by a post and wire boundary fence. At the time of my site visit, it was enclosed on the east side by a wire fence, with a small gate immediately to the south of the Lauriston boundary fence. There is a rough grass verge between this eastern fence and the turning circle or hammerhead at the southern end of Yarm Way. The interior of the Disputed Land largely consists of dense woodland. However, there is a cleared area close to the southern boundary, which has a brick built barbecue and a bench within it. There is also a dilapidated shed towards the western end of the Disputed Land and close to the boundary with Lauriston.

3. The application for first registration was based on adverse possession. In support of the application, Mr Stevens signed a Statement of Truth, which included particulars of the alleged acts of adverse possession since 1998. The ST1 includes the following statement: " .... *we realised that the triangular piece of land next to us did not seem to belong to anyone so we removed a panel in the side fence so we could access it. It was fenced in but was not maintained or visited or used by anyone and at no time during the whole of our occupation did I or my parents ever see anyone else either..... The area was wooded and it provided a relaxing retreat for us. We trimmed the vegetation and cut back the undergrowth to make paths running through the land and built a grove in the centre of the land and had a shed at the western end..... Throughout the period I maintained the trees and bushes which were elder and cropped the flowers and berries for wine. I also gathered wood from the land for fires. On various occasions I seeded the ground with grass, with limited success due to the tree*

cover. In the main I simply kept the existing undergrowth clear of the paths and open areas."

4. According to panel 6, headed *"Enclosure of the land"*, the land *"has been fenced on all sides"*. Mr Stevens says that the front, eastern, fence was erected by him. The southern fence was erected by the owners of the adjoining land to the south. The northern fence – Lauriston's boundary fence – was erected by Mr Stevens's family in 2002, replacing an existing fence. He continues: *"The only means of access is via the gap in the fence between Lauriston Court and the [Disputed Land] which is shown clearly in photo 2."* Photo 2 shows a low fence panel with a narrow gap next to it.

5. This is not the first time that the parties have been in dispute. The Respondents have made a number of unsuccessful applications to register a narrow strip of land within the title of Lauriston, lying between a thick garden hedge and a post and wire fence at the extreme south-western edge of the title. The basis of these applications was claimed adverse possession. These applications were vigorously resisted by the Applicant, who has alleged, among other things, that the Respondents forged a statutory declaration by a predecessor in title, an allegation which they deny. These applications seem to have caused a complete breakdown in relations between the parties. The Respondents have made allegations of theft and criminal damage against the Applicant, and the police have been involved on at least one occasions. It is no exaggeration to say that there is palpable animosity between them.

6. In summary, a person seeking to establish a title by adverse possession must prove two things: (a) exclusive factual possession, and (b) an intention to possess. Both these phrases have, fortunately, received considerable judicial exposition, most notably in the first instance case of Powell v McFarlane (1979) 38 P & CR 452 and the decision of the House of Lords in JA Pye (Oxford) Ltd v Graham [2002] UKHL 30 which adopted much of the reasoning in Powell's case. As to exclusive factual possession, the following passage (taken from Powell v McFarlane at 470-471 and approved in Pye v Graham at para.41) is definitive: *"(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."

7. The second element in adverse possession is the requirement of an intention to possess. This is perhaps a more difficult concept to define, but fortunately the authorities mentioned above also contain helpful guidance. These passages from Powell v McFarlane are particularly helpful:

> *"What is really meant, in my judgment, is that, the* animus possidendi *involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow..... The question of* animus possidendi *is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made 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, the courts will treat him as not having had the requisite animus possidendi *and consequently as not having dispossessed the owner. A number of cases illustrate the principle just stated and show how heavy an onus of proof falls on the person whose alleged possession originated in a trespass."* (at pages 471-472)

In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi *in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner. The status of possession, after all, confers on the possessor valuable privileges* vis-a-vis *not only the world at large, but also the owner of the land concerned."* (at page 476)

"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 ploughing up and cultivation of agricultural land is one such act: compare Seddon v. Smith. 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. The plaintiff however, did none of these things in 1956 or 1957. The acts done by him were of a far less drastic and irremediable nature. What he did, in effect, was to take various profits from the land, in the form of shooting and pasturage, hay and grass for the benefit of the family cow or cows and goat, and to effect rough repairs to the fencing, merely to the extent necessary to secure his profits by making the land stockproof. On many days of the year neither he nor the animals would have set foot on it. These activities, done, as they were, by a 14-year-old boy who himself owned no land in the neighbourhood, were in my judgment

equivocal within the meaning of the authorities in the sense that they were not necessarily referable to an intention on the part of the plaintiff to dispossess Mr. McFarlane and to occupy the land wholly as his own property. At first, surely, any objective informed observer might probably have inferred that the plaintiff was using the land simply for the benefit of his family's cow or cows, during such periods as the absent owner took no steps to stop him, without any intention to appropriate the land as his own.

In these circumstances the burden must fall fairly and squarely on the plaintiff affirmatively to prove that he had the requisite intent in 1956–57. I adopt the approach followed in Convey v. Regan, an Irish decision to which Mr. Wakefield, on behalf of the second defendant referred me. Black J. said :

> "The basis of the principle seems to be that when a trespasser seeks to oust the true owner by proving acts of unauthorised and long continued user of the owner's land, he must show that those acts were done with animus possidendi, and must show this unequivocally. It is not, in my view, enough that the acts may have been done with the intention of asserting a claim to the soil, if they may equally have been done merely in the assertion of a right to an easement or to a profit à prendre. When the acts are equivocal—when they may have been done equally with either intention—who should get the benefit of the doubt, the rightful owner or the trespasser? I think it should be given to the rightful owner." (at pages 477-478)

8. Against that background, I shall consider the evidence. Mr Stevens verified his Statement of Case, the ST1 and his Appendix 6 (at page 111 of the Bundle), which stood as his evidence. He was cross-examined on these statements. I have already quoted extensively from the ST1 in support of the original application. Paragraphs 10 and 11 of the Statement of Case read as follows:

> *"From the summer of 1999 to the present day the Land has been used by the Applicant and his family as part of their garden. The Land has been used for relaxation and social occasions including barbeques. The land has also been used as a private safe area for minors without the need for supervision. The Applicant placed a shed on it at the western end in 1999 to store garden tools and to store charcoal and equipment for barbeques. The Applicant has cleared pathways and cleared the central area to*

create a relaxing retreat from the heat of the summer and has maintained it since 1999 and has contracted gardeners to help with the work.

The Land has historically since 1998 been continuously enclosed on all sides by fences including a barbed wire fence and wooden posts running behind concrete posts on the Eastern boundary with Yarm Way, a barbed wire fence on the Western boundary and a wire fence on the southern boundary. The only access is from the rear garden of Lauriston Court."

9. Ms Adriana Dragomir also made a statement, which she verified and on which she was cross-examined. Ms Dragomir was the full-time carer for Joan Stevens, the Applicant's mother, who died in December 2015. It appears that she is now a good friend of Mr Stevens and they cohabit. The most material part of her statement reads as follows; *"In my spare time and when Chris [the Applicant] was home I took over the general gardening starting in early 2011 as this is one of my passions. Chris and I maintained the adjacent wooded part of the garden (the part that Chris is applying for) and I took Joan there on many occasions as it was a place that she loved to be in. On a warm summers day we would have a barbeque which she also loved. It was one meal that she would eat absolutely everything. These excursions were a break for her from the boredom of the house. Chris and I would go there on a summers evening to relax after I put Joan to bed."*

10. For the Respondents, evidence was given by Mrs Seifert herself, and Dr Frances Barnby Smith, Mrs Thelma Batchelor and Mrs Jill Mackinder. These had all made witness statements upon which they were cross-examined. They also relied on a statement by Mrs Cooksley, but she was not called to give evidence.

11. Mrs Seifert's evidence essentially amounted to this. She disputes the Applicant's claim to have been in adverse possession of the Disputed Land. She says that land was openly accessible from Yarm Way until 2016, when Mr Stevens constructed the fence and gate along the eastern side of the Disputed Land. She says that prior to that time, she and her husband, and other local residents, went onto the Disputed Land from time to time without hindrance. She denies that the Applicant, or any member of the Stevens family, treated the Disputed Land or any

part of it as an adjunct to the garden of Lauriston, or used it for social or recreational purposes. It has always been something of a wilderness. She says that the Applicants has recently created the "barbecue area" within the Disputed Land for the purposes of strengthening his claim.

12. Dr Barnby Smith does not live in Yarm Way, but is active in the local Residents' Association, and estimates that she has visited Yarm Way *"in excess of 50 times over the last 12 years."* She recalls in her statement that she acquired a dog in November 2005 and in Summer 2006 *"I visited Yarm Way specifically to investigate the rough area of land at the end of Yarm Way to see how far it extended and if there was any footpath through into the open land behind to join u to the path (Worple Lane) at the rear of my home to create a circular walk with my dog."* She said that *"I went between the close boarded wooden fenced off area and the house called Lauriston. I saw a set of concrete fence posts, but there was no fencing between them nor any remains of an old fence. I was able to walk past these posts and to see inside."* She added that there was no sign of any activity on the Disputed Land. In cross-examination, however, Dr Barnby Smith seemed confused with regard to the area of land that she was describing. It was not at all clear whether she was talking about the Disputed Land itself, or about the other areas of rough woodland that surrounded the electricity sub-station immediately to the south of the Yarm Way hammerhead.

13. Mrs Mackinder has lived in Yarm Way since January 2015. She and her husband live next door to Beechwood. It was her evidence that until 2016 the Disputed Land was open to Yarm Way, but in that year a fence was erected between the concrete posts that previously existed alongside the Yarm Way hammerhead. She had entered the land on a number of occasions with her dog. Prior to the erection of the fence she had entered the land she had been able to enter the land (which she described as "The Thicket") without hindrance. The area itself was dense woodland unsuitable for any social activity. She produced two letters written to the Land Registry in 2017 stating that the Applicant had recently erected fencing to prevent access to the Disputed Land from Yarm Way. Mr Stevens in cross-examination suggested I think that these letters had somehow been concocted,

because the later letter (December 2017) refers to a letter dated April 2016, whereas the letter actually produced is dated 2017.

14. Mrs Thelma Batchelor has loved continuously at 7 Yarm Close since 1970, with the exception of two periods – 1970-73, and 1976-85. Her house is approximately half a mile from the Disputed Land. In her statement she said that she has frequently walked in the area, including the area around the hammerhead on Yarm Way. She has picked elderflowers and blackberries in the woodland on either side, including the Disputed Land. She saw a rough path into the Disputed Land running alongside the fence to the south of Lauriston. She did not see any fence preventing access from Yarm Way, until relatively recently.

15. Mrs Cooksley's witness statement also contains a detailed account of the use of the Disputed Land since 1982, when she moved into the neighbourhood. At page 2 of the statement, she explains how the concrete posts at the eastern end of the Disputed Land came into being. She says that gypsies had entered the area and accessed the fields beyond. The local residents paid for the erection of the concrete posts in order to prevent further access from Yarm Way.

16. I should also mention a letter to the Land Registry dated 12th April 2017 written by Mr Malcolm Joy, owner of "Acorns", situated directly opposite Lauriston. He also objected to the Applicant's application, but subsequently withdrew that objection. In his letter of objection he said this: "*In the 21 years that I have lived here both areas have remained in their natural state and members of the public have had direct access from the hammer head of the turning circle of Yarm Way. This changed only recently when the owners of Lauriston erected a wire fence preventing access to the area adjoining their property and made the application for the "unsold land" of the Yarm (Court) Estate.*"

17. My findings of fact are as follows:

    (1) The Applicant did not enclose the Disputed Land until October 2016 or thereabouts, not long before the date of the FR1 application. The southern fence had not been erected or maintained by him. His family erected a boundary fence along the southern boundary of Lauriston in 2002, which, incidentally, formed the northern boundary of the Disputed Land.

However, the land has always been open from the east, namely from the verge adjoining Yarm Way.

(2) I do not accept Mr Stevens's evidence that in 2016 he merely replaced an existing fence along the eastern boundary. There had been a series of concrete posts erected along this line, but there was no evidence of any barrier joining these posts and forming a fence. The posts had been installed by local residents to prevent vehicles driving into the Disputed Land.

(3) It is true that there were some damaged fence posts visible at the end of the boundary farthest from Lauriston. However, nothing can be inferred from their presence. There was certainly no sign of any historic fencing across the eastern boundary of the Disputed Land.

(4) Mr Stevens may from time to time have entered the Disputed Land to pick berries or perhaps simply to contemplate the world. However, I reject his evidence that he and his family regularly entered the land for the purposes of barbecues or social gatherings.

(5) The Applicant did not go into exclusive factual possession of the Disputed Land until the erection of the fence by Yarm Way in or about October 2016. Until that time the area was open from the east and there is evidence that other local residents were (until the erection of the fence in 2016) able to enter the Disputed Land freely, and did so on occasions for a variety of purposes, such as dog-walking and picking berries.

(6) When he did enter the Disputed Land, he did so in a clandestine manner, through a gap at the end of the Lauriston fence in the fence or by means of a lifting fence panel.

(7) I do not consider that the Applicant had the required intention to possess the Disputed Land until he enclosed it. Prior to that time, and to the extent that he did enter the Disputed Land, he must be considered a persistent trespasser. It is telling that he and his family did not enclose it when the Lauriston boundary was re-fenced in 2002. That would have been the moment to have asserted an intention to possess. Instead, on his case, he

continued to enter by the temporary and/or clandestine means of access referred to above.

(8) He did not enclose the land, or erect any signage indicating possession, and made no permanent form of access. Although he claims to have erected the shed, in view of its appearance and condition, it must have long pre-dated 1999 (the Land Registry surveyor put its age at 30 plus years).

(9) Accordingly, the Applicant (and his family) have neither been in exclusive factual possession of the Disputed Land, nor has he (or the family) had the necessary intention to possess, for the required period.

18. In making these findings of fact, it is evident that I have generally preferred the Respondents' evidence where it conflicts with that of the Applicant, and have not accepted much of the Applicant's evidence. My reasons are as follows:

(1) The central assertion, that the Applicant and his family used the Disputed Land as a "wild garden", is inherently improbable. Lauriston itself has a large and well-tended garden and terrace which would clearly have been a far more congenial area for social gatherings. Given that the only access to the Disputed Land – even on Mr Stevens's own evidence – was either a gap in the fence at the western end of Lauriston, or a removable fence panel, it would be necessary to transport all the food, equipment and other paraphernalia to the end of the garden, and then through an area of thick woodland, in order to reach the "grove", or barbecue area at the southern edge of the Disputed Land. This is the closest point to the A24. The traffic noise at this point was very intrusive, at the site visit, and it is in my view unlikely that the Applicant and his family would choose to sit there rather than in the pleasant gardens of Lauriston itself, particularly in view of the numerous obstacles within the Disputed Land, in the form of fallen branches and thick undergrowth. The Applicant's evidence (and that of Ms Dragomir) is simply not credible, particularly in view of the fact that the Applicant's parents were elderly.

(2) As I have mentioned above, there is a history of ill-feeling between the Applicant and the Respondents. Much of his evidence, and the case as put forward in the documents that he relies on, was designed to attack their credibility on the alleged basis that their earlier applications had no merit. Mr Stevens seems to have taken the Respondents' previous applications very badly, and this application appears to be motivated by a desire to damage them. He clearly has a high degree of animus towards them which in my view coloured his evidence. By contrast, although Mrs Seifert found it difficult at times, she tried hard to retain some objectivity when giving her evidence and I found her to be a generally more measured and reliable witness. Ms Dragomir was manifestly partisan.

(3) The Respondents relied on three independent witnesses. Although I found Dr Barnby Smith's evidence to be too confused to be of much assistance, I do not have the same reservations about Mrs Mackinder and Mrs Batchelor. They appeared to be honest and reliable witnesses whose evidence regarding the use and appearance of the Disputed Land was not shaken by cross-examination.

(4) There is some documentation to support the Respondents' evidence as to the enclosure of the Disputed Land. In particular, I have in mind the letters written by the Mackinders, DF Richmond-Coggan, and Mr Cox. These letters were written to the Land Registry, and all claim that the fence enclosing the Disputed Land from Yarm Way was recently erected by the Applicant recently.

(5) I should say that I did not find the Google Street View photographs of the eastern end of the Disputed Land, relied on by the Respondents, to be of much use. It would be very difficult to discern a fence in the undergrowth.

19. In summary, therefore, I have concluded that the Applicant (and his family) was not in exclusive factual possession with the necessary intention to possess until 2016 at the earliest, when he fully enclosed the Disputed Land. I shall therefore direct the Chief Land Registrar to cancel the Applicant's application in Form FR1

dated 14th November 2016. I am minded to award the Respondents their costs on the standard basis. I direct them to file with the Tribunal and serve on the Applicant a statement of costs within 7 days of the date of service of this Decision and Order. If the Respondent objects to the amount of costs, and to the proposed order, he should file and serve his submissions within 14 days of receiving the costs statement, and the Respondents may respond within 7 days thereafter.

Dated this 7th day of January 2019

Owen Rhys

BY ORDER OF THE TRIBUNAL