[2018] UKFTT 578 (PC)

REF/2017/0211

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

**LAND REGISTRATION ACT 2002**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY**

**BETWEEN**

**(1) NEILL ALASTAIR VINCENT**
**(2) CHERYL LYNNE VINCENT**

**APPLICANT(S)**

**and**

**(1) PATRICK LYNCH**
**(2) JOANNE LYNCH**

**RESPONDENT(S)**

**Property Address: 17 Fallow Field Close, Chippenham**
**Title Number: WT174637 and WT168900**

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## ORDER

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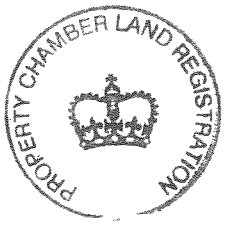
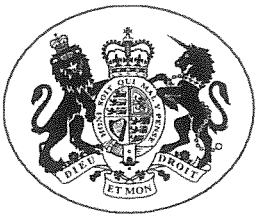
1. The registrar is directed to give effect to the Applicants' application dated 20TH February 2015 but limited to those matters referred to the Tribunal by the Chief Land Registrar (defined in the Decision as the Hedge and the Drive) as if the Respondents' objection had not been made.
2. The Respondents shall pay the Applicants' costs of the Application on the standard basis, such costs to be subject to a detailed assessment if not agreed.

Dated this 17th day of August 2018

By order of the Tribunal
Nigel Thomas





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**APPLICANT(S)**

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**(1) PATRICK LYNCH**
**(2) JOANNE LYNCH**

**RESPONDENT(S)**

**Property Address: Fallow Field Close, Chippenham**
**Title Numbers: WT174637 and WT168900**

**Before Judge Nigel Thomas**
**Sitting at: Swindon Magistrates Court**
**On: 26 and 27 July 2018**

| | |
|---|---|
| Applicant Representation: | John Dickinson instructed by Forrester Sylvester Mackett |
| Respondent Representation: | Charles Auld instructed by Awdry Bailey Douglas |

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**DECISION**

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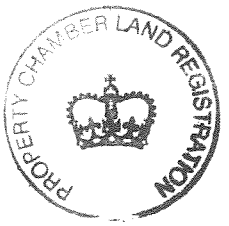
*KEYWORDS*

**Cases referred to: Powell v McFarlane (1977) 38 P&CR 452**
**JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419.**
**Wuta-Ofei v Danquah [1961] 1 WLR 1238**
**Wilson v Martin's Executors [1993] 1 EGLR 178**

**Judge Nigel Thomas**

Dated this 8th day of August 2018




By order of the Tribunal

1. By an ADV1 dated 18 February 2015 Mr and Mrs N.A. and C.L. Vincent ("the Applicants") applied to be registered as persons in adverse possession of land at 5 Fox Close, Chippenham Wiltshire SN14 6YB under Schedule 6 Land Registration Act 2002.

2. The Applicants are the registered freehold proprietors of 17 Fallow Field Close, Chippenham, Wiltshire SN15 6YA under title number WT174637. The Respondents, Mr and Mrs Lynch, are the registered freehold proprietors of 5 Fox Close under title number WT168900. The Applicants were registered as proprietors of their property on 18 December 2003 and the Respondents were registered on 20 December 2011.

3. The Applicants claim title by adverse possession to two areas of land which were referred to at the hearing as "the Hedge" which was a hedge growing on land between the two gardens and a triangular area of driveway "the Drive" lying to the south and south eastern end of both properties.

4. The application is made pursuant to Schedule 6 paragraph 5(4) of the Land Registration Act 2002 ("the 2002 Act") which is the provision dealing with a claim to acquire title by adverse possession where there is a common boundary.

5. For the purposes of this hearing I am required to consider the boundary line to be the line plotted by a survey carried out by David J Powell Surveys Ltd which shows the boundary based upon the Land Registry plans. I shall refer to this survey as the "Powell Plan". That is the position agreed by the parties and I shall make my decision accordingly. The Powell Plan shows the Hedge and the Drive within the Respondents' registered title.

6. Nevertheless it is the case that I have to make some findings on what the parties thought the boundary line to be as this is highly relevant to the question of whether the Applicants satisfy the requirements of paragraph 5(4) and in particular subparagraph (c).

7. I held a site view on July 26 and the hearing took place on July 27 and July 28 at Swindon Magistrates Court.

The Issues

8. I am indebted to both Counsel for their skeleton arguments, agreed chronology and agreed list of issues. Cross examination carried out by them was both courteous and thorough and their submissions, written and oral, were comprehensive.

9. The agreed list of issues is as follows:

(1) Have the Applicants been in adverse possession of the disputed Hedge Area (consisting of a large hedge and smaller hedge closer to the road) and the disputed Driveway Area for 10 years prior to their Application of 18 February 2015?

(2) Have the Applicants been in factual possession of the disputed land for a period in excess of 10 years:

(1) What physical acts of possession are established?

(2) Have the Applicants exercised such possession without challenge or consent?

(3) Have Applicants proved the necessary intention to possess?

(4) Did the Applicants reasonably believe throughout the 10 year period that they owned the area they possessed?

The Site

10. Both properties are pleasant detached houses with integral garages on the south western edge of a development built in the 1990s by Westbury Homes (Holdings) Ltd ("Westbury"). Behind each house is an attractive garden and to the front each property has a lawned area and driveway. On the site view I was shown features including edging stones on the north western and northern side of the Hedge on the side of the Respondents' driveway with a manhole cover. Around the Respondents'

house there is a concrete slabbed path that leads to the rear gate opening directly into the garden. Between this path and the flank wall of the Applicants' house there is a gravelled area on which the Applicants have placed a storage box hard up against the wall of their house. The box is situated on their land according to the Powell Plan but the front doors swing over the Respondents' Property.

11. The Hedge comprises a tall hedge and at its southern and south western end a much lower hedge. On the Applicants' side of the Hedge is a tarmac extension to their drive which they had laid in late 2013. The tip of this extended drive is the Drive for the purposes of this Application. The lawn and grass strip surrounding the Drive run up to and are contiguous with the Hedge. There is no demarcating feature on the Applicants' side of the Hedge.

12. On the Respondents' side of the Hedge on the other hand there is an unbroken line of stone edging running the length of the Hedge. Between the north eastern edge of the Hedge and the corner of the Respondents' house there is a gap through which the Respondents' concrete slabbed path runs before turning at right angles around the corner of the house before heading towards the garden gate.

13. Although the south western end of the Hedge is considerably lower than the upper end it nevertheless does present to the eye a clear boundary feature. It marks out the Drive and to the casual observer would indicate that the Drive falls within the curtilage of the Applicants' Property.

The Witnesses

14. It is most regrettable that the Applicants and the Respondents who are next door neighbours have found themselves involved in such a bitter dispute. I note that attempts were made to resolve matters by ADR which unfortunately were not successful.

15. I did not find either the Applicants or the Respondents to be wholly satisfactory witnesses in the sense that there were times when each of them was prone to exaggerate their evidence in support of their case. In the case of Mr Lynch for instance there were several instances of when he gave oral evidence which went beyond anything in his witness statement. On the other hand I found the explanation by Mr and Mrs Vincent as to why a photograph of the Hedge was taken in July 2012 to be unconvincing. I find that it was taken because they had become concerned about what the Respondents' intentions were with regard to the Hedge and they wished to record the position at that time.

16. Overall however I formed the view that both parties, subject to my comments above, were keen to help the Tribunal and to describe the position as they saw it.

17. Of the other witnesses who gave oral evidence I found Mrs Parsons to be convincing. She and her husband Mr R.J. Parsons were the first owners of the Applicants' Property having purchased it in 1998, and it was her evidence, which I accept, that when she and her husband purchased the Applicants' Property the boundary between their property and the Respondents' Property was clearly delineated by edging stones which she assumed the developer Westbury had laid and within which (i.e. on the Applicants' side) shrubs had been planted by it which I find is now the Hedge. She told me, and I find, that the then owner of the Respondents' Property (which had also

been built by Westbury) Ms S. Brister, who had purchased the Respondents' Property as first owner in January 1998, accepted that this was the case. Mrs Parsons was able to show me photographs of both the edging stones and the newly planted shrubs. The edging stones are still in place and I saw them during the site view together with a manhole cover; the Hedge is on the Applicants' side of these stones.

18. Mrs Parsons was asked about the Property Information Form prepared at the time of the sale of the Applicants' Property to them. With regard to the boundaries her husband on behalf of himself and Mrs Parsons indicated in the form that he did not know who owned the boundary but as she had nothing to do with filling in the Form she could not explain why he had completed it in this way.

19. Mrs Sue Parker (formerly Ms Brister), did not give oral evidence, but she provided a witness statement dated 10 September 2017 and a copy of a letter to the Applicants dated 23 August 2014. As noted above she was the first registered proprietor of the Respondents' Property. When she moved in there was no fence between the edge of the Drive on her property and what is now the Applicants' Property. The Applicants' Property had not been built at this point but the site foreman told her that the boundary was the edge of the driveway which was tarmacked and along the edge of which edging stones had been placed. I find that these are the edging stones shown in the photographs produced by Mrs Parsons which she referred to in oral evidence as the white line on the photograph which edging stones she thought to be the boundary.

20. Along the front of the house and to its side ran the slabbed path which Mrs Parker understood to be within the curtilage of the Respondents' Property. Mrs Parker says that the boundary during the period she owned the Respondents' Property was never

an issue and that it was Mr and Mrs Parsons who maintained the Hedge and mowed the grass (I take this to mean around the Drive). There was, she said in her witness statement, no doubt in her mind where the boundary was. She of course cut the Hedge on her side but that was to be expected in order to keep it tidy.

21. I am mindful that this evidence has not been subject to cross-examination but as it is consistent with Mrs Parsons' evidence I accept it.

22. Mrs Helen Oliver also gave evidence at the hearing. She and her former husband purchased the Respondents' Property in May 2009 and sold it in December 2011 to the Respondents. It is clear that there was no love lost between Mrs Oliver and the Respondents whom she regarded as difficult not to say unreasonable purchasers, and I bear this in mind when considering her evidence. Mrs Oliver in a letter dated 26 August 2014 stated that she understood that the Hedge belonged to the Applicants. This evidence is consistent with the evidence of Mrs Parsons and Mrs Parker and I accept it.

23. At this point I should mention that both Mrs Parsons and Mrs Oliver were cross examined on the fact that when they came to sell their respective properties the Seller's Property Information Forms both declared that they did not know who owned the boundary between the Applicants' and Respondents' Properties. I did not find this of great significance because although the parties themselves knew what they regarded as the de facto boundaries they would naturally be more careful in making a statement which has legal significance in the absence of any clear written statement of where the boundaries are. Therefore I am of the view that I can safely accept the evidence of these three witnesses as to where they regarded the boundaries were situate.

24. Mrs French provided a witness statement on behalf of the Respondents, whose property she owned between June 2005 and July 2008. Her evidence was that she cut her side of the Hedge but could not remember if the Applicants maintained the rest of the Hedge namely the top and sides. Clearly, however, it was maintained by Mr Vincent and as I accept his evidence in this regard I see no inconsistency between her evidence and the evidence, which I have accepted, of the three witnesses all of whom had owned the properties previously. Significantly Mrs French does not claim that the Hedge belonged to her or the previous owners of the Respondents' Property.

25. Turning to the evidence of Luke Harris who was the only other person to give evidence, he was responsible in part for laying the Drive in October 2013. His evidence concerned a very narrow point as to whether he had obtained water from the Respondents for the purposes of these works. He said he met the Respondents when he called at their house. The Respondents both said that Mr Lynch was away on a course during this period so Mr Harris could not have met him, whilst Mrs Lynch said that being alone she did not and would not have answered the door to him. As it happens there was no real significance in Mr Harris' evidence as Mrs Lynch admitted that she was aware of the works to the Drive and informed her husband about them when she spoke to him that evening on the telephone. She could see what was going on from her bedroom window. It seems to me likely that Mr Harris was mistaken about where he obtained the water for the works and that the Respondents were correct in stating he did not do so from them. I come to this conclusion as in giving their evidence on the point they were consistent and clear in their version of events. On the other hand this was just another job for Mr Harris occurring nearly 5 years ago and he had no particular reason to recall precisely from whom he obtained the water.

26. With this background and the findings I have made I turn to the evidence of the parties. I am satisfied that the Applicants and the Respondents, until the summer of 2014 in the Respondents' case, regarded the Hedge and the Drive as forming part of the Applicants' Property. The Applicants and the Respondents adopted either consciously or subconsciously the position which existed on the ground that the Applicants' and their predecessor maintained the Hedge and that everything to the Applicants side of the Respondents' driveway (including the lower section of hedge) formed part of the Applicants' Property. I come to this conclusion on the basis that Mr Vincent, somewhat obsessively, maintained all that part of the Hedge to which he had access without the need to obtain permission to enter the Respondents' Property. So it was he who cut his side, the top and the end parts of the Hedge. There was no real challenge to the evidence in this regard; indeed Mr Lynch said he found Mr Vincent's continuous cutting of the Hedge very irritating.

27. I accept that Mrs Lynch did cut the Respondents' side of the Hedge by light trimming but she did that, as she told me, to ensure ease of access for their cars to the garage. Mr Lynch gave similar evidence. It was also clear from the Respondents' evidence that they knew about and made no objection when the Drive was installed in October 2013. Mrs Lynch observed the works from her bedroom window and informed her husband about them on the phone. Mr Lynch told me that on his return from his course he did not bother to go down and see the Drive, in fact he only looked at it over the low hedge in early 2014.

28. At about this time, namely after viewing the Drive Mr Lynch told me he consulted the Land Registry plans of his property. The Respondents told me that they were aware of where the true boundary lay from the time they first saw the Land Registry plans upon

the purchase of their property in 2011. I do not accept that evidence because if that were the case they would have challenged the right of the Applicants to lay the Drive in October 2013. Moreover I note that the first time they did anything concrete about claiming the Hedge was in August 2014 when Mrs Lynch cut back the Hedge at the point closest to the houses. This then set off the current dispute. I find that the Respondents did not appreciate the line of the boundary as they now contend it to be until the summer of 2014.

29. Sometime in early 2012, probably during the summer, both parties agreed a conversation took place about the Hedge. The Applicants say that Mr Lynch asked Mr Vincent if he could remove the Hedge and replace it with a fence. Mr Vincent said he preferred to have a green boundary. No more was then said about it until August 2014, when Mrs Lynch cut back part of the Hedge when the Applicants were out at a christening.

30. On the other hand the Respondents say that Mr Lynch simply informed Mr Vincent that he intended to remove the Hedge and replace it with a fence and Mr Vincent's only response was to express concern about access to the storage box next to the pine end of his house.

31. I prefer the Applicants' version of this conversation for two reasons. First, if what the Respondents say is true then they would have replaced the Hedge if not immediately then within a reasonable time otherwise there was no point to the conversation and secondly they would have objected to the works to the Drive in 2013 and Mr Vincent's continuing maintenance of the Hedge.

32. The fact that the Respondents were registered as proprietors of the Respondents' Property in December 2011 meant that they were presumed to be in possession of all the land to which they had paper title. However it is only a presumption and I find that neither they nor their predecessors in title of the Respondents' Property were ever in factual possession of the Hedge or the Drive. This is because from the time that the Respondents' Property was first sold by Westbury in January 1998 the owners of it, accepted that the boundary was the edge of the driveway demarcated by the paving stones and by the low hedge which was accepted to be planted on the Applicants' Property.

33. I find that on purchasing the Respondents' Property in December 2011 the Respondents similarly accepted the position and behaved accordingly. It was only in the summer of 2014 that they thought the Hedge and the Drive might fall within their paper title. The fact that this finding means that the boundary is a dog leg as it skirts the corner of the house and might be contrary to what the Land Registry plans show is not to the point. The boundaries shown on these plans, as is well known, are not precise boundaries but general only: see section 60 2002 Act.

Adverse Possession: the Law

34. The next question I have to decide therefore is whether the Applicants were in adverse possession. Counsel took me though the relevant law starting with JA Pye (Oxford) Ltd v. Graham [2003] 1 AC 419 and Powell McFarlane (1977) 38 P&CR 452 together with extensive citation from Adverse Possession by Stephen Jourdan QC and Oliver Radley-Gardner. It seems to me that the issue in this case is whether it is possible to

carry out acts to the Hedge and the Drive sufficient to establish factual possession and thus title by adverse possession.

35. I hold that the Applicants already had the intention to possess by reason simply of the fact that they thought they owned it.

36. As to factual possession I remind myself what is sufficient for these purposes. In Powell v McFarlane at page 471 Slade J said that whether the squatter has taken a sufficient degree of control is a matter of fact, depending on all the circumstances, and the manner in which the land is commonly enjoyed. "The type of conduct which indicates possession must vary with the type of land" per Lord Guest at 1243 in Wuta-Ofei v Danquah [1961] 1 WLR 1238. On the other hand trivial acts might not be sufficient to establish adverse possession see Wilson v Martin's Exors [1993] 1 EGLR 178.

37. In my judgment the Applicants have established factual possession of the Hedge and Drive. Their predecessors in title Westbury planted the Hedge and from December 1998 the successive owners of the Applicants' Property maintained it by inter-planting when individual shrubs and plants died, and by cutting it along one side, the top and at the ends. I find that bearing in mind the nature of the land and the Hedge planted upon it and in the circumstances of this case based upon my findings these acts amount to sufficient control to establish adverse possession.

38. Likewise the Drive which was subject to the 2013 works without protest and the surrounding strips of grass which were maintained by the Applicants such as grubbing

up moss and cutting the grass were in all the circumstances, in my judgment, conduct exhibiting sufficient control to establish factual possession.

39. I need also to consider the specific requirements of paragraph 5(4) of Schedule 6 to the 2002 Act which I answer as follows:

(a) the Hedge and the Drive are adjacent to the land belonging to the Applicant.

(b) the exact boundary line has not been fixed. The Powell Plan produced in 2016 is merely a plotted line based upon the Transfer plans which are reflected in the Land Registry plans show general boundaries only.

(c) I find the Applicants have for more than 10 years reasonably believed the Hedge and the Drive were theirs. When they purchased the Applicants' Property in 2003 they succeeded Mrs Parsons who was the first owner and she considered the Hedge and the Drive were part of the Applicants' Property and so did the owners of the Respondents' Property. The issue simply did not arise. The works to the Drive proceeded without complaint from the Respondents and throughout, until August 2014, no-one challenged the Applicants' control and maintenance of the Hedge. I reject any notion that checking the Land Registry plan was required of the Applicants and statements to Parliament when the 2002 Act was introduced support this view; and even had they done so what would they have revealed? In my judgment very little, because the plan scale is small, the area is

intensely developed, the general boundaries rule applies to the plan and in any event as the Powell Plan shows, the notional boundary line contradicts the position on the ground. In Registered Land by Charles Harpum and Janet Bignell the authors at 30.43 say as follows, (and of course the drafting of the 2002 Act was largely the work of Dr Harpum):

> "This third condition is intended to meet the common situation where the boundaries as they appear on the ground and as they appear on the register do not coincide. Typically this may happen because the physical features suggest that the boundaries are in one place when in fact they are in another, or because of some mistake in the erection of fences or walls when a new estate is laid out otherwise than in accordance with the plan": see paragraph 30.43.

(d) this requirement is met.

Conclusion

40. For the reasons I have set out I shall direct the Chief Land Registrar that the Applicants be registered as the proprietors of a registered estate in land pursuant to paragraph 1 of Schedule 6 of the Land Registration Act 2002.

41. I invited the parties to make written submissions on costs. It was agreed that the starting point was that the Respondents should pay at least part of the Applicants' costs the issues being upon what basis and to what extent they should be liable. The Applicants claim all their costs on an indemnity basis, because primarily they say they made several offers which the Respondents have failed to beat. The Respondents on

the other hand argue that the Applicants failed at the first hurdle with their claim as the Gravel area was not even referred to the Tribunal and in any event the offers the Applicants made were not genuine attempts to settle as they contained no element of compromise.

42. Having considered these submissions it seems to me that there is force in both sets of submissions in these circumstances I find that there is no clear preponderance of argument either way sufficient to persuade me to alter the usual order that the Respondents pay the Applicants' costs on the standard basis.