

[2018] UKFTT 0612 (PC)

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

REF/2017/0631

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

B E T W E E N:

CAROLINE JANE BOSTOCK

Applicant

and

DANIEL JAMES WINDER

Respondent

**Property Address: Land adjoining Daisy Bank Farm, Alders Lane, Tansley,
Matlock, Derbyshire DE4 5FB.
Title Numbers: DY505638**

Before: Mr Max Thorowgood sitting as Judge of the First-Tier Tribunal

**Sitting at: Derby Magistrates Court, The Court House,
St Mary's Gate, Derbyshire DE1 3JR
On: 4th July 2018**

Applicants' representation: In person

Respondents' representation: In person

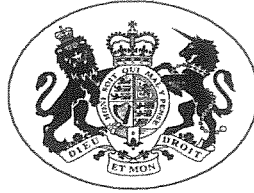
1. Introduction

- 1.1. I had the benefit of viewing the site on the afternoon before the hearing of this matter in company with the parties. The findings which I set out below are informed by my observations during the course of that site visit.



2. The application

- 2.1. This reference concerns the Applicant's application dated 17th August 2016 for first registration of the small parcel of unregistered land which is shown coloured yellow on the plan annexed hereto, "the Disputed Land" and "the Plan".
- 2.2. The Disputed Land comprises a small, roughly rectangular, area, 3' x 8'9" x 4' 6" which is enclosed on three side from the Respondent's land by a rough stone wall ("the Wall"). The Disputed Land is open to a larger area shown coloured red on the Plan which adjoins the Applicant's cowshed and which admittedly forms part of the Applicant's title.
- 2.3. It is the Applicant's case that from 1970 at least (and very probably for a long time before that) until about 2004/5, the Wall supported a cast iron water tank which collected run off from the roof of the cowshed ("the Water Tank"). It is further the Applicant's case that the water thus collected was used to supply the water troughs on the Applicant's land particularly within the cowshed.
- 2.4. The Applicant's parents bought Daisy Bank Farm in 1970 and she has been familiar with the land since then. She moved away to live in Matlock Bath when she married but still visited reasonably frequently. She returned to live at the farm full-time when she inherited it upon her mother's death in 2014.
- 2.5. At the time of her parents' purchase there was no mains water supply to Daisy Bank Farm. Water came either from the well in the farmyard, the water tank which collected the run off from the roof of the cowshed in the farmyard or from the Water Tank.
- 2.6. Shortly after they completed their purchase, the Applicant's parents installed a mains water supply and from that point on the Water Tank, which had formerly been integral to the farm's functioning, fell into disuse. It became corroded, started to leak and eventually had to be removed.
- 2.7. The Respondent acquired his title to the adjoining land from Mrs Hilda Allsopp in 2004 but he has lived nearby all his life. The plan to the transfer of the Respondent's title to him by Mrs Allsopp is of poor quality but it seems to show the Disputed Land within the land being conveyed to him by Mrs Allsopp because the line of the boundary at the material point appears to be straight. This is consistent with the various OS plans which the Respondent produced in support of his case all of which indicate that the boundary between the Applicant's land and the Respondent's land continued in a straight line to the corner of the Respondent's field passing enroute along the western face of the Applicant's cowshed.
- 2.8. The Respondent's title was registered upon its transfer to him by Mrs Allsopp and it would appear that the Disputed Land was deliberately excluded from the land within his title, as it is shown on the title plan produced upon first registration. I therefore surmise that the Land Registry must have surveyed the boundary upon the application for first registration being made and identified the fact that the Disputed Land was enclosed within the Applicant's parents' land by the Wall at that time. The Respondent raised no objection to this exclusion of the Disputed Land from his title at that point. He says that he was unaware of it at the time.



- 2.9. After he had purchased his land the Respondent applied for and obtained planning permission to drain and level the land which adjoins the Wall for the purpose of constructing a new barn in that area which had previously been very boggy and had been used for keeping ducks.
- 2.10. It is this former use of the land upon which the Respondent relies as the basis for his objection to the Applicant's application. It is his case, based upon what he was told by Hilda Allsopp before her death and in reliance upon a written statement and documents with which she provided him, that the Wall had been constructed by the Applicant's parents' predecessor in title, Ted Hearn, as a means of access to the wet area (on which the Respondent has since constructed his barn). He says that Mrs Allsopp and her husband agreed by a written, "Document of Intent", to let that land to Mr Hearn for the purpose of developing a duck breeding enterprise and that the agreement included a permission to construct an access point from Daisy Bank Farm to Barn Close. It is his case, based on Mrs Allsopp's statement, that Mr Hearn did create a means of access through the Wall. Hence, he says that Mr Hearn's use of the Disputed Land was with the consent of Mrs Allsopp. Mrs Allsopp's letter also says that she mentioned the fact that the boundary should be straight to Philip Gill, the Applicant's father, and that he never used the Disputed Land.

3. The question which I have to consider

- 3.1. The question which I have to decide is whether the Applicant can show that she, and/or her parents before her, have been in adverse possession of the Disputed Land for a continuous period in excess of 12 years. If she can, because the title to the Disputed Land is unregistered, it is the combined effect of sections 15 & 17 Limitation Act 1980 that the title which Mrs Allsopp purported to convey to the Respondent's title has been extinguished and that the Applicant is entitled to be registered as the proprietor of the Disputed Land as she claims.
- 3.2. The test to be applied in determining whether a person has been in adverse possession of land was laid down in the decision of the House of Lords in *J.A. Pye (Oxford) Limited v Graham* [2003] 1 AC 419 approving the analysis of Slade J in *Powell v MacFarlane* (1977) 38 P & CR 452.
- 3.3. It is generally said that there are two elements to the dispossession of the owner of a paper title by an adverse possessor. The first is factual possession, the second is that the person in factual possession should also have an intention to possess the land.
- 3.4. As to factual possession, Lord Browne-Wilkinson approved this statement of Slade J:

“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.”

The necessary intention to possess, he said, was:

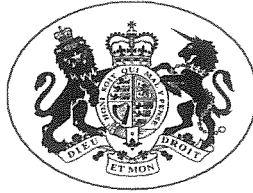
“... an “intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow”.”

- 3.5. However, it is also plainly of some importance, as Lord Hope said, to understand what is meant by the word “*adverse*” in this context. He explained the position as follows:

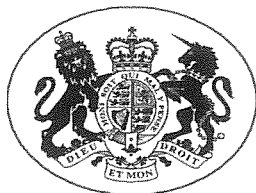
“69. At first sight, it might be thought that the word “*adverse*” describes the nature of the possession that the squatter needs to demonstrate. It suggests that an element of aggression, hostility or subterfuge is required. But an examination of the context makes it clear that this is not so. It is used as a convenient label only, in recognition simply of the fact that the possession is adverse to the interests of the paper owner or, in the case of registered land, of the registered proprietor. The context is that of a person bringing an action to recover land who has been in possession of land but has been dispossessed or has discontinued his possession: paragraph 8 of Schedule 1 to the 1980 Act. His right of action is treated as accruing as soon as the land is in the possession of some other person in whose favour the limitation period can run. In that sense, and for that purpose, the other person's possession is adverse to his.”

- 3.6. Thus, the possession of a person who has gone into possession with the permission of the owner of the land is not *adverse* to that owner, it is lawful and consequently does not give rise to a right to obtain possession in respect of which a period of limitation could run. Time would only begin to run for the purposes of the Limitation Act if notice to quit were given to determine the permission or the licence or tenancy expired in accordance with its terms so that a right to obtain possession accrued.

- 3.7. The questions which I have to consider therefore are:



- 3.7.1. Have the Applicant and/or her parents been in factual possession of the Disputed Land for any continuous period of 12 years since they acquired it in 1970 ? That is to say, were they in physical control of the land ?
- 3.7.2. Did they at the same time have the intention to possess the land to the exclusion of all others so far as the processes of the law would allow ?
- 3.7.3. Was that possession adverse to the interests of Mrs Allsopp and/or the Respondent ?
- 3.8. The first and third questions are related in this case because it is the Respondent's case that the Wall was constructed by Mr Hearn for the purpose of enabling his ducks access the wet area.
- 3.9. The Applicant's evidence was very clear. For so long as she has had knowledge of the Disputed Land it has been more or less in the condition in which I saw it, although the Water Tank was removed in about 2007 and the Wall was repaired somewhat after it collapsed into the Respondent's field when he levelled and drained the ground in order to construct his barn. It was never used as a means of access to the wet area in her parents' time and, so far as she could tell, it never had been. She and her parents controlled the Disputed Land and used it as part of the shed for the purposes of storage together with the land shown coloured red on the Plan.
- 3.10. Insofar as Mrs Allsopp's evidence contradicted the Applicant's evidence, I remind myself that she could not attend to be cross-examined and that her letter does not say that the Wall was constructed for the purpose of giving access to the wet area for the ducks, nor does her letter identify precisely the area which she says was constructed with her permission for the purpose of forming the access. Her letter does not address the pre-existing presence of both the Wall and the Water Tank, which the Applicant contends was of long-standing, and does not explain how in that event any consent to the construction of the access could have rendered Mr Hearn's possession of the land which had formerly been enclosed by the Wall consensual. The Respondent did produce a plan of the area but that plan was produced by him, not Mrs Allsopp, and Mrs Allsopp's evidence did not refer to it.
- 3.11. In relation to this latter point, the Respondent admitted that the Water Tank had been supported by the Wall but said that the Wall had recently been repaired so as to remove any evidence of its former use as a point of access for Mr Hearn's ducks to the wet area. He also pointed out, correctly as it appeared to me following a reasonably careful inspection during my site visit, that there was no evidence that the Water Tank fed the troughs in the Cowshed. That may well be but is really nothing to the point. The only relevant questions are whether the Wall supported the Water Tank and enclosed the Disputed Land in such a way that the only effective means of access to it was controlled by Daisy Bank Farm. It may possibly be that Mr Hearn did create a means of access through the Wall, although I think that is unlikely because he would not have wished to destabilise the Water Tank



which was important to him because of the Farm's limited water supply, but, if he did, I do not consider that that would, without more, have rendered his possession of the Disputed Land consensual. It is more likely that any access was constructed elsewhere, in which case the question whether Mr Hearn's and/or the Applicant's parents' possession of the Disputed Land was by consent would fall away entirely.

- 3.12. But even if I am wrong about that, it seems to be clear from Mrs Allsopp's letter that any consent regarding the use of the Disputed Land as a means of access ceased when Mr Hearn sold Daisy Bank Farm to Mr Gill. Mrs Allsopp says that when Mr Hearn sold Daisy Bank Farm to the Applicant's father she and her husband took on his ducks and that she told Mr Gill that the boundary in the vicinity of the Wall should be straight. She says that she explained all the details of the arrangement with Mr Hearn and that, thereafter, Mr Gill did not use the Disputed Land. There can therefore be no doubt that if thereafter Mr Gill was in physical control of the Disputed Land with the intention to possess it, any possession would have been adverse to the interests of Mrs Allsopp and time, for the purposes of the Limitation Acts, ran against her.
- 3.13. I am satisfied that Mr Gill and Mr Hearn before him were in physical control of the Disputed Land and that they used it as an owner would. I am willing to accept that Mrs Allsopp mentioned to Mr Gill her belief that the boundary in the vicinity of the Wall should be straight but it seems to be clear that Mr Gill continued to use the Wall and the land which it enclosed in precisely the same way as it had been used for many years prior to that and that it was his intention to possess it. I find that if Mrs Allsopp had sought possession of the Disputed Land Mr Gill would have contested her claim on the same grounds that the Applicant now applies to be registered as the proprietor of it, namely, that the Wall and the Water Tank which it supported had been on the land for many, many, years with the effect that the Disputed Land had been within the exclusive control of Daisy Bank Farm.

4. Conclusions

- 4.1. My conclusions are therefore as follows:
- 4.1.1. That the Wall supported the Water Tank and that that arrangement had been in place for many years, certainly from Mr Hearn's time and probably before. It is clear that the Wall has relatively recently been repaired but I find that its position has not changed since before 1970.
- 4.1.2. It was the effect of the Wall to enclose the Disputed Land within Daisy Bank Farm so that the owners of that land from time to time were in exclusive physical control of it and that they regarded it as part of their land.
- 4.1.3. If and insofar as Mrs Allsopp gave Mr Hearn permission to construct a means of access through the Wall to the wet area, that permission did not relate to his possession of the Disputed Land and in any event did not



continue after his sale to Mr Gill. From that point on Mr Gill and subsequently the Applicant have been in possession of the Disputed Land.

- 4.2. It follows that I propose to direct the Chief Land Registrar to give effect to the Applicant's application dated 17th August 2016.
- 4.3. It would ordinarily follow that I would make an order that the Respondent should pay the Applicant's costs of the reference but in view of the fact that neither party has been represented I shall make no order to that effect unless the Applicant asks me to do so in which case the following directions will apply.

ORDER

UPON hearing the Applicant and the Respondent

IT IS ORDERED THAT:

1. The Chief Land Registrar shall give effect to the Applicant's application dated 17th August 2016 as if the Respondent's objection had not been made.
2. If the Applicant wishes to make an application for an order that the Respondent should pay her costs of this reference (any costs associated with the application before it was referred to the Tribunal are within the jurisdiction of HM Land Registry not the Tribunal) she must file with the Tribunal and serve on the Respondent a statement of her reasons for seeking that order and a detailed breakdown of the costs which she claims, together with any supporting vouchers, by 5 pm on 24 October 2018.
3. If the Applicant makes an application for an order that he pay her costs of this reference the Respondent may file and serve Point of Dispute to her application by 5 pm on 7 November 2018.
4. If the Respondent files Points of Dispute, the Applicant may file and serve Points of Reply to his Points of Dispute by 5 pm on 21 November 2018.

Dated this 26th Day of September 2018

Max Thorowgood



BY ORDER OF THE TRIBUNAL

Title

2017/0681 Boshnek v Winter - Plan

BARN CLOSE.

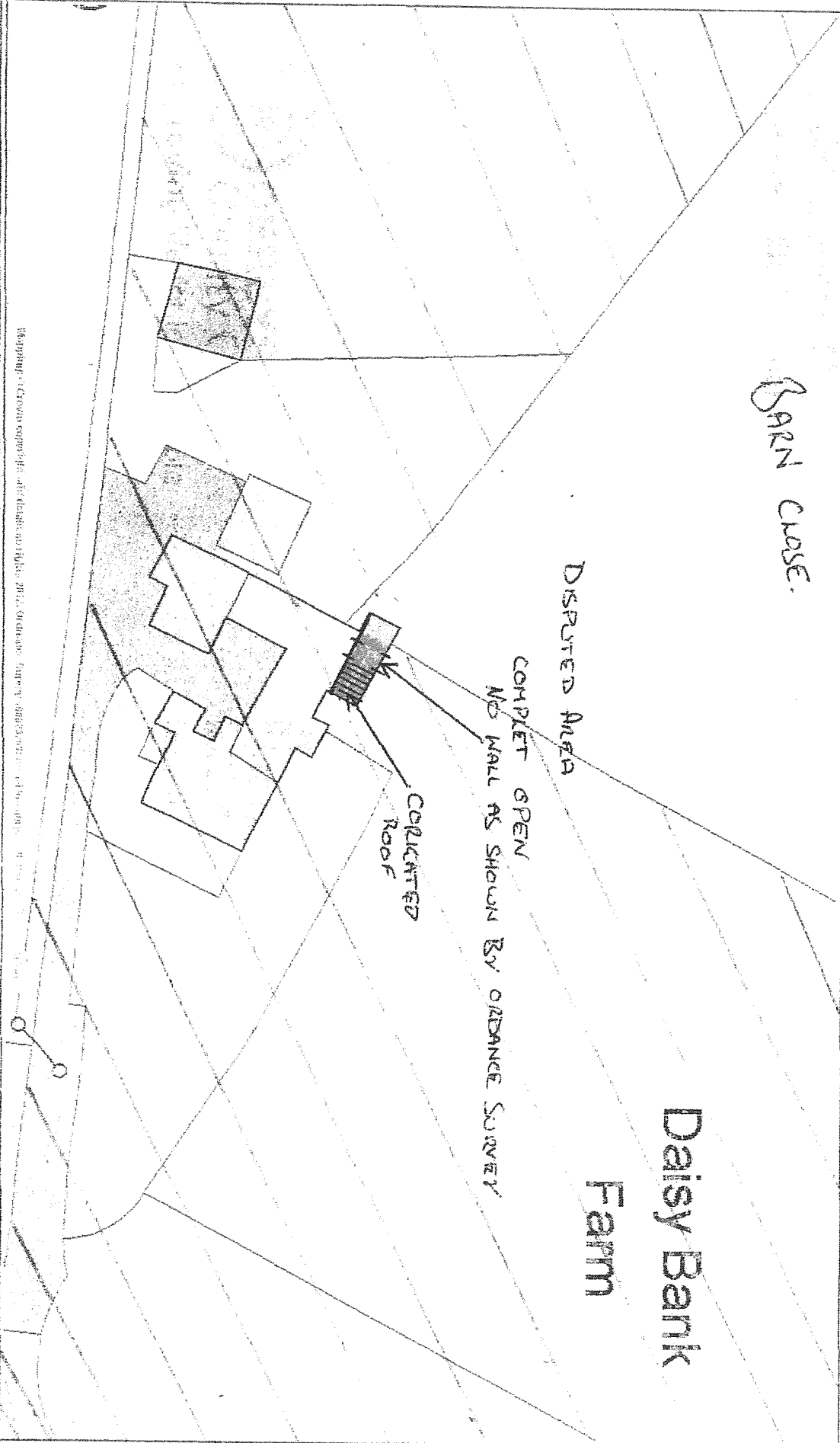
Daisy Bank

Farm

DISPUTED AREA

COMPLETE OPEN
NO WALL AS SHOWN BY ORDNANCE SURVEY

COMPLICATED
ROOF



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