

REF/2018/0792

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

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

MICHAEL ROBIN SMITH

Applicant

-and-

**(1) EUAN STEWART KENNEDY
(2) SHUNA MACKINNON DICKSON**

Respondents

**Property Address: Land adjoining Cherups, Jack's Lane, Takeley, Bishop's Stortford,
CM22 6NR**

Title Number: EX962350/EX703369

ORDER

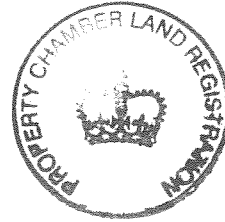
The Tribunal orders as follows:

- (1) that the Chief Land Registrar do give effect to the Applicant's application dated 7 November 2017 as to the part of the land tinted blue on the plan prepared by Mr Barker pursuant to the requisition of HM Land Registry dated 7 March 2018 and do register the Applicant's title under title no.EX962350 accordingly as if the objection to that application had not been made.
- (2) that there be no order as to costs unless an application in writing is made by any party accompanied by a schedule of costs no later than 4pm on 30 October 2019. If such an application is made:
 - (a) A copy of the application must be sent, at the same time that it is made, to the other parties;

- (b) The other parties will then have until 4pm on 27 November 2019 to respond to the application by way of written submissions sent to the First-Tier Tribunal and copied to the applying party; and
- (c) Any response to such submissions should be sent to the First-Tier Tribunal and the other parties by 4pm on 11 December 2019.

Dated this 10th day of October 2019

Andrew Bruce



BY ORDER OF THE TRIBUNAL

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Title Number: EX962350/EX703369

Before: Judge Bruce
Sitting: Alfred Place, London
On: 7 October 2019

Applicant Representation: In person
Respondent Representation: 2nd Respondent in person

DECISION

Unregistered land – Adverse possession – Village greens – Factual possession

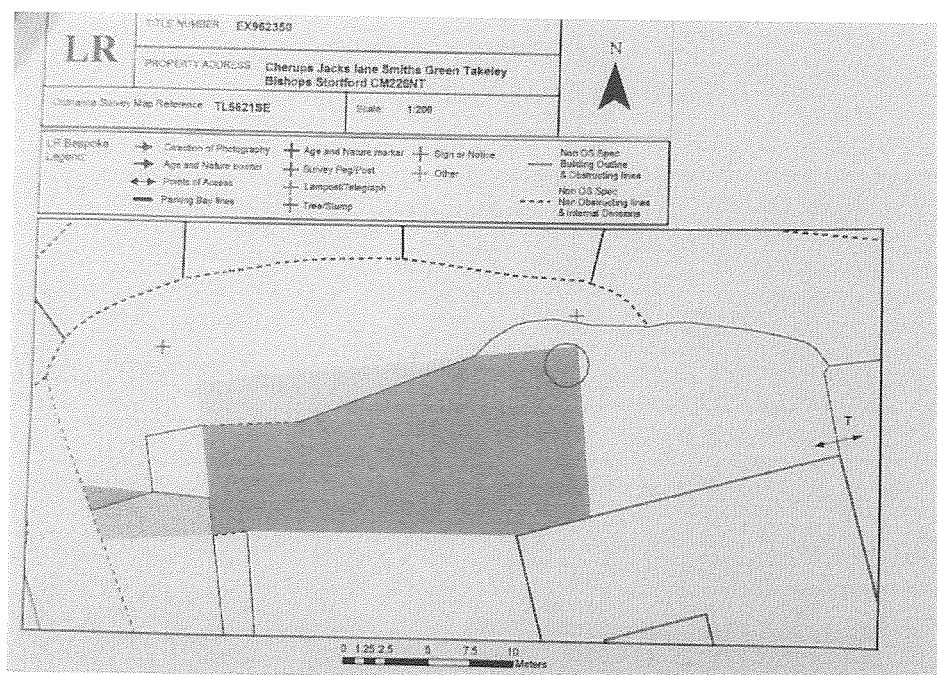
Introduction

1. The Applicant, Michael Robin Smith ["Mr Smith"], is the registered freehold proprietor of land in Takeley, Bishop's Stortford on which two adjoining cottages stand: "Cherups" and "The Cottage". The land on which "Cherups" stands is registered at HM Land Registry under title no.EX703369. Mr Smith's father, Percy Edward Smith, had acquired the land pursuant to a conveyance dated 12 October 1962 from Louisa Rose Moss ["the 1962 Conveyance"]. The 1962 Conveyance described the land conveyed as including two tenements formerly known as 'Lamberts'. The plan attached to the 1962 Conveyance shows the land as having a frontage onto Jack's Lane

up to a point in line with the west wall of the cottages, but then being set back from Jack's Lane. Mr Smith's father re-named the two cottages as "Cherups" and "The Cottage" (with "Cherups" being the property to the west). When Mr Smith's father died in 1991 the title to "Cherups" passed to Mr Smith's mother (Mr Smith's father having already conveyed "The Cottage" to Mr Smith in 1972). Following Mr Smith's mother death in 1995, "Cherups" was vested in Mr Smith with the title being registered (as "Cheerups") in his sole name in 2003.

2. The Respondents are the successors-in-title to Mr A.S. Kennedy. Mr A.S. Kennedy purchased Warish Hall Farm and with it the manorial title "Lord of the Manor of Warish Hall and Takeley Grange" in or about 1967. In or about 1973 Mr A.S. Kennedy registered land adjacent to the roadways at Smith's Green and Jack's Lane as a village green pursuant to the provisions of the Commons Registration Act 1965. The said land was registered with Essex County Council under unit number VG117. The manorial title passed to Mrs E.L. Kennedy in 1990 and was then gifted to Mr E.S. Kennedy on 30 March 1995. On 30 March 1995 Mr E.S. Kennedy established the Kennedy Family Trust to hold the manorial title and the Respondents are the trustees of the Kennedy Family Trust. In or about 2009 Mr E.S. Kennedy and Ms S.M. Dickson were registered as freehold proprietors of various manorial lands under title no.EX645448 (though the Tribunal was not provided with a copy of this title). It appears that the extent of the land registered under unit number VG117 differs from that registered under title no.EX645448 in that the former includes an approximately kidney-shaped parcel of land to the south of Jack's Lane and lying to the north-west of Cherups, whereas the latter does not. In other words, the village green registration is more extensive than the land registration. This kidney-shaped parcel overlaps to some limited extent the land claimed by the Applicant.
3. By an application in Form FR1 dated 7 November 2017 Mr Smith applied to register title to certain land to the north-west of Cherups. This land is unregistered and for the purposes of the application it was given title no.EX962350 by HM Land Registry. This application was supported by a statutory declaration made by Mr Smith on 14 September 2017. On 7 March 2018 HM Land Registry made a Survey Requisition and, on 13 March 2018, a survey of the subject land was undertaken by Mr W. Barker. Mr Barker's Survey and Report are dated 14 March 2018 and shows the land claimed as

being variously coloured in the plan below. However, in correspondence and at the hearing, it was confirmed that Mr Smith only claimed title to the land shaded blue on the plan below [“the Blue Land”]. It seems that the Blue Land overlaps to a limited extent (along its northern boundary) the kidney-shaped parcel which is shown to be within VG117 on the plan maintained by Essex County Council.



4. On 8 June 2018 the 1st Respondent objected to Mr Smith’s application and on 13 June 2018 the 2nd Respondent objected to Mr Smith’s application. Thereafter the dispute was referred to the Land Registration division of the Property Chamber, First Tier Tribunal under rule 5 of the Land Registration (Referral to the Adjudicator to HM Land Registry) Rules 2003 and s.73(7) of the Land Registration Act 2002 on 18 September 2018.

The Hearing and the Witnesses

5. At the hearing, the Tribunal heard evidence from two witnesses: Mr Smith and Ms Dickson. Both witnesses were honest and straight-forward. In addition, the Tribunal carried out a site visit on 8 October 2019. The site visit confirmed the continuing accuracy of the observations made by Mr Barker in his Survey in respect of the Blue Land, viz “Land tinted blue is...being used as a construction area and parking area. Occupation appears to be by Cherups...” and that the Blue Land was bounded to the north

(up to the dotted line on the plan at para.3 above) by *"a 2m high hedge and bank. Established trees can be found within. Over 50 year."*

6. Mr Smith confirmed the truth of his witness statement dated 21 August 2019 and gave evidence that:
- (a) "Cherups" and "The Cottage" had been purchased in 1962, the year he got married, and he had contributed to the purchase price paid by his father.
 - (b) Mr Smith and his wife moved in to "Cherups" in 1962 and the family then renovated "The Cottage" which had become dilapidated and had been the subject of a 'Closing Order'.
 - (c) In 1968 Mr Smith moved in to "The Cottage" whilst his parents moved in to "Cherups".
 - (d) At all times prior to 1996 there was a pond on the Blue Land, covering virtually its full extent. Mr Smith believed this pond had been dug out in order to provide daub for the original cottages. As at 1962, there was a hedge to the north and west of this pond (part of which hedge remains today and is shown by the solid line between the land tinted blue and the land tinted yellow on the plan at para.3 above). Mr Smith and his father treated the pond as part of the garden to "Cherups" and Mr Smith's father kept fish in the pond, which was some 5' deep at its middle, and (with his son) kept it clean. The hedge was originally 5'-6' high but Mr Smith's father reduced its height to 2' in order that he might have a view to Priors Wood. Mr Smith and his father trimmed the hedge annually in the autumn. On the occasions of the birth of his two children, in 1964 and 1968, Mr Smith planted two Scots Pine trees adjacent to the pond and within (what the Smiths believed was) the garden of "Cherups".
 - (e) In 1996 Mr Smith filled in the pond because sewage seemed to be leaking into the pond and the fish had died. Uttlesford District Council was notified that the pond had been filled in and was concerned that a watercourse might have been altered. However a Mr Hunt (from Uttlesford District Council) inspected the site and was satisfied that Mr Smith had not acted improperly.
 - (f) In or about 2002 Mr Smith removed part of the hedge which had bounded the pond in order that he could gain vehicular access from Jack's Lane to the Blue Land.

7. Ms Dickson confirmed the truth of her witness statement dated 6 September 2019 and gave evidence that:
- (a) No issue was taken as to the fact of Mr Smith (and his family)'s historic use and occupation of the Blue Land. However, the Respondents were keen to ensure that there was no encroachment upon the registered village green and relied upon the registration of the village green in order to resist the application.
 - (b) By a Deed of Grant dated 20 February 2002 Mr E.S. Kennedy granted to Mr Smith a right to construct a driveway (not exceeding 3m) in the approximate position shown coloured green on the plan to the Deed and a right of way over such driveway. The plan shows the intended driveway running from Jack's Lane and ending at, approximately, the northern edge of the Blue Land. The driveway crossed the land in title no.EX645448. Subsequent to the execution of the Deed of Grant, Mr Smith sent a letter to Peterborough District Land Registry dated 20 February 2002 in which he stated: *"Having been given assurances by Mr E.S. Kennedy regarding access to my property across the land in the above registration application [i.e. EX645448], I have pleasure in confirming that I wish to withdraw my objection to this registration which I made in my letter to you dated 28 June 2001."*

Law and Discussion

8. Mr Smith claims title to the Blue Land on the basis of adverse possession. The Respondents object on the basis that (at least part of) the Blue Land comprises a village green. There is, though, no intrinsic impediment to a claim of adverse possession in relation to registered common land or a town or village green. Nonetheless a claim to adverse possession will need to be supported by convincing evidence and may be particularly difficult or in some cases impossible to sustain because of the statutory provisions which apply to such land (see Gadsden on Commons & Greens (2nd ed) at 5-31). Further the current guidance published by the Department for Environment, Food & Rural Affairs and Natural England indicates that it is considered (by DEFRA) that a squatter can become registered as the owner of common land or a town or village green by adverse possession of the land (see fn.38 to Ruoff & Roper's "Registered Conveyancing" at 33.009).
9. As a matter of law adverse possession requires that: (1) the squatter has factual possession of the land (e.g. fencing the land so as to exclude others); (2) the squatter

has the necessary intention to possess the land; and (3) the squatter's possession is without the owner's consent. In respect of unregistered land or where the title is said to have been acquired prior to 13 October 2003, the period of time for which the adverse possession must have continued is 12 years.

10. Section 194(1) of the Law of Property Act 1925 provides that: "*The erection of any building or fence, or the construction of any other work, whereby access to land to which this section applies is prevented or impeded, shall not be lawful unless the consent of the Minister thereto is obtained...*". This section was repealed on 1 October 2007 by the Commons Act 2006, section 53 and Schedule 6 part 2. However, that did not affect the operation of section 194 up to that date: see section 16(1)(b) of the Interpretation Act 1978. Section 194(3) of the Law of Property Act 1925 provides that s.194 applies to any land which at the commencement of the 1925 Act (on 1 January 1926) is subject to rights of common. In this case, though, the Tribunal was provided with no evidence that the Blue Land was subject to any rights of common as at 1 January 1926, merely that some part of it was registered as a village green in or about 1973.

11. All registered common land is, though, subject to Part 3 of the Commons Act 2006 which makes it unlawful to construct any works which would restrict or prevent access to the land, or to resurface the land, without the consent of the Secretary of State. This means that it is unlawful to put up a fence or wall, or for example a building, on registered common land. No offence has been committed by the erection of an unlawful work, but any person may seek relief in the courts to require removal of the works. In Gadsden (*ibid*) at 5-33 it is stated:

"Notwithstanding Part 3 of the 2006 Act, fencing or other works are occasionally erected unlawfully on registered common land without consent and no action is taken against the person responsible (or alternatively, the works may be lawful because they do have consent). In these cases, it may be easier to demonstrate the necessary factual possession. The fact that such works may be unlawful does not, in itself, undermine a claim to adverse possession."

12. But, Part 3 of the Commons Act 2006 and s.38 in particular are not retrospective in effect. Thus, like in *Whitehurst v. Dickinson* (REF/2008/0315), the Commons Act 2006 has no bearing on the issues in this case. This is because there is no evidence that any works have been done so as to enclose the Blue Land subsequent to 1 October 2007 and no action has been taken to remove any unlawful works (save that it appears that some

fencing was removed by Mr Smith in 2016 at the request of the 1st Respondent, albeit that this was not on the Blue Land). Rather, the evidence is that at all times subsequent to 1962 the Blue Land was enclosed by the hedge to its north (which hedge remains, at least in part, to this day).

13. Furthermore, the Tribunal is not, in any event, satisfied that any part of the Blue Land does form part of the village green. As is said in Ruoff & Roper's "Registered Conveyancing" at 9.013:

"It should be noted that registration as owner under the Commons Registration Act 1965 is not conclusive proof of ownership of the land; a good documentary title must be produced to the Land Registry in the usual way. However, where on an application for first registration there is a discrepancy between the commons registration ownership and the title deeds, such discrepancy should be accounted for."

Here, there is a discrepancy between the extent of the land registered at HM Land Registry under title no.EX645448 and that registered as VG117 (see para.2 above). No explanation has been provided for the discrepancy and the Tribunal has not been provided with full copies of all the documentary evidence which supported the two registrations in order that the matter might be resolved. Given that registration under the Commons Registration Act 1965 is established not to be conclusive proof of ownership and that this is the sole basis of the Respondents' claim to ownership of any part of the Blue Land, the Tribunal is not persuaded that any part of the Blue Land is owned by the Respondents whether as village green or otherwise.

14. The Tribunal is satisfied that Mr Smith has established the necessary ingredients of adverse possession in respect of the Blue Land in that:
- (a) He has been in factual possession of the Blue Land (together with his predecessor-in-title, his father) since 1962 and, in maintaining the pond and the hedge, he has dealt with the land as an occupying owner might have been expected to deal with it (see *Powell v. McFarlane* (1977) P&CR 452 at 477 and *JA Pye (Oxford) Ltd v. Graham* [2003] 1 AC 419 at para.41). Since 1962 no one else has occupied the Blue Land other than Mr Smith, his father and their families. Mr Smith's acts of cleaning and stocking the pond (together with his father), ultimately filling the pond in, maintaining and cutting the hedge (with his father) and planting symbolic trees adjacent to and within the hedge clearly evidence his exclusive possession.

- (b) Mr Smith has been in uninterrupted possession of the Blue Land from 1962 to the present day and he has at all times had the intention to possess the Blue Land by excluding the world at large from such land and treating it as part of the garden of "Cherups".
- (c) Insofar as part of the hedge was taken down in 2002 pursuant to the Deed of Grant dated 20 February 2002 the Tribunal is not satisfied that this adversely affects the claim. Thereafter Mr Smith dealt with the Blue Land as owner by laying the gravel surface which now covers it and had anyone sought to park on (or otherwise use) the Blue Land exception would have been taken to it. Moreover the plan attached to the Deed of Grant does not establish that Mr Smith acknowledged that the Respondents owned the kidney-shaped part as the parties gave no thought to this issue, being solely concerned to regularise access over that part of the village green immediately abutting the roadway of Jack's Lane.

Disposition

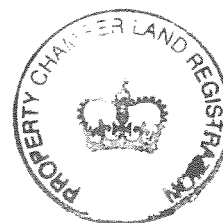
- 15. For the reasons stated above, the Tribunal is satisfied that Mr Smith has established his title to the land shaded blue within the plan prepared by Mr Barker pursuant to the requisition of HM Land Registry dated 7 March 2018. Mr Smith has not established title to any other part of the land which was given title no.EX962350. I will accordingly direct the Chief Land Registrar to give effect to Mr Smith's original application in part (i.e. as to the Blue Land only) as if the objection to that original application had not been made.
- 16. I am provisionally of the view that the appropriate order as to costs is that there be "No order as to costs", i.e. neither party should be ordered to pay any part of the other party's costs and the costs should lie where they fall. This seems to me to be the right order where: (i) all parties have acted as litigants-in-person such that any costs are unlikely to be significant; (ii) the application has been partially (but not wholly) successful; (iii) the Respondents simply put the Applicant to proof as to his adverse possession and raised a point as to the extent of the village green; and (iv) neither side has behaved in any way unreasonably. Nonetheless if any party does wish to apply for an order for costs, they must make an application in writing, accompanied by a

schedule of costs no later than 4pm on 30 October 2019. If such an application is made then:

- (a) A copy of the application must be sent, at the same time that it is made, to the other parties;
- (b) The other parties will then have until 4pm on 27 November 2019 to respond to the application by way of written submissions sent to the First-Tier Tribunal and copied to the applying party; and
- (c) Any response to such submissions should be sent to the First-Tier Tribunal and the other parties by 4pm on 11 December 2019.

Dated this 10th day of October 2019

Andrew Bruce



BY ORDER OF THE TRIBUNAL