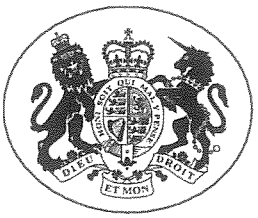


[2019] UKFTT 0588 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2018/0223

BETWEEN

Professional Structural Services Limited

Applicant

and

Andrew Joseph Arnold

Respondent

Property address: Land on the east side of The Street, Thornage, Holt, Norfolk
Title number: NK464670

Judge Hargreaves

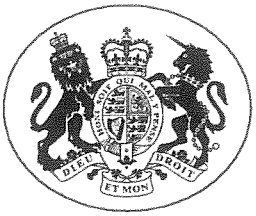
ORDER

The Chief Land Registrar is directed to give effect to the Applicant's application in Form FR1 dated 16th August 2016.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

DATED 9th AUGUST 2019



[2019] UKFTT 0588 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2018/0223

BETWEEN

Professional Structural Services Limited

Applicant

and

Andrew Joseph Arnold

Respondent

Property address: Land on the east side of The Street, Thornage, Holt, Norfolk
Title number: NK464670

Before: Judge Hargreaves
Alfred Place WC1E 7LR
21st June 2019

Applicant representation: Alasdair Wilson instructed by Rogers & Norton, Norwich
Respondent representation: in person

DECISION

Keywords – adverse possession of a driveway providing access to a number of properties including the parties' – acts of possession sufficient over many years to justify finding adverse possession – Applicant's predecessor in title had paper title (conveyed "to the estate and interest of the Vendors") but this was rejected as inadequate proof of title by HMLR on the Applicant's application for first registration, thereby prompting the adverse possession claim – Respondent's challenge on the facts since 1998 was inconsistent – Applicant's case

preferred on facts and law and much of case rested on direct evidence of facts from 1987 prior to the Respondent's relevant purchase in 1998

Authorities cited

Pye v Graham [2003] 1 AC 419
Terry and Terry v Dyer REF/2010/0094 and REF/2011/404/692 Deputy Adjudicator Hargreaves 7th June 2012
Dyer v Terry and Terry [2013] EWHC 209 (Ch) Richard Millett QC
Chapman and Chapman v Godinn Properties Limited and Stirling [2005] EWCA Civ 941

Adverse Possession (2nd ed) Jourdan QC and Radley-Gardener

1. I direct the Chief Land Registrar to give effect to the Applicant's application in Form FR1 dated 16th August 2016 for the following reasons.

2. All page references are to those in the trial bundle except where otherwise stated.

3. I am indebted to Mr Wilson for the clarity of his submissions and to the Respondent who turned up to a hearing listed in London (for various reasons which do not need revisiting) despite vigorously opposing the location and threatening not to, and having health issues which made the day a challenge for him. I am confident that given the totality of his lengthy written submissions and evidence I heard, that he had the opportunity to explain his case in full, and it has been met in detail (and fairly) by Mr Wilson. That he has been unsuccessful is due to the strength of the Applicant's case, as explained, rather than the fact that the Respondent was a litigant in person, though he had some assistance at the site visit and until lunchtime on the day of the hearing. Both parties have filed closing submissions in writing and I extended the Respondent's time for doing so from 5pm 19th July to 5pm 24th July at his request made late on 19th July (with a subsequent extension to the Applicant for a final response which is dated 1st August).

4. I had the opportunity of inspecting the disputed land on the afternoon of 19th June 2019. It has been given title number NK464670 for the purpose of this application,

and an adequate location plan is in the form of the HMLR notice plan at p14 where it is coloured blue. The Applicant is the registered proprietor of NK448260, which is in two parts. First, Brook House (which is the dwelling) and then a separate field area which I will call the Pightle for the purpose of this decision, and which adjoins the disputed land.[1] The Respondent has been the registered proprietor of Rowan Cottage which is also adjacent to the disputed land (NK225690) since December 1995 (p77-82). Rowan Cottage is closer to the Pightle than Brook House. Further descriptions and photographs have been collated by Adrian Clarke and these can be found at p91-99. See also p129, p374-382 (where there is a selection of aerial photographs). The driveway is just that: it provides access to the Pightle and the rear of Rowan Cottage (the Respondent's home), Melbourne Cottage, Meadow View and Brook House.

5. These properties have a frontage onto The Street in Thornage, a fairly busy road, and near a bend: parking on that road is arguably impractical. The disputed land has never been gated for reasons explained by Mr Graham Clarke, and I will deal with that below. There is no dispute that the driveway has been used for years to provide vehicular access to the rear of Rowan Cottage, Melbourne Cottage, Meadow View (formerly all three known as Meadow View Cottages) and Brook House as well as the Pightle. It is not particularly wide: from the road looking down there is a hedge on the left side (ie the north side), and the garden wall of the Respondent's Rowan Cottage on the right, room for one car at a time. The hedge is not the northern boundary, there being at least for part of the way a gap between the hedge and boundary wall to Meadow Cottages on the north side of the driveway, the location of some disputes about logs and a compost heap. The drive has an untreated surface. The Applicant has an old garage at the end of the drive close to the entry to the Pightle (indicated on the notice plan). It is difficult to know on the ground where the disputed land ends, and whereas that debate gave rise to some spirited exchanges at the site visit, it has no impact on the decision making process because the Respondent does not have a competing claim to title. The notice plan at p14 shows that the rear gardens of the cottages except for Rowan Cottage extend east to the banks of a stream. Again, certain

[1] It is a major part of the Respondent's case that the Pightle was common land, relying on Cannon J.F Lord's letter dated 5th September 1983: see p110. However neither the Pightle nor the driveway has ever been registered as common land and the evidential impact of this letter is therefore nugatory, in addition to the fact that the other correspondence is missing. Otherwise the evidence is unsubstantiated hearsay and speculation. On any view, the evidence such as it was that either piece of land was used by villagers predates 1981 by many years, and relevant records do not exist to support the claims: see p337.

issues surfaced at the site visit and in the papers and evidence which suggest that various other disputes might be simmering as far as the Respondent is concerned (such as the extent of his rear boundary and where he parks his vehicle), but with the nature of the application before me, those issues are of tangential evidential value rather than directly relevant

6. The purpose of the driveway and its location is relevant to its conveyancing history, and that in turn underpins this application. On 24th July 1981 Mr and Mrs Packman conveyed Brook House (identified as "A" on one plan attached) to Mr and Mrs Lintott. See p20. Secondly they conveyed the land edged green and marked "B" (ie the Pightle). By a supplemental conveyance dated 8th December 1981 the Packmans conveyed to the Lintotts "for the estate and interest of the Vendors" the land they omitted by mistake from the July conveyance, ie the driveway. See p27.The Lintotts meanwhile had taken the precaution of obtaining a twenty year title indemnity insurance policy on the grounds that there were "no title deeds" (p43). No claims were made against the policy (p49). But that is clear evidence of presenting as being entitled to possession.

7. On the same day as the parties entered into the supplemental conveyance, Mr and Mrs Lintott entered into a further deed with Messrs Brown and McNamara, who then owned all three Meadow View Cottages (p51). The deed records the parties' mutual decision to grant each other rights of way. The Lintotts granted rights of way over the driveway to the owners of Meadow View Cottages, who in turn granted rights of way over the yellow land ie the land at the rear of Meadow View Cottages as known then, on foot and by vehicle to the Lintotts and their successors.[2] Both grants were on terms and subject to covenants but I need not recite those, except to note that Mr Moss of Melbourne Cottage provided his share of a repair bill in 1993 in accordance with those terms. All the relevant registered titles record the benefit and burden of these 1981 rights. See for example the Respondent's title at p79-80, and Melbourne Cottage at p88. Again, this is cogent evidence of the neighbours' acceptance of the rights of the owners of Brook House to the disputed land. Those parties included the Respondent's predecessors in title.

[2] See the plan at p57: the right of way for Meadow View Cottages is over the land coloured brown which to the eye looks to be over half the width of the driveway, but the plan is not to scale and it is assumed that the right of way was granted over the width to the hedge.

8. The Applicant's predecessors in title were Graham and Mary Clarke to whom Brook House, the Pightle and the driveway were conveyed on 28th May 1987 (p109), the driveway by reference to the December 1981 conveyance and therefore "for all the estate and interest of the Vendors therein".[3] This was a legal distinction which was only picked up by HMLR in 2015 so far as I can see (their explanation is in a letter dated 17th October 2017 at p119). Graham Clarke's evidence was therefore critical to this application, not least because he and his wife lived in Brook House for nearly twelve years before the Respondent bought Rowan Cottage. Nearly 30 years later in 2015 Mr and Mrs Graham Clarke transferred all three parts of Brook House to the Applicant (p31) and the Applicant was registered as proprietor of the house and the Pightle on 8th June 2015. As to the driveway, HMLR rejected the application for first registration on the grounds that there was insufficient evidence of documentary title to the driveway, whereupon the Applicant made the FR1 application which was the subject of objections by both the Respondent and Mr Moss of Melbourne Cottage (who was granted permission to withdraw his objection and has played no further part in the proceedings).[4]

9. The Applicant's statement of case is at p1, and the thrust of it, as would be expected on the basis of the brief chronology set out above, is that the owner of Brook House has had possession of the driveway and an intention to possess it at all material times, and at the latest from May 1987, relying on Graham Clarke's evidence. In addition the Applicant correctly relies on the effect of the 1981 conveyances and deed to demonstrate that the parties then and subsequently acted in accordance with a formal arrangement which was only ever consistent with the owners of Brook House having recognised ownership of the driveway. The Applicant asserts, further, that until Adrian Clarke arrived on the scene and the FR1 application had to be made, there was no challenge to that situation, and the facts support that (see below). Such acts undertaken by the Respondent on the disputed land were carried out with the permission of Graham Clarke, and my findings support that as well.

10. The Respondent filed two statements of case at p102 and p130. The core of his objections is that the factual basis of the Applicant's case is flawed because he had

[3] Adrian and Susan Clarke (of the Applicant) are no relation to Graham Clarke

been in possession of the disputed land unlike the Applicant or its predecessors (from 2002 at the latest), whose evidence he disputed, and accused both Graham Clarke and Adrian Clarke of dishonesty in their respective accounts. He relied heavily on the lack of documentary title in this context. At times his position could be confused: on the one hand he criticised the Applicant and its predecessors for the nature of their control, on the other he indicated that they should have done more to keep the area tidy. But none of the Respondent's activities go further than keeping the driveway neat and tidy in a relatively harmonious spirit of co-operation with Graham Clarke. Similarly, some contribution to that was on the Respondent's evidence made by Mr Moss, one of his neighbours. Significantly, some of the Respondent's objections can clearly be traced to a falling out with Adrian Clarke. The Respondent seems to have developed more of a combative interest in the disputed land since the Applicant acquired Brook House. It is clear that there have been tensions and at one stage the police were called after an altercation involving Susan Clarke. As is frequently the case, and fortunately, I do not need to make findings of fact in relation to that episode to decide the application, but it highlights the strength of feeling about the issues, on both sides. For the Applicant's representatives, the need to make an FR1 application in respect of the driveway clearly came as an unwelcome surprise. It is part of the Applicant's case that difficulties with the Respondent followed that, and in particular Mr Wilson developed a line of cross examining the Respondent to challenge him on a change of attitude. That approach was effective, as will be seen.

11. The Respondent, though hampered by an admitted difficulty in committing his written position to the Tribunal clearly, balanced that with a dogged determination to challenge both Graham Clarke's and Adrian Clarke's evidence. He produced several witness statements to support his case; though no other witnesses were called to give evidence, that has not in itself damaged the Respondent's case for the following reasons. Gillian Sands (p322) gave evidence of using the driveway on foot to visit Meadow View Cottage in the 1960s and added that "this piece of land was, is and always has been known as common land by locals ...". Her evidence is consistent with long standing access to the rear of Meadow View Cottages and a view held by some in the village – no more than that – that the land was "common land". Again,

[1] The Applicant's ST1 is at p362

Norma High (p325) gives an account of her childhood user in the 1950s including her children's user in the 1970s, but nothing in her statement is inconsistent with Graham Clarke's evidence except she too insists that the land was common land. Chelsey Ball (p327) gives critical evidence about observing and commenting on the poor relationship between the Respondent and Adrian Clarke: that does not assist me on the main issues and I observed that for myself. Glenise Moss (p 328), the former Second Respondent's wife, has given evidence supporting the Respondent's account of his activities on the disputed land including storing logs, cutting wood, and trimming the hedge (so I can deal with those in relation to his evidence), and is also generally critical of the Applicant and Graham Clarke, which suggests a personal involvement and attitude. She too asserts the point about the land being common land, and a concern that the Applicant's motive is a desire to control the driveway to enable future development (the evidence before me is that this fear is currently unfounded). On any view the rights of way are protected, and as such, indicate that any owner takes subject to them.

12. None of this evidence really assists the Respondent, even if the witnesses had been called to give oral evidence. In addition, Kevin Riches (p323) gives evidence about his father parking his tractor and trailer on part of the driveway up to 2012-2013, and I can return to that allegation in the context of Graham Clarke's evidence as well as the Respondent's. Mr C. Sadler (p324) gives evidence as to being asked by the Respondent to scrape the surface of the driveway to deal with excess rainwater from the road, and to cutting the hedge with his machinery. Again, I can return to these allegations (which go to the question of who had control of the driveway) in the context of other evidence, though I note the statement contains no dates.

13. These statements do give a general indication of some of the Respondent's main evidential themes. He did not provide a separate statement and relied on his statements of case. He has sought to add evidence in his written closing submissions dated 24th July, and Mr Wilson's final submissions point out that these are general but extensive, and could have been introduced earlier. I do not take the additional evidence into account because they were untested.

14. Under cover of a letter dated 12th July the Respondent sent three further letters to the Tribunal from witnesses on whose evidence he wished to rely. They are all handwritten and only one clearly predates the hearing. They are not admissible as evidence because served late, and there is nothing to suggest that the Applicant has seen them. That apart, however, they do not assist the Respondent's case for the following brief reasons to make the position clear. A letter from Joseph Ashley dated 10th June states that he has seen the Respondent cutting the grass and hedge on the driveway "adjacent to his cottage" and doing "maintenance work on the driveway itself". This does not add anything more to the Respondent's evidence. John Smart, the chairman of Thornage Parish Council writes in a letter the date of which I find hard to discern (but it is June) to the effect that the Respondent "always tell the truth as he sees it", (credibility and evidence being a matter for me). Peter Hammond writes in a letter dated July (and therefore definitely after the date of the hearing) that the "silence of those [supporting Graham Clarke's evidence] has been deafening", and in a critical letter repeats the assertion that the disputed land is common land, a long held view by some for which no evidence has been presented to me.

15. The Applicant also provided statements from two witnesses who were not called. James Richardson (p152) of the adjoining property to Brook House, Meadow View Cottage supports Graham Clarke's accounts (though not of great evidential weight), to the effect that "My wife and I have always been under the impression that Graham and Mary owned the track as this was made clear to us by Graham when we bought our property ... there were no disputes with regards to the ownership of the driveway until the Applicant's purchase of Brook House" (p154).[5] Similar evidence was given by another neighbour, James Bailey (p170), whose evidence I heard and accept, though with the caveat that his Thornage home is a second/holiday home. Nigel Coverdale, a builder engaged on behalf of the Applicant also provided a statement (p163) but again though it evidences a poor relation between the Respondent and Adrian Clarke, it does not assist me to decide this application. I stress however that this application is decided on the evidence I heard during the trial and the main evidence was given by the Clarkes.

[5] The OCE for Meadow View Cottages also recording the benefit and burden of the 1981 conveyances are at p157.

16. This brief review takes me to the important evidence of Graham Clarke. I should say at the outset that he was a compelling witness who said he had spent much time thinking over his past years at Brook House, where he lived full time, since he was contacted on behalf of the Applicant about the registration problem. I have no hesitation in preferring his evidence to the Respondent's where their evidence conflicts and note that his written evidence, which starts at p182, was prepared after he had read the Respondent's objection letters to HMLR and his statements of case. His statement is a careful explanation and rebuttal, and he gives four examples of behaviour confirmatory of possession prior to 1998 and the Respondent's arrival (see paragraphs 5-8). I reject the Respondent's submission that Graham Clarke's account was untrue. Without repeating the contents of the statement, it contains clear evidence of both possession and an intention to possess the driveway. His evidence is that permission was granted on various occasions to Mr Riches to park his tractor trailer and not granted to Mr Moss to park his car and that he organised repair works to the surface of the driveway in 1993 (at least in the sense of paying for them and collecting contributions in accordance with the 1981 grants).[6] He gave limited permission to the Respondent to keep chickens on part of the driveway, refused the Respondent permission to install gates across the driveway and gave him permission to take some wood (stored by himself on the driveway) from the driveway. In 2013, aged 80, he had a heart attack, his cutting back of the hedge suffered, and he agreed that the Respondent could clear the hedge and take the wood to use as firewood, and the Respondent did so. He also agreed that the Respondent could replant his rowan tree on the disputed land, and that he himself took regular steps to prevent holiday makers from parking on the driveway. They had a good, neighbourly relationship. Overall, Graham Clarke's clear evidence is of control of the driveway based on his understanding that he owned it. I also accept his evidence that he was sure that "no-one challenged [my] acts as owner." It is clear that this included not only control over the owners of the Meadow View Cottages including the Respondent but third parties such as holiday makers who might have been tempted to find a convenient place to park on the drive.

[6] So far as the statement of Kevin Riches contradicts this evidence, I give it no weight, because it is hearsay evidence. Kevin Riches was not called, and I have already explained my preference for Graham Clarke's evidence.

Adrian Clarke also gave evidence on behalf of the Applicant. He and his wife are the actual occupiers of Brook House in succession to Graham Clarke. It is their planned retirement home. His statement is at p203. It contains a detailed account of the history, so not all is his own evidence. Having listened to his oral evidence, and read the log referred to below, I accept his evidence, and again, where it conflicts with the Respondent's, prefer Adrian Clarke's. He makes the point that when he first met the Respondent and was introduced by Graham Clarke, that the Respondent did not challenge ownership of the driveway, when meeting to the rear of Rowan Cottage. In addition, he relies on the Respondent's allegations in his responses to HMLR which complained of the "bullying" attitude of Graham Clarke in asserting his rights over the driveway (see eg p206). For himself, Adrian Clarke, who is an engineer and pays careful attention to detail, was advised to start and keep a log of incidents and activity which he did between 27th May 2015- 11th September 2018: see p264. Whilst not every recorded incident relates to the driveway, it is clear that there was an ongoing issue from the outset as to the nature of activity on and control over the disputed land, in which the Respondent and Adrian Clarke were frequently drawn into what could be described as a low-key altercation. It is also clear to me that Adrian Clarke took the view from the outset that the disputed land was under his control and made that clear to the Respondent, and that looking at the matter in the light of Graham Clarke's evidence and Adrian Clarke's log, that the Respondent engaged in challenging conduct towards the latter which he had not displayed towards the former, though not all of it was limited to the issue of the driveway. (For example, Adrian Clarke took a series of photographs which are at p289-296 and show other places of tension.) An example of the type of interaction by letter is at p233 (30th December 2016). To be clear, I accept the relevant contents of the maintenance log as true: the main incidents are described in Adrian Clarke's statement (p209-216) and speak for themselves. In a sense the Respondent's challenge to Adrian Clarke's evidence undermines his own defence: he repeatedly cross-examined him as to why he kept carrying out acts of maintenance on the driveway (such as cutting the hedges and the grass), only to invite the response: "Because it is mine [ie the Applicant's] to maintain". However, even if Mr and Mrs Adrian Clarke had ignored the driveway since the Applicant's purchase and the Respondent had been solely responsible for its maintenance, it would not assist the Respondent because there is a compelling case that Graham Clarke's activities extinguished the true owner's title by the end of May 1999. There was

clearly no challenge by the Respondent in the early years of his ownership of Rowan Cottage from 1998 which would interrupt Graham Clarke's required 12 year period of possession pursuant to the 1980 Limitation Act.

18. Susan Clarke gave brief evidence confirming the truth of her husband's, which I accept. In all, Adrian Clarke carried on much as Graham Clarke had done, but with a further eye to succeeding in this application once the Respondent objected to it. That does not mean he exaggerated his activities, just kept a careful record. If his record appears exaggerated, I conclude that he was pushed into recording detail because of the Respondent's obstructive behaviour, as is documented in the maintenance log. In particular I accept Mr Wilson's closing submissions summary of the actions of the Clarkes on behalf of the Applicant (in addition to Graham Clarke's evidence) including (i) granting permission to the Respondent to store logs (ii) refusing to allow the Respondent to erect gates (iii) re-locating the rowan tree again (iv) giving the Respondent permission to fill in holes on the driveway (v) removing the Respondent's logs after he failed to do so on request and requiring him to remove a wacker plate (which he did) (vi) maintaining and limiting access to a compost heap on the disputed land. But again, the heavy lifting in terms of evidence supporting the claim, was already done by Graham Clarke.

19. Adrian Clarke's statement contains an equally careful rebuttal of the Respondent's statement of case (p216-218) and is in my judgment borne out by my approach to the Respondent's evidence. Turning now to the Respondent's oral evidence, he was cross-examined in detail by Mr Wilson on the contents of his written statements, the most important of which are at p102-129, p130-133, and by way of response to the FR1 application, p229-232. As Mr Wilson submits in his closing submissions (dated 5th July) the Respondent's starting position was to emphasise when he first moved in at (p230) "that Graham Clarke made a point of seeing me and quite forcefully told and insisted that all of this land was his ... Mr Clarke would continue these bullying tactics of authority ... To be honest he would make your life hell if you even challenged him on land ownership or boundaries, to a point he was obsessed with it." That is clear evidence of possessory behaviour both in terms of possession and evincing an intention to possess. The Respondent has sought to backtrack on this but there is no realistic alternative explanation for such a forceful description of behaviour

other than to accept it as accurate, especially having heard Graham Clarke's evidence. If the Respondent denies the version he gave at the outset then that undermines his credibility and adds to the weight I give to Graham Clarke's evidence.

20. The Respondent, furthermore, referred to (and therefore emphasised) other examples of Graham Clarke's control at p231, p232, and p122. He referred to control of parking, storage of wood by Graham Clarke, his own request for permission to keep chickens on the disputed land (p230), and permission granted to re-plant his rowan tree (p229). Whether or not the Respondent (as he alleged) planted blackthorn cuttings along the disputed land or whether those were already there in 1987 as Graham Clarke alleged, or kept wood on the disputed land, does not affect my overall analysis of activities carried out, as even if the Respondent's recollection is correct, that would not undermine the totality of Graham Clarke's evidence. It was rightly accepted by Graham Clarke that the Respondent carried out acts of maintenance on the driveway but I agree that this would be consistent with his express right of way in any event and not by reference to ownership. As Mr Wilson analyses the evidence, the Respondent only refers to two dates on which he recalled carrying out works to the driveway, 2004/5 and 2013-2014 (after Graham Clarke had a heart attack in 2013 and was by then in his 80s). So even on the Respondent's own admissible evidence, there is sufficient evidence to corroborate the Applicant's case.

21. That apart, there were also aspects of the Respondent's evidence which were unsatisfactory. I accept Mr Wilson's main submission in support of this which is that after the Respondent was notified of the application and took advice he then alleged that Graham Clarke "never ordered me off or obstructed me in any way ..." (p109). That this contradicted his opening salvoes to HMLR was not a matter he could explain satisfactorily, and similar contradictions which appeared in his later statements which challenged the extent of Graham Clarke's activities and evidence in relation to maintenance have to be evaluated as against my preference for the force of the latter's evidence, which was consistent. The Respondent, having started his opposition by lambasting the control of Graham Clarke, undermined his evidence by then backtracking once the application was made, as I indicate above. This was probably because he now thought the fact that there was no paper title to the driveway meant that he was free to reinterpret Graham Clarke's evidence as unreliable because based

on a misapprehension. Further, his first challenge to the Applicant was made as late as February 2017 when he suggested that the land was common land and Adrian Clarke denied this (p213).

22. I should add that although it is not particularly easy to follow the Respondent's written statements, because the driveway was at all times open for the passage of vehicles to the rear of the cottages, the range of facts which the parties are describing are understandably narrow in their range: the driveway is marked on its north face by a hedge which needs maintenance, and an untreated surface which needs maintenance, in order to provide easy access for vehicles. The main acts of control are those directed not so much as to building or enclosing, but to keeping it clear, ie apparently negative acts. The most tendentious acts recently (ie after the Applicant's acquisition of Brook House) have been as to the Respondent's other activities such as parking, and storage of logs on the areas of the disputed land which are not totally required as part of the driveway, and therefore of less significance when I am considering the overall pattern of use and evidence. There are no single defining incidents which stand out since 1987, and I hazard a guess that user of the driveway was in the hands of the owners of Brook House without any problems prior to 1987: as Graham Clarke said at p183 "it was always our understanding that we had acquired three parcels of land" in 1987 anyway, and there is no credible evidence that this view was ever challenged. The Respondent was thoroughly cross examined by Mr Wilson and the overall effect is to underline the finding that where there is a conflict I must prefer Graham Clarke's evidence, as Mr Wilson stresses in both his closing written submissions dated 5th July and 1st August.

23. In his written closing submissions the Respondent went outside the remit of proper closing submissions in that he introduced further suggestions on the facts which were not included in his original evidence, such as claiming that Mr Lintott obtained title indemnity insurance without reference to Messrs Brown and McNamara (they provided a statutory declaration, see p43), seeking to add further evidence to support the common land argument, and indicating that he paid a hedge contractor twice to "reduce the height [of the hedge] to a more manageable level". Similarly, for example, he suggests that in 1998 a couple of brothers up the road were using the driveway to jump start their car, but that evidence was not given at the hearing. Neither did he put

to Graham Clarke that his eyesight was reduced because he lacked vision in one eye, or that he never gated off the Pightle because he knew he had no right to do so (a somewhat wild allegation for which I can find no reason). So far as the Respondent added new evidence about activities on the Pightle, the first point is that the Pightle is not part of the disputed land, the second point being that his evidence that he was given permission to burn rubbish and garden waste on it, supports rather than diminishes Graham Clarke's assertions of control in the area and in relation to land he owned or thought he owned.

24. The Respondent has taken this dispute to heart and his opposition to it can produce an emotional response which is exaggerated and distorts his defence. For example, his characterisation of the Applicant as a "commercial property developer" is flatly contradicted by Adrian Clarke's evidence about why the property is registered in the Applicant's name, and what his and his wife's intentions are for their future retirement. That type of approach is underlined by his references to the 1981 arrangement which suggest that everyone in the cottages was almost misled about the arrangement, as to which there is no evidence whatsoever (but a strong suggestion to the contrary). Further, he repeats his underlying theme that because Graham Clarke did not have paper title to the disputed land, as he obviously believed, then he must have lied about everything. In other words, the Respondent sees himself as the victim of a deception and wrongly presents his case on that basis.

25. Mr Wilson's closing response to the Respondent's final submissions (dated 1st August) is very careful. It adheres to a careful analysis of his record of the evidence given by the witnesses and on the documents and accords with my notes. It rightly challenges the Respondent's tendency to add and embellish the evidence already given and recorded, as I have found it to be. The Respondent starts his submissions by suggesting that though he acknowledges that he had assistance during the court process, the Applicant's superior resources and funding would "skew the odds in his favour in this dispute". He seeks to draw a distinction between his own honest approach and the tailored and "vetted" evidence of the Applicant's witnesses. At the same time, the Respondent seeks to re-write some of his evidence, notably by insisting that Graham Clarke was told and/or knew from the outset, that his ownership of the disputed land was challenged, which I reject. But I reiterate that the Respondent

bought Rowan Cottage in 1998, years after the 1981 arrangements were implemented, and years after Graham Clarke bought Brook House. In my judgment, to repeat, the Respondent accepted that the disputed land was part of Brook House until the LRA application was made, at which point he basically turned his long standing view on the matter on its head and challenged it, because he could and because of the growing animosity between himself and Adrian Clarke. He then suggests that the facts are quite narrow and that the relevance of *Pye v Graham* to those facts is in doubt.

26. The Respondent has a tendency to take an account of facts of which he has no personal knowledge, and seek to rely on it as though it is evidence on which I can properly rely. In this category, for example, I put his account of the 1981 transactions, and the repeated claim that the disputed land was common land, speculation about Graham Clarke's eyesight and what he could see from Brook House and how often (not matters he put to Graham Clarke), what Mrs Norma High's husband told him. The Respondent has always been at a disadvantage, but that is the disadvantage of coming onto the scene late, in 1998, by which time the evidence which I have accepted of Graham Clarke points firmly to an adverse possession case being all but made out in terms of the requisite 12 year period. So far as the Respondent seeks to challenge the Applicant's case by reference to pre-1998 activities and evidence in his closing submissions, I reject it where it conflicts with Graham Clarke's evidence for the reasons I have already set out.

27. Turning to the law, it is already clear from the above that this is not a case of adverse possession in which the Applicant can rely on enclosure of the disputed land. But there is authority to support the proposition that title by adverse possession can be acquired without that, and also the fact that the disputed land is subject to rights of way is no bar to the acquisition of title. As Jourdan QC states at 13-29 "Even if there is no locked gate or door, the control of access to the disputed land is generally an unambiguous assertion of control". In *Pye v Graham* at p435 Lord Browne-Wilkinson summarised the requirement of legal possession in the context of adverse possession as "(1) a sufficient degree of physical custody and control ("factual possession"); and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")". Graham Clarke's evidence (supported originally by the Respondent) has easily demonstrated the required "intention to

possess", as has Adrian Clarke's evidence. The fact that this intention might have been based on a mistaken belief that they had paper title is irrelevant.

28. As to factual possession, the test in *Pye* at p436 is whether there is "an appropriate degree of physical control." It must be a single and [exclusive] possession ... 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 ... the alleged possessor [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."

29. Again, the requirement of factual possession is met by the evidence of Adrian Clarke and Graham Clarke. It is plain that so far as possible the latter controlled the driveway as any owner would. Graham Clarke kept the area clear and maintained it, even if from time to time the Respondent also cut back foliage. So far as adverse possession of similar areas is concerned, so long as there is sufficient evidence that justifies sufficient acts of the appropriate nature, the fact that the land in question might be unfenced is no bar to the acquisition of title. See for example *Terry v Dyer* at paragraph 16 citing *Chapman v Godinn Properties* and Jourdan QC/Radley-Gardner *Adverse Possession* (2nd ed) at 13-59, where I decided that title to "Area 2", a concrete verge including access to part of a horse riding establishment, had been acquired by adverse possession: see paragraphs 17-25. That part of the decision was subsequently upheld on appeal.[8] It provides a working example of a proper approach to areas of land such as the disputed land in this case, which has always been open, due largely to the fact that it is an access area. As emphasised in Jourdan at 13-01, he totality of evidence is important. The historic pattern of user in this case is sufficiently consistent to justify a finding of factual possession.

30. It follows that the Applicant has made out its case. The normal order is that costs follow the event, so that the Applicant would be entitled to apply for costs to be paid by the Respondent. If the Applicant wishes to apply for an order that the Respondent pays the costs of the reference, then an application must be made by 5pm 2nd September 2019 and served on the Tribunal and Respondent. It should include a brief

[8] Sir J Slade J in *Powell v Macfarlane* (1977) 38 P&CR 452 at p470-471

statement (a skeleton argument is not necessary) and a schedule of the costs claimed in Form N260 or similar for the reference only. The Respondent has until 5pm 16th September to file and serve a response. Costs will be dealt with after that.

BY ORDER OF THE TRIBUNAL

Sara Sturgeon

DATED 9th AUGUST 2019

[4] *Terry v Dyer; Dyer v Terry, Chapman* at paragraph 22: see citations