[2017] UKFTT 0009 (PC)

REF/2016/0085

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

MARK ANTHONY WAPHAM
ALEKSANDRA BILSKA

APPLICANT

and

MAYOR AND BURGESSES OF
THE LONDON BOROUGH OF HILLINGDON

RESPONDENT

Property Address: Land adjoining 14 The Furrows, Harefield, Uxbridge UB9 6AT

Title Number: AGL346952

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

On: 1st November 2016

Applicant representation:	Fiona Todd of Counsel instructed by Swinburne Maddison Solicitors
Respondent representation:	Sam Phillips of Counsel instructed by Hillingdon Legal Services

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D E C I S I O N

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1. By an application made in Form AP1 dated 26th June 2015 the Applicants applied to the Land Registry for title to a small area of land at the end of their rear garden, being land registered within the Respondent's title MX248905. The Applicants are the

registered proprietors of title AGL346952, being No.14 The Furrows, Harefield, Uxbridge UB9 6AT. I shall call the land in dispute, which I shall describe in more detail below, "the Disputed Land". The basis of the application was a claim that the Applicants, and their predecessor in title Derek Richard Howarth, had been in adverse possession of the Disputed Land continuously since 1979. Despite some apparent confusion (for example, the Respondent served a NAP counter-notice and the Applicant's Statementof Case refers to a period of 10 years), the application is clearly made under the provisions of paragraph 18 of Schedule 12 to the Land Registration Act 2002 ("the 2002 Act") – i.e under the transitional provisions, and not under the new regime contained in Schedule 6 of the 2002 Act. An application of this nature requires proof of at least 12 years' adverse possession expiring on or before 13th October 2003. The Respondent objected to the application by its letter dated 2nd November 2015. Essentially, the Respondent contended that there was insufficient evidence to establish adverse possession for the required period. The Land Registry referred the dispute to the Tribunal on 5th February 2016.

2. Before hearing this matter, I had the benefit of a Site View, in company with representatives of both parties. At the hearing, the Applicants were represented by Ms Todd, and the Respondent by Mr Philips, both of Counsel. Live evidence was given by Mr Wapham, and his neighbour at No 12 The Furrows, Mr Twydell. In addition, they relied on a Statutory Declaration by their vendor, Mr Howarth. The only evidence called by the Respondent was that of Mr Richards, its Head of Green Spaces. All three of these witnesses were cross-examined.

3. The Disputed Land lies at the western end of the rear garden of No.14, which property lies on the western side of the road known as The Furrows. It occupies the full width of the garden (north-south) and is several metres deep (east-west). There is no internal barrier between the two parts and it is indistinguishable in appearance from the remainder of the rear garden. There is a large wooden shed in the north-western corner of the Disputed Land, and there are mature plants, borders and areas of cultivation within – albeit, if the Applicants will forgive me for saying so, now somewhat neglected. The Disputed Land is fenced on the northern, western and southern sides, with a locked gate at the south-western corner giving access into the Respondent's land, which forms a large area of undeveloped open space at the rear of

the gardens of The Furrows and (to the south) Hillside. The western fence is a wooden trellis panel fence 1.8metres in height. The northern boundary is marked by a wooden close boarded fence 2 metres high. The southern boundary is formed by a chicken wire mesh fence 1.5 metres high. These fences are all noted on a plan prepared by a surveyor sent by the Land Registry in July 2015. The survey report is in evidence, together with various photographs taken by the surveyor at the time.

4. There is no dispute between the parties as to the legal principles to be applied. Ms Todd has referred me to three classic authorities on adverse possession: Powell v McFarlane (1979) 38 P & CR 452; J A Pye (Oxford) Ltd v Graham and anor [2002] UKHL 30; and Buckinghamshire CC v Moran [1990] Ch. 623. Essentially, the Applicants must prove that they or their predecessors have been in exclusive factual possession of the land, with the required intention to possess. The intention to possess – not, of course, an intention to own – will generally be inferred from the fact of exclusive possession. Mr Phillips, for the Respondent, also refers me to section 27 of the Commons Act 1876 which renders any encroachment on a town or village green a public nuisance. He submits that the Respondent's land is or could be a toen opr village green, although not registered as such under the 1965 Act. He also refers to the case of R ex parte Smith v Land Registry [2009] EWHC 328, a highways case. The overarching submission is that the Applicants have committed unlawful acts (albeit tortious rather than criminal) and this should disentitle them from barring the Respondent's title.

5. The Applicants contend that they and their predecessor in title Mr Howarth have been in exclusive factual possession of the Disputed Land since 1979. They say that the Disputed Land has formed part of the garden of No.14 and has been fenced off from the Respondent's land since that date. They have no knowledge of the Disputed Land prior to Spring 2014, when they first inspected No. 14. They therefore rely on the Statutory Declaration dated 16th February 2015 of their predecessor, Mr Howarth. At paragraph 4 he says this: "*The land has been enclosed and maintained as part of the back garden to the Property since 1979. There is a shed situated to the North West of the land and a gate situated South West with a lock of which I hold the keys.*" Mr Wapham could only give evidence as to the position since Spring 2014. He said in

evidence that the Disputed Land, and the fences around it, have not been altered since the time he first saw it.

6. The Applicants also rely on the evidence of Mr David Arthur Twydell, who was cross-examined on his witness statement dated 1st January 2016. He owns No.12 The Furrows, which is situated immediately to the north of No.14. He has been the owner and occupier for some 48 years, since 1968. He says that when he purchased the property he was aware of an area at the rear known as "the Dell", which dropped steeply westwards. His neighbour to the north, at No.10 The Furrows, had a longer garden, which was undermined by the slope. It was therefore agreed that the local authority would fill in "the Dell" using a moderate soil dump and planting trees, thus reducing the angle of the slope. When the work was done, he says that he "*used the rear boundary line of number 10 The Furrows as a marker, and arbitrarily extended my garden to bring it in line. I did it without permission of the Local Authority, and it constituted approximately a 20 ft extension.... At about the same time, my neighbour at number 14 The Furrows, Derek Howarth, took exactly the same action, effectively ensuring that the 3 properties, number 10,12 and 14, had a new fence line which was continuous without any dogleg.*" In cross-examination, he said that the fences were erected in about 1979. He has produced an aerial photograph, believed to be taken in August 2000, on which he says it is possible to see the shed and rear fence on the Disputed Land. I have not found this photograph to be at all helpful.

7. The evidence from Mr Richards, for the Respondent, did not take the matter very much further. He said that his authority does not have the resources to monitor all its boundaries, and did not monitor this particular boundary in the last seven years, which is all he can speak about. He contends that the evidence provided by the Applicants is insufficient to establish adverse possession.

8. This is the state of the evidence. For perhaps obvious reasons, the Respondent is not able to provide any relevant evidence of its own. However, Mr Phillips submits that the Applicant's evidence is insufficient. He relies heavily on the opinion of the Land Registry surveyor, recorded in his report, that the western trellis fence and gate are less than 2 years old, the northern fence less than 5 years old and the southern fence less than 10 years old. He also points to the absence of any live evidence from Mr

Howarth, and to the absence of any photographs of the rear garden of either No 12 or No 14 showing the rear fences. He says this is surprising. Overall, he says that the Applicants have failed to discharge the burden of proof.

9. I disagree. I conclude that the Applicants have established, on the balance of probabilities, that the owners and occupiers of No 14 have been in exclusive factual possession of the Disputed Land since 1979, with a sufficient intention to possess. Enclosure of land is the strongest possible manifestation of an intention to possess, and also of course renders the occupation of the land exclusive. I accept the evidence of Mr Twydell in its entirety, and have been given no real reason why I should not so do so. The opinion of the Land Registry surveyor is just that – an opinion – no more valid than that of any other person. There has been no direction for expert evidence, and I am not sure that the age of a fence is within any expert discipline. My own observation of the Disputed Land indicates that it is indistinguishable from the remainder of the garden in terms of planting and cultivation – this is something that can only be achieved over a number of years. The fences appear to me to be far older than the surveyor suggests. The shed has clearly been in place for many years. Whilst there might be some room for doubt as to the exact age of these items, in the face of Mr Twydell's evidence the exercise is somewhat academic. He dates the enclosure of the Disputed Land to 1979 and that is sufficient. As to the suggestion that there is something sinister about the absence of photographs of the rear fences, it is a fact that until such an unfortunate dispute arises, the last thing that most normal people do is to photograph their boundary fences.

10. I therefore conclude that the Applicants' predecessor in title was in adverse possession of the Disputed Land from 1979 onwards, and a section 75 trust came into effect in around 1991. That being so, the transitional provisions apply and the Applicants' application must succeed. With regard to Mr Phillips's points, first there is no evidence that the Respondent's land is a town or village green and the absence of registration indicates otherwise. In any event, in view of the Best decision, I am not sure it would make any difference. Secondly, the effect of the Limitation Act 1980 is automatic, and there is no discretion or balancing exercise involved. Whilst of course respecting the Respondent's laudable aim of protecting and preserving public amenity

land, at the end of the day this is a private law issue and the Respondent is treated the same as any private owner.

11. It follows that I shall direct the Chief Land Registrar to give effect to the Applicant's application made in Form AP1 dated 26th June 2015. With regard to costs, I shall order the respondent to pay the Applicants' costs on the standard basis. The Applicants shall file and serve a Statement of Costs within 14 days of today, and the Respondent may respond on the amount of costs 7 days thereafter. I shall then summarily assess the costs.

Dated this 1st day of November 2016

Owen Rhys

BY ORDER OF THE TRIBUNAL