Neutral Citation Number: [2024] UKUT 57 (LC)

Case No: LC-2023-716

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT REF: 2021/0281

4 March 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – ADVERSE POSSESSION – schedule 6 to the Land Registration Act2002 – the third condition in paragraph 4 – evidence – reasonable belief

BETWEEN:

BRIAN LARMAN

Appellant

-and-

The estate of GERALD ERNEST LINZELL (1)
STEPHEN LINZELL (2)
MICHAEL LINZELL (3)
JACQUELINE LINZELL (4)

Respondents

High Elms,
South Hill,
Langdon Hills,
Basildon,
Essex, SS16 6JD

Upper Tribunal Judge Elizabeth Cooke
Determination on written representations

The following cases are referred to in this decision:

Brown v Ridley [2024] UKUT 14 (LC)

IAM Group PLC v Chowdrey [2012] EWCA Civ 505

Ladd v Marshall [1954] 1 WLR 1489

Zarb v Parry [2011] EWCA Civ 1306

1.

Introduction

1. In June 2019 Mr Brian Larman, the appellant, applied to HM Land Registry for registration of title to a small triangle of land, entirely enclosed within the walls of his garden, of which he claimed to have been in adverse possession since he bought his property, High Elms, in 1998. The respondents are the registered proprietors of the disputed triangle, and it is registered as part of their property, Sutton Hall Farm. They objected to the appellants' application, and the dispute was referred to the First-tier Tribunal pursuant to section 77(3) of the Land Registration Act 2002.

2. The FTT found that the appellant has been in adverse possession of the triangle since at least 2003. But title to the triangle is registered, and the respondents required it to be dealt with under paragraph 5 of Schedule 6 to the 2002 Act. Therefore in order to be registered the appellant has to show that one of the three conditions in that paragraph apply. He argued that the third condition applies; the triangle lies on the boundary of his property and he has believed for at least ten years of the period of adverse possession ending on the date of the application that the triangle is his.

3. The judge found that although the appellant had that reasonable belief until 2007 he has not had it since then, and for that reason directed the registrar to cancel the appellant's application. The appellant appeals, with permission from this Tribunal.

4. The appellant has not been legally represented. The respondents provided written representations in response to the application for permission; they have chosen not to participate in the appeal but I refer to them as the respondents for brevity. Sadly Mr Gerald Linzell passed away on 10 February 2024.

The legal background

5. There has been no dispute about the relevant law and I can summarise it briefly.

6. The Limitation Act 1980 has the dramatic effect that once a person has been in adverse possession of land for 12 years, the title of the person he or she has dispossessed is extinguished. Hence the strength of a "squatter's title". Section 96 of the Land Registration Act 2002 provides that title to registered land is not extinguished by adverse possession. Schedule 6 to the 2002 Act creates a procedure whereby a person in adverse possession may apply for registration as proprietor by adverse possession and may in certain circumstances succeed. Anyone may object to that application; but in addition the registrar will send notice of the application to the registered proprietor (and a short list of other persons, in paragraph 2 of the Schedule), and the registered proprietor may respond by requiring the application to be dealt with under paragraph 5.

7. If the registered proprietor does so, as the respondents did in this case, then the applicant is entitled to be registered as proprietor of the land if he can show that one of the three conditions in paragraph 5 of the Schedule is met. Relevant to this case is the third condition in sub-paragraph (4):

> "(4) The third condition is that—
> (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.

8. In the present case there was no difficulty about points (a), (b) and (d), but the judge found that the appellant could not meet point (c).

The factual background and the FTT's decision.

9. High Elms was originally known as "Valletta" and used to be part of Sutton Hall Farm. High Elms was sold in 1988 by Mr Gerald Linzell and his wife to the second respondent, Mr Stephen Linzell. In March 1998 the appellant and his wife bought High Elms from Stephen Linzell, comprising (1) most of the land that comprises High Elms, which was registered on his purchase under title number EX398546 and (2) a thin sliver of land which was registered under title number EX215942 shortly before the sale. In 2018 the appellant was registered with possessory title to a further area of land to the south-east, known as The Orchard. The judge in the FTT referred to these three areas together as "High Elms" and I shall do so too, although there will be a need to make separate reference to The Orchard later.

10. The disputed triangle is entirely within the walls of the garden of High Elms, next to its garage. The judge in the FTT said in his decision:

> "5. On the ground, and as was swiftly apparent on the site visit, the disputed land is for all practical purposes enclosed onto, and appears tob e an undifferentiated part of the garden at High Elms. On the north-east side it abuts the solid wall, some 5m/15 feet high, of the adjacent farm buildings. On the north-west side it abuts another, lower (c. 2m) but equally solid wall of the Far. The long or "hypotenuse" south-west side of the triangle is entirely open to, and indistinguishable from, the garden of the main High Elms title."

11. The judge remarked later that the only way the respondents could have accessed the triangle after the appellant's purchase would have been by climbing over the garden wall, and they had not done so.

12. Until 2000 there were some trees along the hypotenuse of the triangle, but the appellant removed them. The judge found that the applicant and his wife were in adverse possession of the disputed land at least from that point even if not at the date of their purchase, so that had title to the triangle been unregistered that would have been the end of the matter; the respondents' title would have been extinguished and the applicant's application for registration would have been successful.

13. However, title to Sutton Hall Farm, including the disputed triangle, was registered in 2008. The registered proprietors at the time of the appellant's application to HM Land Registry were Mr Gerald Linzell, Mr Stephen Linzell, Mr Michael Linzell and Ms Jacqueline Stokes. Accordingly the appellant's application had to made under the 2002 Act and, since the respondents required it to be dealt with under paragraph 5, he had to

satisfy one of the three conditions in that paragraph. As I have already indicated he claimed to have met the third condition, set out at my paragraph 7 above. And the issue was whether the appellant could show that for ten years of the period of adverse possession he and his wife, and later he alone, actually believed that the disputed land belonged to them and that that belief was reasonable.

14. The judge accepted the appellant's evidence that he and his late wife genuinely believed that the land they bought in 1998 included the disputed land, that that belief was reasonable at the time, and that that reasonable belief continued until October 2007. None of that is in dispute in this appeal so I do not need to go into the evidence on which it was based save to say that the judge took it as completely obvious that anyone buying High Elms would have seen the triangle as part of the garden and rejected Mr Stephen Linzell's evidence that he had said, before the sale, that the triangle was not included.

15. So what happened in 2007 to change that situation, as the judge found?

16. It was the appellant's evidence that it was only in 2018, in the course of making his application for registration of title to The Orchard (which was then unregistered land), that he discovered that he did not have title to the disputed triangle. Had that evidence been accepted then the appellant's application for registration of title would have been successful. Counsel for both parties agreed that the period of ten years to which paragraph 5(4)(c) refers is any ten years during the period of adverse possession and the judge accepted that agreement, following a number of FTT decisions. That is not consistent with the Court of Appeal's view in *Zarb v Parry* [2011] EWCA Civ 1306, and the better view is that what Lady Arden said on this point was not obiter (see *Brown v Ridley* [2024] UKUT 14 (LC)); but since in any event the appellant's application to HM Land Registry was made just a few months later in 2019 it was certainly made in good time and had counsel for the respondents taken the point it would have made no difference.

17. However, it was argued for the respondents, and the judge accepted, that the appellant's state of mind changed in 2007.

18. The appellant disclosed, before the FTT hearing, the statutory declaration sworn in support of his application in 2018 for registration of title to The Orchard. In that declaration he exhibited a copy of the Land Registry index plan, derived from a search which was carried out not in 2018 but in 2007. The search certificate itself was also in the FTT bundle; it stated that the property to which it referred was High Elms, and it said that "Part of the Property is unregistered." The plan that came with the certificate was not itself in evidence, only the version exhibited to the 2018 statutory declaration on which colouring and edging had been changed for the purposes of that declaration. It was not possible to see from the 2018 version of the plan exactly what areas were depicted, in the search result of 2007, as unregistered.

19. So far as the 2018 application was concerned that was entirely unproblematic and would have demonstrated that the Orchard was unregistered.

20. It was put to the appellant in cross-examination, if I have understood correctly what happened, that that search included, as part of High Elms, the disputed triangle and that therefore the search result must have shown not only that the Orchard was unregistered but also that the triangle was unregistered. The appellant must have commissioned the

search. Therefore since 2007 he must have known that title to the triangle was unregistered.

21. The appellant was unable to explain why an index map search had been carried out in 2007 by his solicitor.

22. The judge found that the search, whatever the reason for its being done, must have included the disputed triangle within the land described as "High Elms". On the appellant's case, the triangle was part of what he owned – and indeed if the search did not include it then of course that would have made it very clear that at that date the appellant did not think he owned the triangle. And therefore the search result that came back must have shown that both the Orchard and the triangle were unregistered.

23. Therefore, the judge reasoned, the appellant and his wife having instructed their solicitor to carry out a search in 2007, must have discovered in 2007 that they did not have title to the disputed triangle. He did not find that the appellant was lying; but he found that that was the case "even if Mr Larman cannot now specifically remember this". Alternatively, the appellant commissioned the search and then did not consider its result when provided to them. That made their continued belief that they owned the land unreasonable.

24. The judge went on:

> "67. I further consider that what has probably happened in this case, and what the Larmans are likely to have been advised, is something along the following lines. This 2007 search revealed that there were two areas of unregistered land within what they believed to be High Elms, and which they had until then reasonably believed already to belong to them. They were then fully in possession of those areas as part and parcel of High Elms. Their solicitor, and indeed probably any competent solicitor, would probably have advised them to 'sit tight', carry on as they were, then later make an application for possessory title to both of those unregistered areas once a sufficient period of time had passed. Indeed, the date of the search may give a clue to this. By 2007, the Larmans could not have demonstrated 12 years or more of adverse possession of these unregistered areas since 1998; but the fact of the search suggests that they may have been considering the possibility of such an application in the near future.
>
> 68. They then did indeed carry on in possession of those areas, but did not make any applications for some time. In the meantime, and almost certainly unbeknown to the Larmans at the time, … the title to the Farm was the subject of first registration in 2008, and included the now disputed land. So the possibility of a Limitation Act 1080 adverse possession application for title to any part of that land as unregistered land was then removed…
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> 69. Such an 'old law' application remained possible in relation to the 'Orchard' land, and so was successfully made in 2018. The Applicant said in evidence … that his solicitor advised him to deal with the title matter in two stages – first the Orchard, then the disputed land (in respect of which the present application was then made in June 2019). He gave that evidence partly to meet the argument that the 2018 application for the Orchard suggested that he had no belief at that stage that the disputed land also belonged tohi,. It was also his evidence that it was

only then – in 2018 – that he had *first* discovered that he did not already have title to either area.

70. For the reasons I have set out above, I do not consider that this was quite correct. I consider that it was probably only then that he found out that the title to the Farm was *registered,* so that a different form of application would be required for the [triangle]."

25. Accordingly the FTT found that the appellant was not entitled to be registered as proprietor to the triangle; the judge was at pains to stress that the only reason that was the case was that from 2007 the appellant no longer reasonably believed that the triangle belonged to him.

The appeal

26. The appellant has permission from this Tribunal to appeal on the ground that:

> "There is a realistic prospect of a successful appeal on the grounds:
>
> a. That the judge's findings at paragraphs 67 to 71 about the likely reason why the 2007 search was obtained were incorrect and
>
> b. that the applicant's belief, which continued after the 2007 search, that the disputed land was his was reasonable."

27. The appellant argues that he was taken by surprise by the cross-examination about the 2007 search which he had not seen before and did not know was in the bundle, and so he was unable to explain the search. However, he has since made enquiries of the solicitor who made the search, Ms Margaret Reynolds. She has made a witness statement, in which she says:

> "The purpose of commissioning an Index Map Search in 2007 was that Mr Larman and his late wife were selling the property in 2007 a Home Information Pack was required. The search was therefore commissioned as part of the pack. The sale however did not proceed but in 2007 it is my belief that Mr Larman was no aware that the land the subject of the application fell outside his title.
>
> Once it became apparent in 2007 that the prospective buyer would not proceed, this firm was no longer instructed with regard to the sale."

28. The appellant's case on appeal is therefore that the judge's finding in his paragraphs 67 and 68 as to what "probably" happened, based as it was on conjecture, was wrong; he knew nothing about the search, he continued to believe the triangle was his, and that belief continued to be reasonable.

29. There is of course a mix of evidence and argument there on the part of appellant, but so far as his own belief is concerned the appellant is reiterating his evidence to the FTT. The new material is from his former solicitor as to the purpose of the search.

30. If that is true then the appeal must succeed. It is clear (as the judge in the FTT said) that a solicitor's knowledge is not imputed to the applicant for title by adverse possession, for

the purposes of paragraph 5(4)(c) of Schedule 6 to the 2002 Act (*IAM Group PLC v Chowdrey* [2012] EWCA Civ 505).

31. Is it open to the appellant to introduce Ms Reynolds' evidence on appeal in order to show that that is true?

32. When the Tribunal gave permission to appeal it directed the respondents to file and serve a respondent's notice if they wished to participate in the appeal and directed them , if they chose to participate, to tell the Tribunal and the appellant by 26 January 2024 whether they contested either the admissibility or the truth of Mrs Reynolds' evidence about the reason why the 2007 index map search was obtained. As they have chose not to participate they have not challenged Ms Reynolds' evidence.

33. Nevertheless I should consider whether it is admissible by reference to the criteria in *Ladd v Marshall* [1954] 1 WLR 1489. Could it have been obtained with reasonable diligence at the original hearing, would it have had an important influence on the result even if not decisive, and is it credible?

34. There is no challenge to the credibility of Ms Reynolds' evidence, and as the truth of her evidence would be easy to verify from her files it is difficult to see that any challenge would succeed. It would certainly have made an important difference had it been available at the original hearing. Could it then have been obtained, with reasonable diligence, for that hearing?

35. Whilst as a matter of practicality that would have been possible, the difficulty is that the appellant could not with reasonable diligence have anticipated the need for the evidence. It will be seen from my paragraphs 22 to 24 above that the conclusion drawn from the 2007 search was obtained by quite a process of reasoning. The plan that accompanied the search was not in evidence, and some deduction was needed to reach the conclusion that it must have included the disputed triangle as part of High Elms. The appellant and his representatives did not think that far because they had, understandably, not anticipated the conclusion that the respondents and the judge drew from it.

36. Still less could they have anticipated that the judge would have constructed, on the basis of that search, a narrative about why it was obtained and what the appellant was advised at the time. If that was not what happened it would not have occurred to them before the hearing that they needed to obtain evidence in order to counter an assertion, not made before the hearing, that that was what happened.

37. So although in theory the evidence could have been obtained, in fact it could not have been because it was not possible for anyone with reasonable diligence to see the need for it.

38. Accordingly I admit the new evidence on appeal, and I find as a fact on the basis of that evidence, that the 2007 search was not obtained by the solicitor in order to advise the appellant about adverse possession. Even without the new evidence that narrative was not particularly plausible – if that was when they sought advice, why wait until 2018 before registering title to The Orchard? On the other hand, why seek advice in 2007 when even on unregistered land rules the appellant had not been on the land for long enough to have acquired title by adverse possession. Ms Reynolds' evidence puts the point beyond doubt: the appellant was not advised about adverse possession in 2007. On the contrary the

search was obtained with a view to selling the property. So ground (a) (see paragraph 30 above) succeeds.

39. As to ground b, the respondents in their representations made in response to the application for permission to appeal accepted that the appellant continued to believe after 2007 that the disputed triangle was his. That belief would not be reasonable if he had seen a search result showing that it was not part of his registered title; but there is no evidence that he saw the search. It was obtained for a seller's pack, not for his use. Whether the conveyancing solicitor spotted the problem is not known, but if she did it is clear from her evidence that she did not tell him about it.

40. Ground b therefore succeeds; there is no evidence that anything happened in 2007 to change the appellant's belief or to make it any less reasonable. If the 2007 search did reveal that the disputed triangle was unregistered, he did not know.

41. Accordingly the appeal succeeds. The FTT's decision is set aside and I substitute the Tribunal's decision that the appellant is entitled to be registered as proprietor of the disputed triangle. I shall direct the registrar to respond to his application for registration as if no objection had been made and on the basis that the appellant has satisfied the condition set out in paragraph 5(4) of Schedule 6 to the Land Registration Act 2002.

Upper Tribunal Judge Elizabeth Cooke

4 March 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.