



[2017] UKFTT 0890 (PC)

PROPERTY CHAMBER
FIRST – TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

2016/0934

BETWEEN

(1) TIMOTHY WILLIAM GUY
(2) DAVID ANDREW GUY

APPLICANTS

and

DAVID CHRISTOPHER HERON

RESPONDENT

**Property Address: Land on the south side of Pen-y-Bryn, Cross Common Road, Dinas
Powys CF64 4TP**

Title Number: CYM673051

**Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the First-tier
Tribunal**

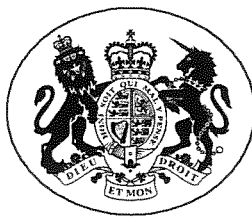
The Chief Land Registrar is directed to give effect to the Applicants' original application dated 12 February 2016 for first registration of the above land as if the objection had not been made.

Dated 22 November 2017

Simon Brilliant



**BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST –
TIER TRIBUNAL**



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Sitting at: Cardiff Civil Justice Centre, 2 Park Street, Cardiff CF10 1ET

On: 11 October 2017

Site inspection: 10 October 2017

Applicants' Representation: Mr G Hughes of counsel.

Respondent's Representation: Ms N Dzameh of counsel.

DECISION

First registration - applicants claiming a good paper title to unregistered land comprising an access way to farmland – issue as to the correct construction of a conveyance dated 2 December 1953 – respondent claiming title by adverse possession - issue as to the length of physical possession and control by the respondent.

Powell v McFarlane (1977) 38 P&CR 452, JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419, Wretham v Ross [2005] EWHC 1259 (Ch)

Introduction

1. Mr Timothy Guy and Mr David Guy, the applicants, are brothers. They are the registered freehold proprietors of agricultural land at Cross Common, Dinas Powys CF64 4TP, which is held under title numbers CY462307 and CYM521208. This land includes most of a narrow strip, running east to west, used as a track connecting most of the agricultural land with Cross Common (“the narrow strip”).
2. Mr Heron, the respondent, is the freehold proprietor of a house, known as Ty'r Waun, and surrounding land, which is held under title numbers CYM72100 and CYM179489. This land lies to the south of the narrow strip.
3. The disputed land in these proceedings (“the disputed land”) is a small wedge-shaped part of the narrow strip which is still unregistered, lying between the applicants' title CYM521208 and the respondent's title CYM179489. It is shown on the plans at pages 46, 51 and 52 in the trial bundle.

4. In these proceedings, the applicants claim to have a good paper title to the disputed land on the proper construction of a conveyance dated 2 December 1953 (“the 1953 conveyance”) made between Mr Todd, as vendor, and Mr and Mrs Baker, as purchasers. Mr Heron disputes that the applicants have a good paper title to the disputed land, and advances a contrary claim to have acquired title to the disputed land by adverse possession.
5. The procedural history is that on 12 February 2016 the applicants made an application to Land Registry for first registration of the disputed land (“the original application”). On 5 May 2016, Mr Heron objected to the original application. On 8 November 2016, the dispute was referred to the tribunal pursuant to section 73(7) of the Land Registration Act 2002.

The conveyancing history

6. The relevant part of the parcels clause of the 1953 conveyance is as follows:

Secondly ALL THOSE three several pieces or parcels of land containing five decimal point 822 acres or thereabouts situated at Cross Common aforesaid being respectively Numbers 302 and 303 and 736 on the Ordnance Survey Map for the Parish of Saint Andrews Major in the said County of Glamorgan (2nd Edition 1900) and which said pieces or parcels of the land are for the purpose of identification only more particularly delineated on the plan annexed hereto and thereon coloured blue
7. The 1900 Ordnance Survey plan shows the narrow strip as being part of field 303. The total area of fields 302, 303 and 736 amounts to 5.823 acres, which is within the description *five decimal point 822 acres or thereabouts* in the parcels clause.
8. The 1942 Ordnance Survey plan shows that the western part of the narrow strip has been separated from field 303, and has become incorporated as part of a new field, 280a. The total area of fields 302, 303 and 736 now amounts to only 5.579 acres.
9. The plan attached to the 1953 conveyance is not one based on the 1900 Ordnance

Survey plan, as might be supposed, but one based on the 1942 Ordnance Survey plan. Although the whole of the narrow strip is coloured blue, the western part is shown as being within field 280a, and not within field 303. This has led Land Registry to the view that the western part of the narrow strip was not conveyed to Mr and Mrs Baker.¹

10. The 1900 Ordnance Survey plan only came to light after these proceedings had been commenced. I am quite satisfied from looking at it that, on the true construction of the 1953 conveyance, the whole of the narrow strip, including the disputed land, was conveyed to Mr and Mrs Baker. Land Registry was, with respect, wrong in holding otherwise.
11. On 10 February 2016, Mr Baker's personal representative, Mr John, transferred ownership of the disputed land by an assent to the applicants. In my judgment, Mr John had a good paper title to the disputed land and thereby passed a good title to the applicants. Accordingly, the applicants succeed unless Mr Heron can show that he has acquired title to the disputed land by adverse possession.

The witnesses

12. Mr David Guy gave oral evidence. The applicants called Mrs Richards to give oral evidence. She is the owner of Pen-y-Bryn, which lies immediately to the north of the narrow track. Mr Heron gave oral evidence.

Adverse possession: the law

13. The relevant statutory provisions are as follows. Section 15 of the Limitation Act 1980 (so far as material) provides:

- (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued

¹ The applicants' title number CYM521208 consists of the whole of the western part of the narrow strip save for the disputed land. In its letter dated 8 April 2016, Land Registry says, "I am unable to account for why we completed the registration of CYM521208...".

to him, ...

- (6) Part 1 of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.

14. Paragraph 1 of Schedule 1 to the Limitation Act 1980 provides as follows (so far as material):

Where the person bringing an action to recover land has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.

15. Paragraph 8 of Schedule 1 to the Limitation Act 1980 provides as follows (so far as material):
 - (1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as 'adverse possession'); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

16. The two most important authorities on adverse possession are the decision of Slade J in Powell v McFarlane (1977) 38 P&CR 452 and of the House of Lords in JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419.

17. As Lord Browne-Wilkinson said in Pye at paragraph 36 “The question is simply whether the ... squatter has dispossessed the ... owner by going into ordinary (my emphasis) possession of the land for the requisite period without the consent of the owner”.

18. Possession, however, itself contains two separate elements namely:
- (1) Factual possession consisting of a sufficient degree of physical custody and control.
 - (2) An intention to possess (“animus possidendi” in Latin) being an intention to exercise such custody and control on one’s own behalf and for one’s own benefit.

Factual possession

19. Lord Browne-Wilkinson expressly agreed in Pye at paragraph 41 with the attempt by Slade J to define this in Powell v McFarlane, where he said:

“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. ... 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.”

20. In Wretham v Ross [2005] EWHC 1259 (Ch) David Richards J said that the first issue for a court dealing with claims to adverse possession is whether the occupier has been in factual possession for the requisite period. Whether there was factual possession should be objectively assessed by reference to the squatter’s acts relied on to constitute possession, and the absence of any acts of possession on the part of the paper owner.

The intention to possess

21. In Pye Lord Browne-Wilkinson said at paragraph 42 that once it is accepted that the word “possession” in this context has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only relevant

question is whether the person in factual possession also has an intention to possess. It is wrong to suggest that an intention to own the land or to exclude the owner as well as other people was required.

22. In Pye Lord Browne-Wilkinson said at paragraph 43 that the intention to possess requires 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 if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.

23. In Pye Lord Hope of Craighead said at paragraph 71:

“The important point for present purposes is that it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor. The word “adverse” in the context of section 15(1) of the Limitation Act 1980 does not carry this implication. The only intention which has to be demonstrated is an intention to occupy and use the land as one's own. ... So I would hold that, if the evidence shows that the person was using the land in the way one would expect him to use it if he were the true owner, that is enough.”

Mr Heron's case

24. Mr Heron's land, which is registered under two titles as explained in paragraph 2 above, was bought in the name of his then partner, Ms Thompson, in 2002. Following their separation, the land was transferred to him in 2004.

25. In his statement of case, Mr Heron alleges that he has been in adverse possession of the disputed land since 2002. At that time, he says, the disputed land was separated from the rest of the western part of the narrow strip (now registered under title number CYM521208) by the natural boundary formed by undergrowth. Mr Heron needs to show that he has been in adverse possession of the disputed land for 12 years prior to hearing, ie from at least 2005.

26. Mr Heron contends that in 2002 a small wooden outbuilding (“the shed”) was situated on the disputed land. He proceeded to use the disputed land as a parking area for his trailer and to store bulky items of garden furniture. Several times each year he has trimmed trees and maintained the disputed land up to the natural boundary with the rest of the western part of the narrow strip.
27. Mr Heron maintains that from late 2002 onwards he laid scalpings on the disputed land to make the ground firm underfoot, and he parked his car and trailer on it. In 2004, he instructed tree surgeons to remove various large cedar trees, including one situated on the disputed land. In 2005, he constructed a garage partly on the disputed land in place of the shed and scalpings. The garage is used to this day to store cars and other equipment. Retrospective planning permission for the garage was granted on 6 May 2009.

My assessment of the evidence

28. The applicants produced Google Earth aerial photographs taken in 2006 (pages 151, 153 and 154 in the trial bundle) and in 2009 (page 152 in the trial bundle).
29. The 2009 photograph clearly shows the presence of the still unfinished garage with a large white vehicle parked on it. The three 2006 photographs do not show the garage, but a substantial clump of trees in its place. I am unable to accept Mr Heron’s suggestion, made by him in cross-examination, that the garage can be seen through the trees in the photograph at page 153 in the trial bundle.
30. On 9 February 2006, a mortgage valuation was carried out at Ty-r-Waun for Mr Heron (page 207 in the trial bundle). Panel 6a dealt with garages/parking. The box marked with an X says *Garage space/parking space on site*. The panel concludes *Brief Description: Parking space*. This is not consistent with the garage having already been constructed at that time.
31. Moreover, there is at page 129 in the trial bundle a location plan prepared for Mr Heron by his architects dated November 2008. It was a plan submitted on 16 February 2009

to the local authority for planning permission. This shows the garage marked on the plan as “Proposed Garage”. When the planning application was received on 16 February 2009, reference is made to the garage as follows (page 137 in the trial bundle):

The partially constructed garage is sited in the north west corner of the property on its frontage with the Common and adjacent to the existing entrance.

32. I therefore agree with Mr Hughes’ suggestion in cross-examination that the most likely time when the garage was built was between November 2008 and February 2009. It was not built in 2005. Further confirmation of this is to be found in the Land Registry survey report carried out on 22 April 2016 where it is reported that the partially built garage is less than 10 years old (pages 48 and 49 in the trial bundle).
33. I also accept Mr Hughes’ observation that Mr Heron is a poor historian. For example, he asserts in his statement of case (page 199 in the trial bundle) that the shed was situated on the disputed land. This is simply not so. It appears clearly marked on the title plan of Ty’r Waun as lying within the registered title (page 20 in the trial bundle).
34. Mr David Guy attended Ty’r Waun in 2004 to help his brother remove a tree stump. I accept his evidence that this tree had been on what is now the applicants’ land and not on disputed land. He said there were no scalpings on the disputed land in 2004, and vehicles were not parked on it to the extent they now are.
35. Mrs Richard said that Mr Heron only began to clear the disputed land in 2007. She remembers this date because Mr Heron disrupted the water supply which served Pen-y-Bryn when he began clearing the disputed land, and this was shortly before her mother died on 15 June 2007. It was only about four years ago when she became aware of the scalpings on the disputed land.

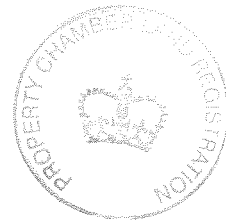
Conclusion

36. I am not satisfied on the totality of the evidence that Mr Heron has demonstrated that he has been in adverse possession of the disputed land for 12 years.

37. I will therefore direct the chief land registrar to give effect to the original application.
38. The normal rule is for costs to follow the event. If Mr Heron wishes to argue that some other order would be appropriate, he should serve written reasons on the applicants and the tribunal within 14 days. If he serves such reasons, then I will decide as to what order for costs there should be and give further directions. If he does not serve such reasons within 14 days, then the applicants should serve on Mr Heron and the tribunal a short summary of their costs since the date of the reference. I will then decide whether to carry out a summary assessment on paper or to direct a detailed assessment.

Dated this 22nd day of November 2017

Simon Birchall



BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL