

[2018] UKFTT 0058 (PC)

REF/2016/1053

PROPERTY CHAMBER, LAND REGISTRATION  
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

James Michael Hepworth

APPLICANT

and

Jane Powell and Alan Roker

RESPONDENTS

Property Address: Land on the north West Side of Hop Cottage, Guildford Road,  
Runfold, Farnham  
Title Number: SY839010

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ORDER

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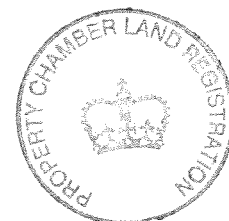
IT IS ORDERED as follows:

The Chief Land Registrar is to give effect to the Applicant's application dated 2 September 2016 to for registration of title to land by adverse possession as if the Respondents' objections had not been made.

Dated this 6 December 2017

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL







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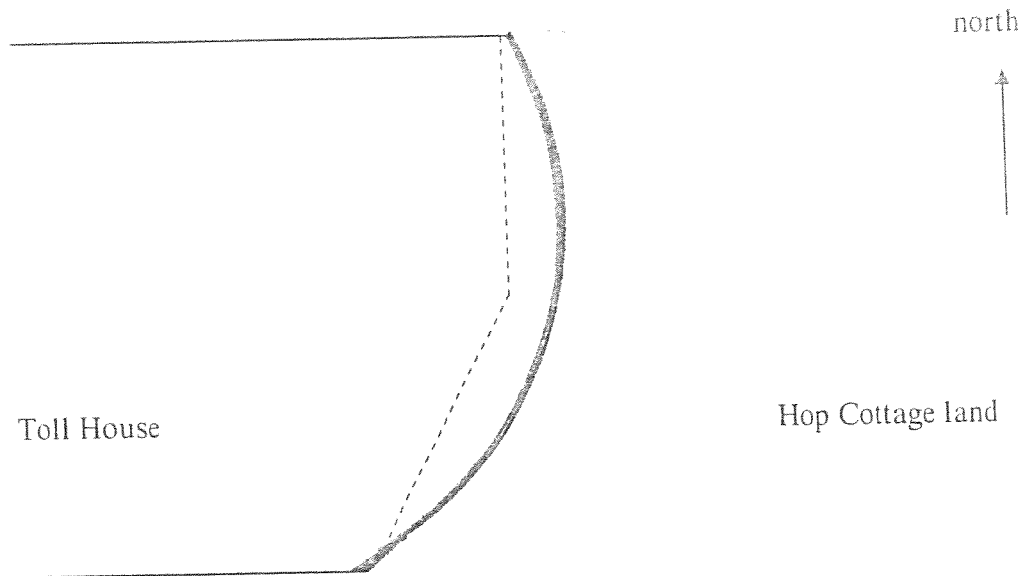
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DECISION

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1. The Applicant, Mr Hepworth, is the registered proprietor of Toll House, Guildford Road, Farnham (title number SY561163). He has applied for registration of title by adverse possession to a small area of land where the garden of Toll House adjoins property belonging to the Respondents, Mrs Powell and Mr Roker. The Respondents' property is registered under title number SY451364 and described on the register as "land on the northwest side of Hop Cottage, Guildford"; I refer to it as the "Hop Cottage land." It is to the east of Toll House, and includes a car park and an animal feed shop known as Snack & Tack.

2. The land of which the Applicant seeks to be registered as proprietor ("the disputed land") is an area on the eastern edge of the garden of Toll House, where it adjoins the car park on the Hop Cottage land; it is easiest to describe it as banana-shaped, looking roughly like this, and being about 2 metres wide at its widest point:



3. The diagram is not to scale. The eastern edge of the disputed land is where a fence now stands, shown as a thick line on my sketch plan. The western edge, shown as a dotted line on my sketch plan, is the boundary of the registered title to Toll House, but the precise position of that boundary is unknown. The Applicant says that since 2001 he has been in possession of all the land between his house and the line on which the fence now stands, and that that possession is adverse insofar as the land is not part of his registered title to Toll House.
4. The Applicant's application on Form ADV1 was dated 27 November 2015. The Respondents objected to his application on the grounds that he had not been in adverse possession as he claimed. They also gave counter-notice to his application, requiring it to be dealt with under paragraph 5 of Schedule 6 to the Land Registration Act 2002 ("the LRA 2002"). This means that even if the Applicant can show that he has been in adverse possession, the Respondents have an absolute right to prevent his registration as proprietor unless he can bring himself within one of the three conditions set out in paragraph 5(2), (3) and (4). Of those conditions, the Applicant says that he meets the condition in paragraph 5(4).

5. The dispute has been referred to the Land Registration Division of the First-tier Tribunal (Property Chamber) pursuant to section 73 of the LRA 2002.
6. It is interesting to note that if the Applicant's application had failed, the line of the boundary between Toll House and the Hop Cottage land – recorded simply as a general boundary on the registered title plan – would have remained unknown; while the Respondents might then have wanted to take down the fence, and to take possession of what is currently part of the Applicant's garden, neither party would have known the precise extent of the Applicant's or the Respondents' property and therefore it would have been impossible to determine the correct position of any new fence.
7. However, that does not arise because I find that the Applicant has shown, on the balance of probabilities, that he has been in adverse possession of the disputed land since 2001, and also that he has met the condition in paragraph 5(4) of Schedule 6 to the LRA 2002. In the paragraphs that follow I explain my decision, first setting out the factual background, then considering whether the Applicant was in adverse possession as required by paragraph 1 of Schedule 6 to the LRA 2002, and finally dealing with the condition in paragraph 5(4) of paragraph 5 of Schedule 6 to the LRA 2002.
8. I conducted a site visit on 25 October 2017, and I am grateful to the parties for allowing me access to their land. I heard the reference in Alfred Place on 25 October 2017; the Applicant was represented by Ms Emma Reid and the Respondents by Mr Andrew Skelly, both of counsel, and to both of whom I am very grateful.

#### **The facts**

9. The following chronology sets out the background to the dispute; it is agreed save where I indicate otherwise.
10. Toll House was acquired in 1936 by Alf Green; he opened a café in the shed next to it. He bought the Hop Cottage land in 1959, and it was later used as a stonemason's yard; as a result, in later years there were a great many boulders (stones too big to be moved by hand) not only on the Hop Cottage land but also in the garden of Toll House.
11. The Applicant bought Toll House in 1996. It was in the past in common ownership with the Hop Cottage land, but no copy of the conveyance that created the boundary is available. A plan from a conveyance of other land, from the Hop Cottage land, in 1976 shows the measurements of the boundaries of Toll House, but it is important to bear in mind that that was not the conveyance that created the boundary between Toll House

and the Hop Cottage land, nor has it enabled two surveyors to agree on the position of the boundary (see below).

12. The registered title plan of Toll House shows the eastern boundary as two straight lines meeting at an angle, as on my sketch plan above. Conifer trees stood more or less on the western edge of what is now the disputed land, in an uneven line or – as the Applicant put it at the hearing – a higgledy-piggledy; the Respondents say that the conifers marked the boundary between Toll House and the Hop Cottage land but the Applicant disagrees. In his Statement of Case he says that they stood “in the region of the boundary between the two properties” and in his witness statement he says that he understood the line of conifers to be “well within the boundary of Toll House.”
13. The Applicant adopts retired racing greyhounds. In 2001 he put up a wire chain link fence to keep his dogs in; he says, but it is not agreed, that it was on the line of the fence that marks the eastern boundary of the disputed land.
14. In 2006 the Hop Cottage land was sold to Andrew Connaway who ran a furniture business there. In 2007 Mr Connaway replaced the Applicant’s wire fence with the timber fence that stands there today; I believe it is not in dispute that he did so by agreement with the Applicant.
15. In December 2010 the Respondents were registered as proprietors of the Hop Cottage land. They are brother and sister. Mrs Powell said in her evidence that she has known the land since she was a child.
16. In 2014 the Applicant asked to buy part of the car park to the Hop Cottage land, adjacent to Toll House, but the Respondents rejected his offer. They say that the land he wanted to buy included the disputed land, but he says it did not.
17. In September 2014 the Applicant had the conifers removed and had the area between the conifers and the fence cleared of vegetation and boulders. The garden was levelled and scalplings (small stones) spread over it. The current dispute seems to have been triggered by this process; I say more about it later in discussing the evidence.
18. In March 2015 the Applicant planted laurel bushes inside the fence, which are still there. There was then a dispute about a right of way; the Applicant’s wife commenced an action in the county court seeking a declaration as to the existence of a right of way for Toll House over the car park of the Hop Cottage land.
19. Both Mrs Hepburn and the Respondents had surveyors’ reports commissioned in connection with that county court action. Both reports were in the hearing bundle for the tribunal reference, but no expert evidence was called for either party.

20. In April 2015 Mrs Hepburn wife issued further proceedings seeking an injunction to restrain the Respondents from removing the fence; that action was stayed to allow the parties to attempt mediation. An unsuccessful mediation took place in September 2015. Both county court actions were struck out in October 2015; the Applicant's application to HM Land Registry was dated 27 November 2015 (although the official date of the application was 2 September 2016 because the application was rejected in error by HM Land Registry and then reinstated).

21. I do not have to decide anything relating to a right of way, and I am told that that dispute is at an end.

**The first issue: adverse possession**

22. The Applicant is not entitled to apply to be registered as proprietor of the disputed land unless he can show that he was in adverse possession of the disputed land for at least ten years ending on the date of his application (Schedule 6 to the LRA 2002, paragraph 1).

*The Applicant's evidence about adverse possession*

23. The Applicant's case is that he took possession of the disputed land in 2001 when he put up his wire chain link fence around his garden.

24. He gave evidence in a Statement of Truth attached to his application to HM Land Registry in November 2015 and in his witness statement in the Tribunal proceedings dated 17 May 2017. He was cross-examined at the hearing. His account of what he has done and of what he believed about the boundary of his land has been consistent; I have no reason not to regard him as an honest witness and I accept his evidence.

25. The Applicant says that he put up the chain link fence in 2001 with the assistance of Mr Melvyn Yardley, and that he believed that he put the fence on land that belonged to Toll House. He says that from 2001 onwards he used the land between the conifers and the fence for exercising his dogs and that he maintained the trees. In cross-examination he explained that the dogs could get between the conifers and into the space beyond, west of the fence. He could not get in there but the dogs could, and they sometimes used to sleep there because it was shady. He also says that he maintained the conifers, and it is clear from some of the photographs in the hearing bundle that the conifers were trimmed on their eastern side.

26. According to the Respondents Mr Connaway in 2007 asked the Applicant to cut down the conifers so that he could replace them with a fence. The Applicant agreed in cross-examination that that request was made, and explained that because he wanted to keep

the conifers to screen his garden from the car park it was agreed that Mr Connaway would replace the wire fence with a timber fence to match the fencing around the rest of the Hop Cottage land.

27. The Applicant goes on to say that in 2008 one of the dogs, Winnie, escaped over the chain link fence and was run over by a vehicle and killed. Therefore in order to make the garden secure for the dogs he stapled chicken wire to the conifers so as to close the gaps between most of them, except for gaps that were too small for a dog to get through.
28. The Applicant describes only briefly the events of September 2014 when he and his wife re-designed their garden; he comments in his witness statement that he does not believe that, prior to September 2014, the Respondents (he says "Applicants" in his statement, which must be a misprint) regarded the boundary as being anywhere other than the line of the fence.
29. The only other evidence given for the Applicant was in the form of witness statements by Mr Longmate and Mr Yardley. Mr Yardley could not attend the hearing, and his evidence (referred to at paragraph 36 below) does not take matters much further. Mr Longmate did the work in the garden in 2014, although he did not cut down the conifer trees (the Applicant says that was done by a tree surgeon). Mr Longmate's evidence does not assist me on the issue of adverse possession.
30. The Applicant made reference to the report written by Mr Keith Walker FRICS and dated 16 June 2015 in connection with the county court action about the right of way. That report uses the measurements on the 1976 plan (see paragraph 11 above) in order to deduce where the boundary is; it makes use of an old fence foundation in the ground a little way inside the car park of the Hop Cottage land, and deduces that the boundary between the properties comprises two straight lines meeting at an angle, as on the title plan and the 1976 plan, and that the lines meet a few inches east of the fence, so that a tiny area of the car park actually belongs to Toll House. Anticipating what I shall have to say below about the Respondents' case, the surveyor who made a report for them in April 2015 in the county court action, Ms Julia Stolle MRICS, likewise uses the 1976 plan and the measurement on it, but she uses a different point at the north corner of the Toll House garden from which to derive her measurements and therefore puts the boundary further west.
31. Neither expert is a witness in the Tribunal proceedings. In the absence of any opportunity to have their evidence explored in cross-examination I cannot say which



of them is right about the boundary, if indeed either of them is; but there is no need for me to do so. I have to decide whether the Applicant has been in adverse possession of the disputed land from its eastern boundary where the fence now stands to the boundary of the Toll House land wherever that lies.

*The Respondents' arguments about adverse possession*

32. Evidence for the Respondents was given by the second Respondent, Mrs Powell, and the Respondents' shop manager Mr David Wyatt. I accept that they gave evidence honestly, but their knowledge of the land is recent because the Respondents bought their property in 2010. I accept Mrs Powell's evidence that she was familiar with the area having lived there as a child; but she did not claim to have looked at the disputed land or at the garden of Toll House during the Applicant's ownership.
33. Mrs Powell's evidence is that she has talked to the three sons of Alf Green, who bought the Hop Cottage land in 10076. On her account two of the Green brothers said that the boundary was as shown in the 1976 plan (to which I referred above, paragraph 11). In the light of what I have said about those dimensions that does not assist me. The third brother said that the boundary lay 4 inches behind one of the fence posts supporting an advertising board, which is still present. Again that does not assist me. None of the Green brothers appears to have mentioned the conifers to Mrs Powell, and none of them says that the conifers marked the boundary. I think it likely that none of the Green brothers could say now where the boundary lay on the ground, rather than on the plan.
34. None of the Green brothers was willing to make a witness statement or to attend the hearing. The hearsay evidence of their recollections is of no assistance to me; what I have to decide is not where the boundary is but whether the Applicant has been in possession of the disputed land.
35. Mrs Powell says that she also contacted Mr Connaway, but that he too was unwilling to become involved in these proceedings. She says that he told her that he put the fence inside his boundary in order to tidy the appearance of the car park. In the absence of any witness statement from Mr Connaway, and of any cross-examination, I attach no weight to this hearsay evidence on a crucial point.
36. Mrs Powell said that the wire mesh fence put up in 2001 was not in the same position as the fence put up by Mr Connaway; but I take the view that there has been some (very understandable) confusion between the chain link fence, which of course the Respondents have never seen because it was removed in 2007, and the chicken wire

that was stapled to the trees in 2008 and which was still there when they bought the property. Mr Yardley, who helped the Applicant put up the chain link fence in 2001, said in his witness statement that the chain link fence was to the east of the conifers and not where the chicken wire was subsequently placed; I accept that evidence, being consistent with the Applicant's evidence and uncontradicted by any contemporary evidence.

37. Mrs Powell says that in 2014 the Applicant asked to buy an area of the land next to Toll House to extend his garden. She says that the land included the disputed land. Mr Wyatt said the same in his witness statement. There is no written evidence of this conversation; I accept that the Applicant was offering to buy part of the car park, but I think it highly likely that he did not intend to include the disputed land although of course the Respondents may have thought that he did. I think it likely that what was spoken of was the car park itself (I accept the Applicant's evidence that he wanted a thin triangle of the car park next to his garden), since that would have been a useful area for the Applicant to purchase. I do not accept that there was any intention on his part to offer to buy, and to pay for, the disputed land itself and therefore that offer cannot have been an acknowledgment of the Respondents' title to it.
38. Mrs Powell then describes what happened in September 2014 and the dispute that followed; she and her brother were away when the conifers were taken down but on their return they were concerned that the Applicant was doing work on what they regarded as their side of the conifers and so asked him to stop work. The litigation that followed has already been summarised.
39. As I have already mentioned Mr David Wyatt also gave evidence. He said that he managed the purchase of the Hop Cottage land for the Respondents in 2010. His evidence is that he paid particular attention to the boundaries of the Hop Cottage land in the course of the purchase. He says that he compared the line of conifers and the fence with the title plan; he noted that the fence was curved rather than straight. He took the view that the boundary was marked by the conifers.
40. I do not doubt that Mr Wyatt took that view, but in the light of the fact that the line on the title plan shows only a general boundary it does not assist me.
41. Mr Wyatt also gave evidence about the development of the dispute in September 2014. Before the Applicant had the conifers removed he asked if the machines could have access via the car park, and Mr Wyatt agreed. He coned off a corner of the car-park for their use. However, once it became clear that the Applicant was also having

stones and vegetation cleared to the east of the conifers, the Second Respondent Mr Roker wrote a hand-written note to Mr Hepworth asking him to stop work. Access from the car park then came to an end. There is some dispute between the parties as to whether the conifers had stood on a bank, and as to whether the overall level of the Toll House garden is now lower or higher than it was. I accept the Applicant's evidence that it is now lower overall. I accept that evidence because the removal of a large volume of boulders and then the levelling of the ground makes it likely that the overall ground level will have ended up a little lower.

42. The Respondents in their Statement of Case sought to argue that the Applicant had been on the disputed land with their permission since May 2015, because they agreed not to remove the fence pending mediation. That position was, rightly, not pursued at the hearing.

*Conclusions about adverse possession*

43. To have been in adverse possession of the disputed land the Applicant must have been in factual possession of the land, and he must have intended to possess it.

44. Factual possession is described in *Buckinghamshire CC v Moran* [1989] EWCA Civ 11:

“Factual possession signifies an appropriate degree of physical control. It must be single and exclusive possession... The question what acts constitute a sufficient degree of 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.”

45. In *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30, the House of Lords approved the following statement by Slade J in *Powell v McFarlane* [1977] 38 P&CR 452:

“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

46. Intention to possess is described, again in the well-known words of Slade J in *Powell v McFarlane*, as:

“an 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, so far as is reasonably practicable and so far as the processes of the law will allow.”

47. In assessing whether the Applicant was in factual possession I bear in mind that until the conifers were taken down in 2014 this was a useless bit of land. It was full of stones too heavy to move by hand. It could not be grassed or mown, and once the chicken wire barrier was stapled to the conifers in 2008 it was inaccessible.

48. From the time the fence was put up in 2001 the disputed land was enclosed; the neighbour who owned the Hop Cottage land could not access it. It is true that the Applicant did not do much with the land, because it was not land that anyone could do much with. The dogs got into it; it is perhaps an overstatement to say he exercised them there, but they certainly got in when they were in the garden. It was the bit of ground at the bottom of his garden, and he used it, “as an occupying owner might have been expected to deal with it” (in the words of Slade J quoted above).

49. I find that the chain link fence was in the same position as the fence that now stands. I make that finding because I believe the Applicant’s evidence. There is no evidence to contradict it, beyond the suggestion by the Respondents that he could not be sure it was in the same place; but I take it from the agreement between the neighbours that the fence replaced the wire mesh and from the fact that the Applicant had no quarrel with the position of the fence. If it had taken land from him he would have protested; and there is no reason at all to suppose that Mr Connaway would have put the fence further east than the wire mesh had been, thus depriving himself of land. Moreover it was agreed by Mr Wyatt in cross-examination that because the disputed land was covered in boulders and vegetation it would not have been possible to get the fence closer to the conifers.

50. For the Respondents some stress was laid upon the fact that once the chicken wire was stapled to the conifers in 2008 the Applicant did nothing at all with the land. That is true, but he remained in control of it – he could access it by removing the chicken wire if he chose to do so, and no-one else could.

51. It was suggested, for the Respondents, that the fact that it was the neighbour who put up the wooden fence in 2007 somehow negated the Applicant's adverse possession, but that cannot be the case. The possession is of the land; there is no claim by the Applicant to own the fence. The fence put up by Mr Connaway, with the Applicant's agreement, continued to enclose the disputed land so that Mr Connaway could not access it.
52. I find that in 2001 when the chain link fence was put up to keep the dogs in the Applicant took adverse possession of the land to the west of that fence and remained in possession of it until the date of his application.
53. I find also that the Applicant had the requisite intention to possess.
54. It is argued for the Respondents that a fence put up just to keep animals in does not manifest an intention to possess. But intention to possess is to be assessed objectively, and to say that the only intention was to keep the dogs in is to beg the question. The enclosure of the land was prompted by concern about the dogs, but the wire mesh fence and later the wooden fence kept people out and sent an obvious message to the world. From 2001 no-one else could access it and the fence made clear the Applicant's intention that no-one should access it. That objective message is more important than the Applicant's statement in cross-examination that he wanted to keep people out.
55. Accordingly I have found that the Applicant was in adverse possession of the disputed land from 2001 onwards, and has met the requirement of paragraph 1 of Schedule 6 to the LRA 2002 that he be in adverse possession for at least ten years prior to his application.

**The second issue: the condition in paragraph 5 of Schedule 6 to the LRA 2002**

56. The Respondents have exercised their right to require the application to be dealt with under paragraph 5 of Schedule 6 to the LRA 2002. This was a provision introduced in 2002 to make it more difficult to acquire title to registered land by adverse possession. It reads as follows:

(1) If an application under paragraph 1 is required to be dealt with under this paragraph, the applicant is only entitled to be registered as the new proprietor of the estate if any of the following conditions is met.

(2) The first condition is that—

(a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and

(b) the circumstances are such that the applicant ought to be registered as the proprietor.

(3) The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.

(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.”

57. In other words, a registered proprietor of land has an absolute right to resist the acquisition of title to his or her land by adverse possession unless the squatter can bring him or herself with one of the three conditions set out in paragraphs 5(2), (3) and (4), of which the relevant provision here is of course paragraph 5(4).

58. To meet that condition the Applicant has to show that he believed the land was his, that he reasonably so believed, and that he did so for the requisite period.

59. I accept the Applicant’s evidence that he believed the land was his. In his witness statement of 17 May 2017 he said

“...prior to the dispute arising between the Respondents and my wife and I. it never occurred to me that the land to which this application relates was not part of Toll House.”

60. The Applicant was, very properly, pressed in cross-examination about his belief about the boundary, and I have carefully studied the answers he gave. He was asked what he meant by the “true boundary” and he was careful not to claim that he thought, now, that the fence was the boundary of his paper title. He admitted that he had not given the matter a great deal of thought in the past, but he said that he thought the boundary

was probably where the fence now is, and also that when he put up his wire mesh fence in 2001 he believed he was doing so on his own land. Referring to his conversations with Mrs Powell he said that when he spoke with her he believed he owned the fence. Mr Skelly explored whether the Applicant believed he had a paper title to the land up to and including the fence, and asked “irrespective of adverse possession, did you believe you owned the land up to the fence”; the Applicant replied “yes”.

61. The obvious question that arises is why the Applicant picked the particular line he did. He said in cross-examination “there was evidence of a fence already there”, and explained that there were some old angle-irons in the ground along the line where he put the fence. He was asked why he had not said so in his statement, and he explained that he had been asked (I assume by his solicitor) whether there was a fence there at the time, and so he just said in his statement that there was none. He had not thought that the angle irons, being evidence of an earlier fence, were relevant. Mr Skelly said in closing that he had understood the Applicant to be referring to angle irons at the north and south ends of the line of the chain link fence. I had the impression that the Applicant was referring to angle irons that were actually along the line of the fence. Certainly if that is what he meant it would have been sensible for him to put it in his witness statement. In view of the controversy about what the Applicant meant I make it clear that I reach my conclusion about his belief without relying on what he said about old angle irons.
62. There are no pictures now of the land as it looked in 2001. It is accepted by both parties that there were boulders to the east of the trees. The Applicant says that he put his chain-link fence there because he believed that that was where the edge of his land lay and that the fence was on his own land. I accept that evidence both because I accept that the Applicant was an honest witness and because it is implausible that he put the fence where he did for any other reason; the trees were in an uneven line at best, and there were boulders just to the east of the trees which meant that the disputed land could not realistically be seen as part of the car park. The strongest possible evidence that the wire mesh fence marked what the Applicant and his neighbour believed was the boundary is simply the fact that he put the wire mesh fence there and the neighbour was perfectly content to have it there. If the two of them had thought the boundary was the trees then they would have agreed for the barrier, to keep the dogs in, to be attached to the trees (as was the chicken wire in 2008). There is no evidence

- that this was a land-grab by the Applicant, nor that the neighbour intended either to give land away or to allow his own land to function as part of the Applicant's garden.
63. So I find as a fact that the Applicant believed that the disputed land was his own.
64. Was his belief reasonable? It was put to the Applicant in cross-examination that he must have realised that the conifers marked his boundary. The registered title plan is the Ordnance Survey map, on which lines represent physical features, and therefore – Mr Skelly suggested – it must have been obvious that the line shown as the boundary was marked on the ground by the conifers. But that does not seem to me to be persuasive or relevant. The registered title plan does not purport to show the precise boundary and it is not possible to argue that because the line on the plan must be the line of conifers on the ground therefore the conifers must mark out the precise boundary.
65. In fact no-one has been able to show precisely where the boundary lies. The experts instructed in other proceedings are not agreed. The title plan shows a general boundary only. It is likely that the conifers did not exist when the boundary was created (because the Green brothers in conversation with the First Respondent make no mention of them). It may well be that features that could have enabled the determination of the boundary at the point when it was created have long ago disappeared. The Applicant did his best with the presence of the boulders next to the trees, and put the fence where he did with the agreement of his neighbour. I find that his belief was reasonable.
66. The other part of the condition in paragraph 5(4) is that he must have held that reasonable belief “for at least ten years of the period of adverse possession ending on the date of the application”.
67. The precise meaning of this requirement is difficult to discern. There has been one appellate decision about it, *Zarb v Parry* [EWCA] Civ 1306. It is, I believe, generally accepted that it cannot be the case that as soon as an adverse possessor's belief in his ownership is shaken he or she must – that same day - write out and post to HM Land Registry a form ADV1. The requirement has been discussed by the Court of Appeal in *Zarb v Parry*:
- “the necessary effect of the way that paragraph 5(4) is expressed is to make the unreasonable belief of the adverse possessor in the last ten years of his possession prior to the application for registration a potentially disqualifying factor even though his belief started out as reasonable but became



unreasonable as a result of circumstances after the completion by him and/or his predecessor in title of a ten year period of possession. The consequence of that is that the paper title owner will have a last chance to recover the land if the adverse possessor did not have a reasonable belief during the last ten years. The moral is that, as soon as the adverse possessor learns facts which might make his belief in his own ownership unreasonable, he should take steps to secure registration as proprietor.

68. In other words, the adverse possessor must act promptly when he changes his mind; if he does not do so then he takes the risk that he will have delayed too long before making his application.
69. The Applicant was cross-examined not only on the issue of whether he believed the disputed land was his, but also on when he changed his mind. This is a difficult issue because an adverse possessor, who believes – as I have found the Applicant did – that land is his but becomes aware that his belief is challenged does not instantly cease to hold that belief. As the Arden LJ put it in *Zarb v Parry* at para 49, he does not have to take what the neighbour says at face value. Awareness of challenge is not the same as conviction of error. The Applicant was asked in cross-examination when he changed his view about the boundary, and he answered 2014, referring to the time when the dispute arose. I did not take him to mean that at that time he ceased to believe that the disputed land was his, merely that his view changed in the sense that he became aware that it was an issue. He was not given any reason at that stage to believe that he had been wrong. Nor is there any evidence that he believed what Ms Stolle said about the boundary in her report made for the Respondents in the county court proceedings.
70. The Applicant was clear, however, that he accepted the view of the expert, Mr Walker, instructed by his wife in the county court proceedings. There is no evidence that he accepted that view as soon as the report was made, in June 2015; but at some point the Applicant took on board what Mr Walker was saying and June 2015 is the earliest time at which he could have done so.
71. If his belief ceased at that point, did he take action sufficiently promptly to meet the requirements of paragraph 5(4) of Schedule 6 to the LRA 2002?
72. As I said above, the decision in *Zarb v Parry* has been taken to mean that the adverse possessor need not apply on the very day he changes his mind, but he must “act promptly”. How soon is promptly? Stephanie Tozer and Kester Lees in an article in

the Estates Gazette, (2015) EG 1521 Estates Gazette 77 express the view that the answer will depend upon the facts of the case, including

- the length of the period of possession;
- the amount of work needed to prepare the application; and
- whether the claimant had alerted the paper owner of his claim prior to making the application (and if so, whether the parties had negotiated).

73. The Applicant was asked in cross-examination why he did not make his application much earlier within this train of events. His response was that he did not wish to derail the possible compromise of the county court action. That action was of course brought by his wife rather than by him, but nevertheless it was his title that was in issue. It would be contrary to the policy of the law for the requirement of prompt action in paragraph 5(4) to be read as a requirement that an application be made in circumstances that would prevent the compromise of litigation. The Applicant made his application promptly after the failure of mediation and the dismissal of the county court actions in October 2015, and in my judgment that was within the requirements of paragraph 5(4) in these circumstances.

#### **Conclusion on the Applicant's application**

74. In the light of my conclusions about adverse possession and about the condition at paragraph 5(4) of paragraph 5 of Schedule 6 to the LRA 2002, I have directed the registrar to respond to the application as if the Respondents' objection had not been made.

75. In the Land Registration Division costs follow the event and the Applicant is in principle entitled to his costs incurred since the date of the reference. If he seeks an order for costs he is to make an application within 28 days of the date of this order, with a detailed schedule of costs. The Respondents will then have 28 days to make any submissions they wish to make as liability for costs or the amount claimed, and the Applicant will then have 21 days to reply. If I make an order for costs I may make an order either for detailed or for summary assessment, depending on the level of costs claimed.

Dated this 6 December 2017

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL