



[2018] UKFTT 0610 (PC)

**PROPERTY CHAMBER  
FIRST –TIER TRIBUNAL  
LAND REGISTRATION DIVISION**

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

**LAND REGISTRATION ACT 2002**

**REF NO/2017/0302**

**BETWEEN**

**Reuben Ian Irvine  
Laura Jane Prazsky**

**Applicants**

**and**

**Robert Benjamin Clement**

**Respondent**

**Property address: Land adjoining Ty'r Bedw, Llanfynydd, Carmarthen SA32 7TX  
Title number: CYM495645**

**Before: Judge Wear**

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**ORDER**

IT IS ORDERED that the Registrar shall cancel the Applicants' application for alteration made on 24 May 2016.

*Michael Wear*

**Dated this 17 September 2018**





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**DECISION**

*Adverse possession- whether there was factual possession- intention to possess-effect of the grant of a tenancy- s11 Land Registration Act 2002*

Cases referred to:

Powell v Macfarlane (1979) 38 P&CR 452

Street v Mountford [1985] AC 809

JA Pye (Oxford) Limited v Graham [2003] 1AC 434

Tracy Ann King v Suffolk CC (2016)

## **Background**

1. On 24 September 1991 the Applicants bought the freehold property known as Ty'r Bedw, Llanfynydd from Mrs Margaret Rabbets-Beaulieu. Ty'r Bedw at that point comprised about 0.844 acres on which were some dilapidated farm buildings.
2. There was, at that time, no vehicular access to Ty'r Bedw. The 1991 Conveyance granted the Applicants a right of way, with or without vehicles, over a track 10ft wide shown coloured green on the Conveyance plan. The green land has never been made up as a track and is, today (save for a short length at its western end), impassable with vehicles and would be very difficult and impractical for foot traffic. I base this remark on what I observed at the site visit which took place on 19 June 2018.
3. The first Applicant told me that prior to the purchase he was living in the vicinity of Llanfynydd and that he sought out Mrs Rabbets-Beaulieu to make her an offer for Ty'r Bedw. No estate agent was involved, and both the Seller and the Applicants used the same solicitor in the transaction: Messrs Dewi Price and Co.
4. To the south and west of Ty'r Bedw is the land claimed by the Applicants in this case. It comprises woodland with some open scrub and there are some further dilapidated farm buildings situated about mid-point on Nant-y-Fuwch. The parcel is called Nant-y-Fuwch. In 1991 there was a track running from the buildings at Nant-y-Fuwch in a westerly direction to the public highway which links Llanfynydd with Brechfa. There was no access to Ty'r Bedw for vehicles over Nant-y-Fuwch, and access on foot in 1991 was difficult.
5. The Applicants started to live at Ty'r Bedw in July 1992, and in the course of doing this they made use of Nant-y-Fuwch for storage and other activities as well as access. The Applicants say that they have thereby acquired a title to Nant-y-Fuwch through adverse possession.
6. On 10 March 2016 the Respondent was registered as freehold proprietor of Nant-y-Fuwch and other land with absolute title under title number CYM495645. He had bought the farm, of which Nant-y-Fuwch was part, from a Mr and Mrs Conner on 1 March 2016. There was some discussion between the parties about a sale by the Respondent of part of the land to the Applicants. Those discussions broke down and the Applicants made an application on 19 May 2016 to rectify title number CYM495645 by the removal from it of the land and buildings at Nant-y-Fuwch.
7. The Respondent objected to this and the matter was referred to the Tribunal on 21 February 2017. I conducted a site visit on 19 June 2018 and the matter was heard on the 20<sup>th</sup> and 21<sup>st</sup> June in Swansea. The Applicants were represented by Mr Sidoli of counsel and the Respondent was represented by Ms Pearce, also of counsel.

## **The application and description of the land**

8. The referred application is for rectification under paragraph 5 of Schedule 4 Land Registration Act 2002 which reads:

*The registrar may alter the register for the purpose of—*

- (a) correcting a mistake,*
- (b) bringing the register up to date,*
- (c) giving effect to any estate, right or interest excepted from the effect of registration, or*
- (d) removing a superfluous entry*

Paragraph 6 is also relevant:

- (1) This paragraph applies to the power under paragraph 5, so far as relating to rectification.*
- (2) No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor's consent in relation to land in his possession unless—*
  - (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake,*
  - or*
  - (b) it would for any other reason be unjust for the alteration not to be made.*
- (3) If on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration.*
- (4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.*

The Applicants say that they have been in adverse possession of Nant-y-Fuwch since the beginning of 1992. On this basis the paper title was barred in early 2004. Mr Sidoli does not rely on any adverse possession after that date. Title to Nant-y-Fuwch was at that point unregistered. Following the death of Mrs Rabbets-Beaulieu on 11 July 1996 freehold title to all of the land surrounding Ty'r Bedw (including Nant-y-Fuwch) was by an Assent dated 30 March 1998 vested by Susan Conner in herself on the death of Mrs Rabbets-Beaulieu. On 11 June 2010 the freehold title was first registered with absolute title under CYM496645 and on 3 May 2011 Mr and Mrs Conner were registered as joint proprietors.

9. The Applicants further say that their occupation meant they had an overriding interest with regard to the land in CYM495645. They rely on paragraph 2 of Schedule 1 of the 2002 Act for this. That interest preserves their rights against the Respondent and they rely on them to ask for alteration. There are, they say, no exceptional circumstances to mean that alteration/rectification should not be ordered.
10. The land claimed by the Applicants is shown edged red on the plan to the notice served by the Land Registry on the Respondent on 29 July 2016. It is at Tab 12 in the Respondent's disclosure bundle. In this decision references to Nant-y-Fuwch are to the land so shown and include the land described below as the Parking Area.
11. It is necessary to describe Nant-y-Fuwch as it is today in a little more detail. The land runs in a strip of varying width, from east to west. At its highest and easternmost point it is the width of a single track for vehicles. Proceeding westward, it descends steeply and broadens to include the bank on the southern boundary of the track and the bank, old

stream bed and further bank with fence on top of it on the northern side. Beyond the further bank, the first Applicant has laid a pipe taking water from the stream to a micro-hydro-turbine situated further west. This generates electricity for Ty'r Bedw.

12. The stream, when flowing, feeds a millpond which has a dam at its western end. The Applicants' claim includes the millpond. Proceeding westward, Nant-y-Fuwch increases in width. The track forms the southern boundary and an area of scrub with trees on it lies to the north. The scrub becomes more dense and the trees more numerous until the track opens into the yard and buildings, with the stream now flowing along the northern boundary of the claimed land. There are three buildings on the claimed land viz.
  - i. The barn on the northern side of the track
  - ii. The former house on the southern side of the track, and
  - iii. The pigsty at the western end of the yard.
13. At this point, the track curves gently to the north as it leaves the yard and then turns west to descend to the public highway. It is at this westerly turn that the right of way granted by the 1991 Conveyance follows the route of the Applicants' track as far as the public highway. Directly opposite to the entrance to Nant-y-Fuwch from the highway is a small parcel of land which the Applicants use as a car park and for storage of disused vehicles ("the Parking Area"). At its widest point, Nant-y-Fuwch measures approximately 230 ft and, as the crow flies, measures approximately 615 ft east to west. The Parking Area is approximately 40 ft by 50 ft.

#### Issues

14. The case raises the following issues:
  - (a) Are the proven acts of possession sufficient, and has the intention to possess been demonstrated by the Applicants and in both cases over a sufficient period of time?
  - (b) If the Applicants have a possessory title to Nant-y-Fuwch, was Mrs Conner bound by it on registration in 2010?
  - (c) If she was bound by it what was the effect of the registration of Nant-y-Fuwch in the joint name of the Connors in 2011?
  - (d) Is the claim by the Applicants to be regarded as an alteration or a rectification of CYM495645?
  - (e) If it is a rectification, is there anything in paragraph 6 of Schedule 4 which precludes it?

## Evidence for the Applicants

15. Both Applicants gave evidence at the hearing. The First Applicant told me he found Ty'r Bedw by looking at a map of the area and then going to look at the property itself. He ascertained that it belonged to Mrs Rabbets-Beaulieu who lived in Brechfa. The First Applicant said he sought out Mrs Rabbets-Beaulieu to make his offer to buy. Mr Rabbets-Beaulieu either was – or had been - the ghillie for the fishing on the River Afon Cothi. The river runs in a north/south direction, roughly parallel with the road at the western end of Nant-y-Fuwch. It is separated from the road by some fields that also belonged to Mrs Rabbets-Beaulieu.
16. Mrs Rabbets-Beaulieu and the First Applicant agreed a price of £4,000 for the sale and purchase of Ty'r Bedw. The First Applicant said that he was averse to debt. He paid cash for Ty'r Bedw, and although both parties used the same solicitor, they did not ever simultaneously attend at the office. The purchase was taken in the joint names of the Applicants.
17. The First Applicant said that the conveyance of Ty'r Bedw granted a right of way over an impassable route because the solicitor who prepared the document did not understand the position. The Second Applicant accepted and the First applicant did not dispute that Mrs Rabbets-Beaulieu was clear there was to be no access through Nant-y-Fuwch and paragraph 3 of the Conveyance expressly affirms this. The First Applicant described himself and the Second Applicant as being innocent at that time.
18. At the time of the purchase, Ty'r Bedw consisted of the original house, a dairy and a barn – all in dilapidated condition and uninhabitable. The access to Ty'r Bedw was open as far as the buildings at Nant-y-Fuwch. Thereafter, the land climbed steeply and there was no track. The First Applicant cleared trees and other growth in order to form the track that is there today. At the eastern end of Nant-y-Fuwch, where the track reaches Ty'r Bedw, a stream crossed the track. The Applicants made this fordable. This enabled two caravans to be towed up to Ty'r Bedw, and in July 1992 the Applicants started living in these while they restored the barn at Ty'r Bedw in which they now live.
19. The contours of the land at the eastern end of Nant-y-Fuwch meant that the First Applicant had to cut back the bank to allow vehicles to pass. Initially, a tractor was needed for access to Ty'r Bedw but with the Applicants' work to the track it became passable by vehicles with four-wheel drive.
20. The restoration work continued and by Christmas 2000, the Applicants were able to move into the house they had created. It was the Applicants' practice, beginning in September 1991, to bring building materials and other effects that they had bought or acquired up to the buildings at Nant-y-Fuwch where they would store them in the barn on the northern side of the track. The First Applicant described this as dry storage, although he accepted that it could not be so described today. Items stored included fencing materials, tools, bicycles, old fridges, washing machine for spares, vehicle parts, timber and cement.
21. The Applicants complied with the covenant in their conveyance requiring them to erect a stock-proof fence along the boundary of Ty'r Bedw within 3 months of purchase. At the entrance to Ty'r Bedw, in the approximate position of the ford, was a wire barricade to exclude animals. It could be unfastened to allow traffic to pass. There was also a gate

about halfway between the entrance to Ty'r Bedw and the buildings at Nant-y-Fuwch. Whenever the Applicants wished to leave Ty'r Bedw by car they had to stop on the higher side of this gate to get out of the car to open the gate, drive through and then shut it again. In the winter of 1992 this operation proved hazardous as the vehicle started to slip forward. As a result, the Applicants altered the fencing at Ty'r Bedw so that it connected with the fencing at Nant-y-Fuwch, thus merging the two plots.

22. The Applicants have constructed a further parking space at the entrance to Nany-y-Fuwch by excavating a part of the bank on the southern boundary. This accommodated one vehicle. This space is separated from the public highway by the unexcavated bank on which the Applicants have placed an oak sculpture. The First Applicant is skilled at chainsaw sculpting and has a qualification.
23. Returning to the buildings at Nant-y-Fuwch, there is behind the barn to the north a disused water wheel, presumably driven by water coming from the millpond. There is no evidence of this having happened recently. The mountings and bearings for the wheel are no longer there. In 1992, the Applicants attempted to restore the wheel to working order. They had assistance from their neighbour, Mark Wintel, but this came to nothing. There was evidence that the wheel might have driven machinery in the barn because there was an abandoned drive shaft next to the wheel that could have served this purpose.
24. The Applicants told me they had, over the years since 1991, parked cars in the yard at Nant-y-Fuwch and stored wood and building materials there. At the time of my site visit, a disused Range Rover and a disused Citroen Xsara were parked there, although the evidence was that the latter arrived in 2011.
25. As regards the Parking Area, the Applicants' practice was to park their un-roadworthy four-wheel drive vehicle there so that it could be used to take provisions, building materials, or their children up to Nant-y-Fuwch or Ty'r Bedw as needed. This started in September 1991 but became a regular occurrence after July 1992 when the Applicants took up residence at Ty'r Bedw. They also left scrap metal on the Parking Area while it awaited collection as well as, from time to time, caravans, boats and vehicles kept for spare parts.
26. The First Applicant was a truthful witness but he did not help himself by, from time to time, questioning the questioner rather than answering the questions. There was medical evidence that this habit was attributable to the First Applicant's autistic personality. I make allowance for this. I also accept the Applicants have chosen a lifestyle that might not appeal to others. In effect, they have – over the years, and by their own efforts and with a limited budget – turned Ty'r Bedw into a private family residence where energy and water required for day to day living are derived from local sources. This was referred to as living 'off grid' by some of the witnesses.
27. Even so, the First Applicant was perhaps a little sensitive to some of the suggestions put to him in cross-examination. The Second Applicant gave her evidence calmly and was a credible witness. I accept everything both of them said regarding their activities at Nant-y-Fuwch. They were challenged on certain other points of detail, and I will deal with these when making the findings of fact.

28. The Applicants called as witnesses:

- (a) Mr J Burgess
- (b) Mr Anthony Wintel
- (c) Mr Mark Wintel
- (d) Ms Rosie Hemming
- (e) Ms Elaine Forde

29. Mr Burgess gave evidence that he had helped the Applicants by taking materials from the buildings at Nant-y-Fuwch up to Ty'r Bedw in 1992 and subsequently. Mr Burgess is a nearby farmer, and it was his tractor that was needed to move the larger items up to Ty'r Bedw. I accept his evidence in full.
30. Anthony Wintel and Mark Wintel both gave evidence that corroborated the Applicants' account of how Ty'r Bedw was reached from the public highway and their practice of storing materials at Nant-y-Fuwch. I accept their evidence. Ms Rosie Hemming is a friend of the Second Applicant and corroborated her account of the use made of the buildings at Nant-y-Fuwch. I accept her evidence. Elaine Forde gave evidence about Nant-y-Fuwch but her knowledge did not pre-date 2008. Given that the Applicants claim to have acquired their title by 2004, much of what she had to say did not help with the issues.
31. I should also refer to the Applicants' offer to purchase the land adjoining Nant-y-Fuwch. The Applicants offered, by letter, to buy a part of the land surrounding Ty'r Bedw on 24 November 2012 (page 150 of the Trial Bundle). The parcel in question, as far as can be judged from the offer letter, has at its southern boundary the northern bank of the stream running through Nant-y-Fuwch. It is impossible to say from the quality of the plan that the offer related to the land at Nant-y-Fuwch. That offer was not accepted and there was a second offer by a letter dated 25 April 2014 – this time for 35 acres. This was not accepted. Another letter, this time to the agents for Mr and Mrs Conner, followed on 2 November 2014 for 21.634 acres. Finally, a letter dated 1 August 2015 was sent to the Respondent by the Applicants making an offer. The Respondent was known by the Applicants to be interested in the Conners' land by this time.
32. Ms Pearce argued that these offers to purchase meant that the Applicants were estopped from denying that the Conners had a better title to those parts of Nant-y-Fuwch to which the offer extended. I can deal with this argument quite shortly.
33. In my judgement, the Respondent has not demonstrated on the balance of probabilities that the Applicants' offer related to land at Nant-y-Fuwch. This is so notwithstanding the letter from Lllys Cennen for the Respondent dated 14 February 2017 to the Land Registry protesting that there was an "overlap" between that land and the offer land. The plan with that letter shows two parcels coloured red. The eastern one is not within Nant-y-Fuwch and the quality of the plans is not sufficient to show that the western one (insofar as it lies south of the bank of the stream) was within the offer land.



34. Even if an overlap had been shown, the offer was made at a time when, if the Applicants are correct, the paper title to Nant-y-Fuwch had been extinguished: section 17 Limitation Act 1980. It would be impossible to accept that the representation implicit in the offers to purchase had the effect of vesting a freehold title in the Respondent or his predecessor.

### **Case for the Respondent**

35. The Respondent contracted to buy the Conners' land on 15 February 2016. The land was described by reference to title number CYM495675 thus including Nant-y-Fuwch. The price, eventually agreed, was £190,000 and the Respondent completed his purchase on 1 March 2016.
36. The Respondent told the Tribunal that he had been living away and, buying the Conners' land meant that he could return to Wales to die and be buried there. He had met the Conners socially and they gave him the Agent's particulars of the land being sold. The Respondent himself said he had no contact with the Selling Agents, Llewellyn Humphries.
37. The Respondent acknowledged that in August 2015 there were discussions with the Applicants about the sale or sub-sale of part of the land to them. They culminated in a meeting at the offices of the Respondent's solicitors, Messrs Margraves, on 9 October 2015. The Respondent was not at that meeting and Margraves note of what happened was not accepted by the Applicants. The Respondent in evidence said that the tone of the Applicants regarding the proposed sub-sale became threatening. As a result, he did not wish to proceed.
38. The inter-solicitor correspondence and other documents surrounding the Respondent's purchase were in evidence. The answers to preliminary enquiries given by Mrs Conners on 15 May 2015 at question 6 state:
- "A right of way exists over the subject property to Tyr Bedw a neighbouring property over the trackway shown on the plans attached to the Sales details."
- In answer to enquiry 7: "The owner of Tyr Bedw has created a right of way over this track by his long use of this route to access his property."
- In answer to enquiry 7(b)(i) about occupation of the property, the response is: "The property is currently vacant."
39. The Sales Particulars prepared by Llewellyn Humphries were in evidence and they do not refer to any adverse right of way through Nant-y-Fuwch although the plan with them has the word 'track' on it between the buildings and the public highway.
40. The Respondent did not make a convincing witness. He was asked whether he inspected the land before buying and eventually said he thought he may have walked over it. The dispute in this case is important to all parties and the Respondent's absent mindedness is difficult to accept.

41. The Respondent denied seeing evidence of the Applicant's presence on the land, noting merely that there was rubbish on part of the land.
42. The Respondent denied ever speaking to Llewellyn Humphries but they must have had had contact with him to complete the personal details and the details of his solicitor on the Memorandum of Sale which they drew up on 12 March 2015. The Respondent said that his solicitors provided Llewellyn Humphries with the information in the Memorandum, which Llewellyn Humphries then sent to the solicitors for each side but not, he said, to himself. There is correspondence between Llewellyn Humphries and Margraves in March 2015 (tab 12 of the Respondent's disclosure bundle) which demonstrates that the Memorandum of Sale was prepared by Llewellyn Humphries and sent to Margraves. That letter states that a copy of it has been sent to all parties, which I would read as including the Respondent. These inconsistencies mean that the Tribunal approaches the Respondent's evidence with caution.
43. The only witness called by the Respondent was Emyr George who gave evidence relating to his occupation as a tenant of Nant-y-Fuwch and the surrounding land. There is little of relevance in his evidence, given that his occupation did not begin until September 2005, after the Applicants say they had extinguished the freehold paper title. However, he did explain that he had taken over the grazing from a Mr Eirwyn Dyer who had done some patching of the fences. Mr George continued this process. Mr George was a truthful witness and I accept his evidence that he grazed the land in the lease, so far as it was practically possible, with sheep and cattle.
44. Mr Dyer made a Witness Statement in which he said he had used the land surrounding Ty'r Bedw for grazing sheep and cattle pursuant to a verbal grazing licence from Mrs Rabbets-Beaulieu and thereafter in 1997 from Mr and Mrs Conner. Mr Dyer did not attend the hearing and very little weight can be attached to his statement in the absence of cross-examination. There is, however, some supporting evidence. First, there is an email sent by Mr Conner to the Respondent's solicitor on 4 January 2016 in connection with the sale to the Respondent. It states that the Connors "inherited in 1997 and the land has always been let." Secondly, there are entries in a diary kept by Mrs Beryl Dyer which record that the rent was paid on the March quarter day in 2005 for the land at Nant-y-Fuwch. Thirdly, there was evidence from Mr George that he succeeded Mr Dyer in the grazing. I will return to this when making the findings of fact.
45. There were other Witness Statements in support of the Respondent's case by a Julia Wright and a Dimitri Tserenia. Neither of these addresses the issue of adverse possession. They take the matter no further forward.

### **Findings of Fact**

46. The Tribunal makes the following findings:
  - (a) The Tribunal accepts the account of events given by the Applicant set out at paragraphs 15-25 of this Decision. They were challenged in cross-examination about grazing and fencing at Nant-y-Fuwch and the parking on the Parking Area.
  - (b) On the balance of probabilities it is more likely than not that there was a grazing agreement with Mr Dyer, which was in force prior to October 2005. It extended to

all the land adjoining Ty'r Bedw as shown on the plan marked ED1 attached to Mr Dyer's statement. This includes all of Nant-y-Fuwch.

- (c) It is impossible to say from the evidence when the grazing agreement began but it is more likely than not that it was on foot by 1997 after Susan Conner became interested in the land as Executor. I base this on the statement made in the email dated 4 January 2016 (tab 12 of the Respondent's disclosure bundle). It is true that Mr Conner refers to "inheriting in 1997" but I do not attach importance to the fact that a lay client in writing to his solicitor does not draw a distinction between the date of the Will and the later Assent.
- (d) Neither side called either Mr or Mrs Conner as a witness and they made no witness statement. However, the Applicants in their evidence said that Mr Dyer did graze the adjoining fields and was a tenant of them. I accept their evidence but I would not expect the Applicants to have any knowledge of the detail of the grazing agreement between their neighbour and an adjoining farmer.
- (e) The Applicants were asked about animals foraging on Nant-y-Fuwch. They said that they had never seen any after they put up the fences enclosing Nant-y-Fuwch and Ty'r Bedw in late 1992. I prefer the evidence of Mr George that his animals grazed the land in front of the former house on Nant-y-Fuwch during the currency of his lease. Be that as it may, it does not quite meet the point.
- (f) The question is whether the proprietor of the adjoining land granted the possessory rights to another at a time when the Applicants claimed to be in adverse possession of Nant-y-Fuwch. By a fine margin, I find that they did.
- (g) The impression from the evidence given on all sides is that the Conners only took an interest in their land when there was a financial consequence. This happened when they altered the Council Tax band for the buildings at Nant-y-Fuwch in April 2000 and secondly when they submitted an application for planning permission to develop the buildings at Nant-y-Fuwch in 2008. It is a reasonable inference to draw that they were content for the land to be grazed pursuant to an informal arrangement for which they were paid and that they did not trouble to draw a distinction in 1997 between Nant-y-Fuwch and the remainder of their land.
- (h) The failure of Mr Dyer to attend for cross-examination may be attributable to his age and nervous disposition, as the Applicants have noted (see page 207 of the Trial Bundle). However, I reject the Respondent's argument that the Applicants have waived their right to cross-examine Mr Dyer, had he attended.
- (i) Ms Pearce submitted that the Applicants' letter dated 7 October 2017 (page 208 of the bundle) meant that Mr Dyer's statement should be admitted as agreed evidence. That letter states that the Applicants are prepared to forego their opportunity to cross-examine Mr Dyer on the basis that he is a vulnerable individual who ought not to be forced to attend the Hearing. Mr Sidoli submitted that the letter did not go so far as to say the evidence was agreed. He drew attention to the email dated 12 June 2018 from the First Applicant to the Tribunal, which noted that there had been no response to the October letter and to a letter from the Applicants dated 13 June 2018 in which they require the attendance of Mr Dyer.

- (j) Even if it was agreed evidence, it is open to a party to resile from that position although there may be a costs consequence of doing so. The Tribunal accepts that in October 2017 the Applicants were conducting their own case as litigants in person and that their concern for Mr Dyer as a neighbour may have given the October letter the wrong emphasis. I do not think that it is possible to spell out of that letter any intention on the part of the Applicants to be bound for all time by the statements made by Mr Dyer. In my judgement, it was open to them to require the witness to attend for cross-examination on passages in his statement with which they did not agree.
- (k) As regards fencing, the second Applicant accepted that Nant-y-Fuwch was fenced as far as the mill pond by the neighbouring farmer by the time the Applicants bought Ty'r Bedw. I accept the Applicants' evidence that they fenced the northern side of the mill pond as far as the entrance to Ty'r Bedw in the winter of 1992. The Applicants were asked about invoices and receipts evidencing their purchase of fencing materials. They had none, but I accept that they would not necessarily have obtained the materials from a traditional retail outlet or, if they had, would have thought to keep any of the paperwork.
- (l) The Tribunal also finds that they erected sheep netting on the southern boundary of the track from the mill pond as far as the entrance to Ty'r Bedw. My observations at the post hearing visit and the remarks of the Land Registry's surveyor in his report of the 15<sup>th</sup> June 2016 bear this out.
- (m) The Parking Area was used by the Applicants from the start of their occupation of Ty'r Bedw. Nant-y-Fuwch is some distance from the nearest settlement at Brechfa. In September 1991 the Applicants had a two year old child called Perry. Their second child Jonah was born in 1992. The Tribunal finds that they could only reach Ty'r Bedw by using a vehicle that they would at that time park in the Parking Area. It is also accepted that they excavated the hedge/bank between the Parking Area and the public highway when they first started using it in 1991. Subsequently, in 2002, they used the spoil from a bank that they excavated on the other side of the highway to backfill part of the Parking Area and extend its useable service area.

#### **Legal Issues: adverse possession**

47. In his closing statement, Mr Sidoli urged the Tribunal to look at things "in the round". He characterised the purchase of Ty'r Bedw as the sale by an eccentric old lady to an eccentric couple who all used the same solicitor. The parties were, he said, naïve. This may be correct but it is not possible to accept as a result that the usual test for title by adverse possession should not apply. There was little dispute between the parties as to the applicable principles.
48. The Applicants have to show that they have "*dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner*" per Lord Browne-Wilkinson in *J A Pye (Oxford) Limited v Graham* [2003] 1 AC 434 at paragraph 36. The Judge went on at paragraph 40 to refer to:

- i. a sufficient degree of custody and control and
- ii. an intention to possess  
as amounting to ordinary possession

He also noted *ibid.* that “*such intention may be, and frequently is, deduced from the physical acts themselves*”.

49. Mr Sidoli submitted, correctly, that there was no question of consent in the present case. There is a reference in the letter dated 3<sup>rd</sup> August 2015 from Messrs BWL, solicitors for the Connors that the Applicants had permission to pass through Nant-y-Fuwch pending the construction of the right of way granted by the 1991 Conveyance. I prefer the Applicants’ sworn testimony on this point that no permission was given.
50. There is more difficulty with the question of ordinary possession. The Tribunal cannot accept that placing sculptures and crystallised stones or planting gunneras or flag irises or placing rubbish bins on the land of another takes the matter of possession any further forward. The words of the judge in *Powell v Macfarlane (1979) 38 P & CR 452 at pages 470-471* must be borne in mind: “factual possession signifies an appropriate degree of physical control”. *Powell* was approved without qualification on this point by Lord Browne-Wilkinson. In my judgement the acts recited could not be characterised as physical control. Still less do they support an intention to possess.
51. It is likewise as regards to the barn, the pig sty and the deserted house. The impression of the actions of the Applicants was that they would use the buildings for storage or, in the case of the pig sty, for their children to play in for so long as it suited them and it was safe and convenient to do so. In the case of the pig sty the activities ceased when it fell into disrepair and became dangerous. The barn initially provided dry storage for cement but as it deteriorated it could no longer be used for that purpose. As regards the house, the Applicants salvaged quarry tiles and tongue and groove boards and some stone from it. They used this at Ty’r Bedw save for the boards which they gave to a Mr Robert Moore in 1998 (page 225 of the bundle).
52. In the passage from *Powell* approved of in *Pye* at paragraph 41 Slade J emphasised that everything depended on the particular circumstances. He went on: “...broadly I think that 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 no one else has done so”.
53. The particular circumstances of the present case are indeed unusual but in the end the test of the occupying owner has still to be applied. In my judgement the occupying owner of the buildings at Nant-y-Fuwch would have taken steps to preserve them and ensure their continued utility. There is no evidence that the Applicants did this. To the contrary, the removal of stone and other material points away from factual possession and away from an intention to possess: it indicates rather an intention to appropriate the materials forming part of the land for the Applicants’ use elsewhere.
54. Mr Sidoli relied on *Tracy Ann King v Suffolk County Council (2016)*, a decision of Judge McAllister sitting in the First-tier Tribunal. In that case a parcel of woodland measuring 38 meters by 32 meters adjoining the Claimant’s dwelling, number 1 Chilton Grove

Bungalow, was enclosed by the erection of a wire fence by the Claimant's partner. Judge McAllister found that the Respondent Council had lost their title through adverse possession. She remarked, "*acts of possession of woodland are by their nature going to be relatively minor*".

55. The present case is concerned with a mixture of woodland, open scrubland and buildings. In my judgement, the *Tracy Ann King* case does not help with the question of whether there has been factual possession of a building. Secondly, that case does not lay down a rule that other operations such as felling or silviculture are irrelevant when it comes to possession of woodland. The case does not detract from the occupying owner test, which still has to be applied in all cases of adverse possession.
56. Mr Sidoli relied on the Applicants having fenced Nant-y-Fuwch (except the Parking Area) in with Ty'r Bedw in 1992. He said that it made no difference whether a fence was erected or an existing fence was simply maintained. In *Powell*, Slade J at page 478 pointed out that the enclosure of land by a newly constructed fence was one of the acts that unquestionably points to an intention to possess. The Applicants, however, did not re-fence the whole of the disputed land themselves. On their own case (page 229a of the bundle) they simply connected to Ty'r Bedw to the existing fence surrounding Nant-y-Fuwch. The second Applicant accepted that the fence on the northern boundary as far as the mill pond was erected by those who had previously farmed in the area. Ms Pearce relied on the commentary at paras 13-18 of *Jordan: Adverse possession 2nd edition*. The distinction there drawn is between maintenance of a boundary and conduct in relation to a boundary that goes beyond this. In my judgement, Mr Sidoli's submission cannot be supported. When evaluating the intention to possess there is a significant difference between a case where two adjacent parcels are simply merged by a minor adjustment of a fence and a case where the whole is re-fenced by the adverse possessor. It follows that the fencing undertaken by the Applicants in this case is of limited value in ascertaining whether an intention to possess has been demonstrated.
57. The Applicants submitted that their restoration of the disused track above the buildings at Nant-y-Fuwch as far as Ty'r Bedw was evidence of physical custody and control supporting their factual possession. The evidence was that the bank alongside the track had to be cut back at certain points to enable vehicles to pass. The Applicants relied on the *Tracy Ann King* case to argue that cutting footpaths in woodland is sufficient to demonstrate factual possession. It is true that the Judge in that case (at paragraph 25) attached importance to the creation of established paths, but the principle remains that exclusive physical control is gauged by reference to the nature of the land and the manner in which land of that nature is commonly used or enjoyed (see *Pye* at paragraph 41).
58. Ms Pearce submitted that the Applicants' actions in this regard were referable to the establishment of a right of way. She relied upon a passage in *Jordan* at paragraph 9-85 seq. The arguments are finely balanced but in my judgement the actions of the Applicants were all to the end that Ty'r Bedw would have a proper access over and through Nant-y-Fuwch. As the second Applicant said in cross-examination: "*it was all about enjoying where we live*". I therefore accept Ms Pearce's submission that use and enjoyment of the track from Ty'r Bedw to the east of the yard at Nant-y-Fuwch (point K on the plan at page 19 of the bundle) was equivocal. From point K to the public highway, the Applicants had of course a right of way pursuant to the 1991 Conveyance. Nothing

they did on this strip of land could be regarded as the actions of the occupying owner rather than someone exercising their right of way.

59. This leaves the Parking Area. It was obvious from the site visit that from the outset the usual way of reaching Nany-y-Fuwch would be, and would only be, by vehicle. It was also obvious that an ordinary car for domestic use would not reach Ty'r Bedw and, although it might reach the buildings at Nant-y-Fuwch, there would be a risk of damage in doing so.
60. In these circumstances, I accept that the Applicants used the Parking Area for parking vehicles continuously, as did their guests, invitees and other visitors. It is also accepted that much of the time there was four-wheel drive transport in either the parking area or the vicinity to ferry people and materials to the buildings and thence to Ty'r Bedw and back.
61. I also find that in 2002 the Applicant used the spoil from an area they excavated on the other side of the road at point E1 to backfill and extend the parking surface in the parking area. They also in 1991 excavated a length of the bank on which the hedge was planted dividing the parking area from the public highway. I reject the criticism made in the Applicants' cross-examination that all they did was create a layby for the use of anyone, particularly visiting fishermen. It was instructive that no witness was called to support this practice. The conclusion is that the Applicants made beneficial use of the Parking Area just as an occupying owner might have done.

#### **Grazing Agreement**

62. This conclusion means that it is necessary to consider the impact of the grazing agreement entered into with Mr Dyer. The Tribunal has found that there was such an agreement on foot in 1997. The evidence does not show whether it was in place at any earlier time. The plan with Mr Dyer's statement includes the parking area. Ms Pearce drew the Tribunal's attention to a passage in Megarry and Wade at paragraph 35-026 where the authors state "*although the tenant's title may be barred after 12 years possession, the landlord's title is not assailable by the adverse possessor until after the term has determined*". See also *Ching Ping Kwam v Lam Island Development Co Limited* [1997] AC38 at page 46.
63. In his witness statement, Mr Dyer described his interest as a verbal grazing licence. That statement was untested by cross-examination. When the supporting evidence is looked at, it is in my judgement more likely than not that exclusive possession was granted to Mr Dyer. The Applicants described him as the tenant. There was no suggestion from any witness in this case, whether examined or not, that there had been any sharing of possession with the Connors or with any other grazier. If exclusive possession was granted then a tenancy would have come into existence, notwithstanding that one of the parties calls it something else: *Street v Mountford* [1985] AC 809.
64. On the evidence, the Applicants' adverse possession of the Parking Area began before Mr Dyer's grazing agreement took effect. Mr Dyer would have seen from an inspection that the Parking Area was in the possession of another at that time. In my judgement, this

makes no difference. The Conners had no doubt ceased to be in possession of the Parking Area but in 1997 they still had the right vis-a-vis the Applicants to grant legal possession to another and this is what they did. Mr Dyer thereby acquired a better right to possession than the Applicants and the Applicants had not extinguished it by 2004

65. The evidence establishes that Mr Dyer's term ended when Mr George took his lease of the fields including Nant-y-Fuwch on the 1<sup>st</sup> October 2005. Accordingly, in my judgement, there has been no adverse possession within the 1980 Act against the freehold title to the Parking Area.

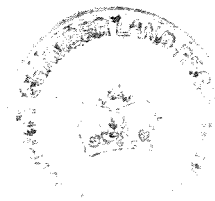
#### **Other issues**

66. This conclusion makes it unnecessary to consider whether the Respondent was bound by the Applicants' interest when he became registered as a proprietor on the 10<sup>th</sup> March 2016. However, the point was discussed at the hearing and I shall briefly refer to it. On the first registration of Mrs Conner as freehold proprietor of the Parking Area in 2010 she would have held, pursuant to section 11 Land Registry Act 2002, subject to "interests acquired under the Limitation Act 1980 of which [she] had notice". I find that she had notice of the Applicants' parking in the Parking Area. This follows from her letter of the 19<sup>th</sup> June 2000 to the Applicants protesting at the practice (see tab 1 of the Respondents disclosure).
67. On the 3<sup>rd</sup> May 2011 Mr Conner was registered as proprietor of CYM495645 jointly with his wife. No price is recited in the register as having been paid at the time. The result is that section 28 Land Registration Act 2002 applies and the Conners would have held jointly subject to the interest acquired under Limitation Act 1980.
68. Further, the Tribunal would have held that the Applicants were in occupation of the Parking Area at the time the Respondent was registered with the result he was bound by their rights. This was not in the end disputed by Ms Pearce. I prefer to make no finding on the question of whether there would be an alteration or a rectification or whether either would have been precluded by paragraph 6 of Schedule 4. This does not arise on the findings which have been made.

#### **Decision**

69. There will be an order directing the Registrar to cancel the Applicants' application for alteration of the register of CYM495645.

*Michael Wear*



**Dated this 17 September 2018**