[2017] UKFTT 0051 (PC)

REF/2016/0292

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

BETWEEN

ELIZABETH SOMMER
KATHERINE SOMMER

APPLICANTS

and

MONMOUTHSHIRE COUNTY COUNCIL

RESPONDENT

Property Address: Land adjoining Treherne, Forge Road

Title Numbers: CYM602416

Before: Judge Owen Rhys

Sitting at: Newport Magistrates Court

On: 17th and 18th October 2017

Applicant representation:	In Person (Ms Elizabeth Sommer)
Respondent representation:	Mr Daly of Counsel instructed by Monmouthshire County Council Legal Services

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D E C I S I O N

Application under Schedule 6 to the Land Registration Act 2002 - landowner claiming that the disputed land forms part of the public highway - service of NAP without requesting the Registrar to deal with application under paragraph 5 – whether contents of NAP effective to invoke paragraph 5 – HELD that application succeeded. The disputed land did not form part

of the highway and Respondent did not successfully invoke paragraph 5. R (ex parte Smith) v Land Registry [2010] EWCA Civ 200 considered - Beacon v Hopkins [2011] EWHC 2899 (Ch) applied.

THE BACKGROUND

1. The Applicants are the registered proprietors of title number CYM49303, which includes the house and grounds known as Treherne, Forge Road, Monmouth NP26 3AZ ("Treherne"). It was formerly part of a larger title, WA365259. The Respondent ("the Council") is the registered proprietor of adjoining land registered under title number CYM571853. On 30th October 2013 the Applicants applied in form ADV1 and paragraph 1 of Schedule 6 to the Land Registration Act 2002 ("the Act") to be registered as proprietor of that part of the Council's title as is shown tinted blue on the plan which accompanies the Land Registry Case Summary. That application has been allocated the provisional title number CYM602416, and I shall refer to the land comprised within this title as "the Disputed Land". The application was supported by two Statements of Truth in form ST1 – one made by Mr Brian Neanor and the other by one of the Applicants, Elizabeth Sommer. She is the mother of Katherine Sommer, who is a party to these proceedings but has taken no active part in them. On 20th February 2014 the Council lodged with the Land Registry its objections to the application in form NAP. In panel 5 of the form the Council ticked the third box – namely "*I object to the registration on the grounds stated in panel 6*". It did not tick the second box – namely "*I require the registrar to deal with the application under paragraph 5 of Schedule 6 to the Land Registration Act 2002*". In panel 6 the Council included six numbered paragraphs containing the grounds of its objection. The Case Summary includes this passage: "*The Objector did not request that the registrar deal with the application under paragraph 5 of Schedule 6 to the Land Registration Act 2002. Clarification was sought from the Objector given the content of paragraph 5 of the NAP.*" I shall consider the grounds of the objection stated in panel 6, and the interaction with panel 5 of the NAP form, in more detail later in this Decision, but for present purposes I simply flag up that there is an issue as to the effect of the NAP. The dispute could not be resolved by agreement, and on 27th April 2016 it was referred to the Tribunal.

2. I heard this case at Newport Magistrates Court over the course of two days. Prior to the hearing, I had the benefit of a site view, in the company of Elizabeth Sommer, Brian Neanor, and Counsel and various officers of the Council. At the hearing itself, the Applicants were represented by Elizabeth Sommer in person, whilst Mr Daly of Counsel appeared for the Council. I heard evidence from Elizabeth Sommer and Brian Neanor for the Applicants. The Respondents called Alan Terrell, a photographer; Gareth David Lloyd-King, one of the Council's Estates Surveyors, and Mr Paul Keeble, the Council's Manager for Highways. In addition, the Council relied on witness statements from a number of other witnesses, to whom I shall refer in due course.

THE ISSUES OF FACT AND LAW

3. This is an application by the Applicants to be registered with a title based on adverse possession. The principles underlying the law of adverse possession are fairly straightforward, although of course each case throws up its own unique set of facts, as the reported decisions demonstrate. The leading case is J.A. Pye (Oxford) Ltd v Graham and others [2002] UKHL 30, and there is no controversy between the parties as to the requirements: exclusive factual possession, coupled with an intention to possess. Exclusive factual possession was considered by Slade J in Powell v McFarlane (1977) 38 P & CR 452 at 470-71, in a passage expressly approved by the House of Lords in the Pye case and generally regarded as the most comprehensive definition:

> *"(3) 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."*

4. In addition to factual possession, the squatter must establish an intention to possess. This was summarised in Powell's case (at 471) as requiring 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." Generally speaking, such an intention will be inferred from evidence of factual possession. An application under Schedule 6 of the 2002 Act requires the Applicants to prove both of these requirements for a period of 10 years prior to the date of the application. If the Council has successfully invoked the conditions set out at paragraph 5 of Schedule 6, the Applicant would also be obliged to prove that they satisfy one or more of the conditions. In the present case, the relevant conditions as specified in the ADV1 are those contained in paragraph 5(2) and 5(4) of Schedule 6. Paragraph 5(2) relies on estoppel, and 5(4) on the following – *"for at least ten years of the period of adverse possession ending with the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him..."*. However, there is a dispute between the parties as to whether the Council has effectively required the Applicants to satisfy the paragraph 5 conditions. Undeniably, the Council failed to tick the correct box on the form NAP. However, there is authority – in the form of Beacon v Hopkins [2011] EWHC 2899 (Ch), a decision of the High Court – that a failure to do so does not automatically prevent the landowner from relying on the paragraph 5 conditions. The true test is whether a reasonable registrar, receiving the notice, could be in any reasonable doubt as to whether the conditions were being invoked.

5. There is a final issue between the parties. The Council contends that the Disputed Land forms part of a highway maintainable at public expense. It contends that Forge Road includes the Disputed Land, and Forge Road has at all material times been such a highway. The significance of such an argument is as follows. Under section 263 of the Highways Act 1980, the surface of every highway maintainable at public expense vests in the highway authority. It was held in R (ex parte Smith) v Land Registry [2010] EWCA Civ 200, that it is not possible for a squatter to obtain a title to highway land by adverse possession. In this case, therefore, the Council argues that even if the Applicants can show 10 years' factual possession with an intention to possess, on the authority of the Smith case that would not be effective to permit registration with possessory title. The Applicant denies that the Disputed Land forms part of a public highway, although accepts that it has recently been dedicated as a footpath. That fact

would not necessarily affect their case, since they allege that they had already enjoyed 10 years' adverse possession prior to the dedication, which took place no earlier than 21st October 2013 being the date of the Deed of Dedication. However, the dedication does not take effect until notice is given to the public and I have heard no evidence in regard to that. Further, it is very unlikely that the 3 metre width of the footpath includes any part of the Disputed Land, but again I have no evidence on this point. I shall consider the highways issue in more detail at the appropriate juncture. I should add that the Applicants now contend that the Council should never have been registered with a title to the Disputed Land. They applied for permission to amend the Statement of Case to raise this issue, but I refused permission. Any such attack on the Council's title would have to be the subject of a separate application to the Land Registry. I express no view on the validity of the Applicants' challenge to the Council's title, save to note that it is based on a detailed and impressively thorough reading of the complex conveyancing history relating to the land of which Forge Road formed part.

6. In my view, therefore, the following issues must be decided:
   (a) Can the Applicants establish 10 years' adverse possession of the Disputed Land prior to the date of the application?
   (b) If so, and assuming they would otherwise be entitled to be registered, was the Disputed Land at all material times part of the public highway and therefore the application must fail in accordance with the decision in Smith v Land Registry?
   (c) If so, are they obliged to satisfy any of the conditions under paragraph 5 of Schedule 6?
   (d) If so, have they satisfied either or both of the relevant conditions – under paragraphs 5(2) and 5(4)?

THE PHYSICAL CIRCUMSTANCES

7. Forge Road runs west from the junction with Osbaston Road, and terminates at a field gate just to the west of Treherne. Treherne lies on the north side of Forge Road. The Old Forge adjoins it immediately to the east – Elizabeth Sommer resides there. Further east still lie Forge Cottages, a series of terraced houses all of which properties stand on the north side of Forge Road. The River Monnow flows just to the south of

the road. There are however two properties on the south side of Forge Road more or less opposite The Old Forge and Treherne. First, Forge House, just to the west of Forge Cottages, and a large new building known as The Old Manor which is not yet finished, at the western end of Forge Road.

8. Forge Road itself is registered in the Council's name – as I have already made clear, its legal status at the western end is in dispute. There is no dispute that the road, insofar as it extends to the most westerly end of Forge Cottages (at no.7), is shown on the County's List of Streets and is treated as a highway maintainable at public expense. From that point to its western terminus, however, the Applicants deny that is it a public highway. The dispute centres on a small parcel of land that is registered within the Council's title but does not appear to be part of the roadway. The eastern part of the Disputed Land forms part of the driveway leading into Treherne, and the western part appears to form part of a roughly landscaped garden area lying between the tarmaced roadway and the front wall enclosing the garden of Treherne. The drive is covered with stone chippings or scalpings, and there is no apparent physical distinction between the area of drive within the Disputed Land and the remainder of it. The garden area includes some specimen shrubs, and although somewhat unkempt is a distinct area which runs up to the edge of the tarmaced roadway and is distinct from it.

THE APPLICANTS' CASE

9. The first Applicant purchased title number CYM49303 in 1998 (her daughter subsequently being added to the title), and set about building a house on it. Planning permission had been obtained in 1990 and renewed in August 1995. Building commenced in July 2000. The core elements of their case appear from the Statement of Truth lodged in support of the application in 2013. The material passage reads as follows: *"The [Disputed Land] had planning permission in 1998 to build a house and relying on WAG Miles statement , this access area and turning area was used to park construction vehicles and deliveries during the course of building the new house. A new driveway was laid so that cars could be parked on it away from Forge Road and the remaining area was used to create a new garden. I purchased and laid soil on the ground as well as planting a large variety of plants and grew fruit and herbs. I also cut back and maintained some of the trees on the area and employed professionals to cut back some of the larger trees so that more light was available for the garden*

plants. I have maintained the garden continuously since and regularly park my car on the driveway. At no time since 1998 until this year have Monmouthshire County Council used the land or advised me that they owned the land. In 2000 when the Council sent their workmen down to cut down the large trees that lined Forge Road further down the road, the Council workers did not cut down the trees which I had been maintaining and advised me that the land on which these trees stood was not part of Forge Road or owned by the Council."

10. The Applicants' Statement of Case is dated 10th July 2017 and is supported by a statement of truth by Elizabeth Sommer. Attached to the document are a number of annexes which supplement the paragraphs of the Statement of Case. The following passage is included: *"In August 2000 the front garden next to the driveway was started by trimming back all the overhanging branches and cutting down some of the trees and distributing and digging in the topsoil from the excavation. Rose bushes, berberis bushes as well as large aloe plants are placed around the borders. Various perennial flowers are planted such as forget me nots and strawberry plants. At the same time the Applicant cleared the overgrown vegetation growing on the Old Forge wall further down on the roadway, and plants various plants that are drought-resistant. The Applicant also placed large stones which had been excavated from the ground during the new build construction, around the part of the garden that she was cultivating to protect them. The Applicant did not clear the land within 6 metres of the kissing gate but she did place plant waste and branches on this area so that land levels could be built up to protect against flooding. That area is now full of self-seeding bushes and trees and has never been cleared by the Respondents....."*

11. The Applicant also produced some documentation to support her case. First, a letter dated 26th July 2000 from Mr Neanor to the Council's Planning Department, confirming that the new build had started and that certain preparatory works had been completed and inspected by the Building Control. This was sent, I think, to establish that the building had commenced within the period allowed by the planning permission. These works included the following; *"(i) the site has been cleared of trees and about 60 cu.m of top soil, with sub-soil surface well covered with scalpings and .... (iv) an entrance road has been laid and graded..."* I should explain that Mr Neanor – who still lives at Treherne – was the former partner of Elizabeth Sommer

and the father of Katherine Sommer (who took no part in the hearing). He had also project-managed the building of Treherne. Secondly, an invoice dated 13th September 2000 relating to this work. Thirdly, a receipted invoice dated 1st October 2001 relating to the supply of scalpings.

12. Ms Sommer's evidence was challenged in cross-examination in a number of respects. She was asked a number of questions regarding her belief that the land belonged to the Applicants. This is a line of questioning that might be relevant if the Council is entitled to rely on the paragraph 5 conditions under Schedule 6. It might also be germane to the issue of intention to possess. She was asked about two particular matters. First, enquiries made by her solicitor prior to her purchase in August 1998. The documents begin with an attendance note made by her solicitor at the time - Miss O'Donovan. *"TOWARDS THE VERY END OF FORGE ROAD IS A SMALL GATE WAY LEADING TO THE BUILDING PLOT. THERE IS LAND BETWEEN THE GATE AND THE METALLED ROAD WHICH HAS BECOME SOMEWHAT OVERGROWN. IT IS THUIS LAND WHICH IS CATEGORICALLY EXCLUDED FROM THE TITLE AND THEREFORE PREVENTS ACCESS FROM FORGE ROAD TO THE PROPERTY. AS FORGE ROAD IS UNADOPTED HOWEVER IT IS NOT CLEAR THAT THERE ARE ANY RIGHTS OVER THE ROAD."* It would appear that this inspection prompted this correspondence between Miss O'Donovan and the vendor Mr Miles, as follows:

    (a) Miss O'Donovan wrote on 3rd August 1998: *"We act for the proposed purchaser of The Old Forge, Osbaston, Monmouth. We enclose for your information a copy of the part of the title relating to land and buildings lying to the north of Forge Road, Osbaston. Entry number four of the Property Register states that the existing access from Forge Road aforesaid is not included in the land conveyed. Whilst we have not seen a copy of this Conveyance we are informed by our client that the access referred to is not the access onto Forge Road itself (which we have coloured orange on the plan) but an older access along the boundary which we have marked green on the plan. We should be grateful for any clarification on this point and indeed if our client is correct we wonder whether you would consider swearing a Statutory Declaration as our client is anxious to have this entry removed from the Registered Title. We look forward to hearing from you."* The area

coloured orange on the plan is not precisely drawn, but clearly includes that part of the driveway that lies within the Disputed Land, and probably also a small part of the garden to the west.

(b) The response from Mr Miles, in a letter dated 6th August 1998 was as follows: *"When I sold land to T.M. Pardington by Conveyance dated 20th January 1984, which is the land I understand is now being sold to your client, Pardington covenanted within one month to construct a new access from Forge Road, which he did, and to block off the then existing access to the property at his own expense, again which he did. The area coloured orange on the paln which accompanied your letter is the newly constructed access to the property. As I see it the situation is in order..."*

13. It was put to Ms Sommer that she cannot have believed that the area coloured orange – whatever that physically comprised – was part of the title she was buying, in view of these exchanges. Her response was that the land comprised in the new access must have belonged to the original vendor, Mr Miles, since otherwise he could not have required the purchaser Mr Pardington (by way of express covenant) to construct the new access upon it.

14. She was also asked about her reaction to the letter from the Council addressed to The Old Forge (her residence) dated 21st August 2013, in which offers for the purchase of a section of Forge Road were solicited. There is a plan attached to the letter which includes the disputed land. She was asked why she did not challenge the Council's right to sell this piece of land. Her response was that she thought it was "a nonsense" since she was occupying the land, and it was expedient to say nothing since she was hoping to acquire the much larger parcel offered by the Council, the disputed land only forming a very small part of it. She could not offer any other explanation.

15. It was also put to Ms Sommer that she had not cultivated the garden area, and the planting that exists today is of recent origin. It was pointed out that the ground level of the garden is the same as that of the adjacent section of Forge Road, which calls into question her evidence that topsoil was dumped in order to create the garden. Her response was that the level of Forge Road had been raised to a noticeable extent by Mr Kear, when the works carried out in 2009 took place. She referred to the statement

of Mr Ronald Kear (one of the Council's witnesses) which refers to the work carried out.

16. In addition to Ms Sommer's evidence, she also relied on the statements and oral evidence of Mr Neanor, to whom I have already referred. Broadly, his evidence was the same as that of Ms Sommer, although he was more directly concerned with the construction of Treherne, since he was project managing the build.

THE COUNCIL'S CASE

17. As is often the case where local authorities are resisting a claim to adverse possession, they have little or no direct knowledge of the history of the disputed area. The present case is no exception. Apart from the legal issues taken by the Council – namely, the reliance on paragraph 5 of Schedule 6, and the contention that the disputed land forms part of the public highway – it also challenges the factual basis of the Applicants' case. Apart from the statements of its own employees, to which I shall refer in due course, it also relies on the witness statements of no less than 5 of the Applicants' neighbours. These are:

    (a) **Ronald Kear**, who made a statement in 2014 but has since passed away. In his statement he refers to a number of photographs – none of which, I think, were taken by him – from which he concludes that the alleged acts of adverse possession had not begun until recently, and certainly not more than 10 years prior to the date of his statement. He also refers to several other statements.

    (b) **Jan Louise McLagan**. She resides at 6 Forge Cottages – a short distance away from The Old Forge to the east. She states that she walks the road daily "and can confirm that they have not maintained or surrounded the said area for more than a couple of years maximum and definitely not before the flood which was in September 2008." In particular, she states that stones have been laid around the "so say garden" and gravelled area only within the previous 4 years (the statement having been made in January 2014).

    (c) **Jonathan Miles Kennedy Seamons**. He also resides at 6 Forge Cottages, and gives evidence to a similar effect .

    (d) **Susan Day**. She resides at 5 Forge Cottages. She states that the garden by the wall at Treherne did not exist prior to 2008. She also refers to an occasion in

2006 when a lady called Tara, a "New Age Traveller", parked a large camper van on the garden area. She also says that the gateway and footpath entrance (the kissing gate) have in recent years become obstructed by the garden by Treherne, but that only happened after 2008. She also refers to stones being placed around the disputed land in recent years.

18. **Mr Alan Terrell**. He is a photographer, who was commissioned by Mr Kear to make a video documentary recording the construction of a hydro-electric power plant on Mr Kear's neighbouring land. He produced several still photographs, mostly extracted from video footage shot on 28th September 2007, but including two photographs taken in April and May 2008. His photographs are self-explanatory, and are said to show that adverse possession had not taken place in 2007 and 2008. He also gave live oral evidence as to his actual recollection of the appearance of the disputed land on those occasions, and was cross-examined.

19. **Mr Paul Keeble**. He is the Council's Group Engineer (Highways and Flood Management) and Manager for Highways. In his statement, he referred to his visit to the site in August 2015, when he confirmed that certain stones adjacent to Forge Road had been removed, and exhibits an email exchange with Mr Neanor. This arose out of an unpleasant incident when Council workmen, with a police officer in attendance, attempted to remove stones allegedly placed on the carriageway by Mr Neanor. Apart from demonstrating the degree of hostility that exists between the parties, this incident, which postdates the Application, is not directly of relevance. Of more import was Mr Keeble's statement in paragraph 7 – "*Forge Road has always been inspected and maintained by the Highways authority and I believe these records have already been provided as evidence .... Whilst the highways records showed the far and of Forge Road as not being adopted until further investigations in 2013, it has always been treated as adopted for all other purposes in accordance with highways best practice.*" This evidence, of course, goes to the status of the disputed land as highway. He was asked some questions about this statement. He was asked in particular about the Notice under section 228 of the Highways Act 1980, dated 17th October 2014 and which he signed. This Notice related to the western end of Forge Road, including the disputed land, and reads as follows: "*Whereas the length of highway more particularly described in the Schedule hereto .... not being at the date of this Notice a*

public highway maintainable at public expense has been made up to the Council's satisfaction. Now therefore Monmouthshire County Council acting under its powers under the Highway Act 1980, do hereby declare that the said length of highway shall become highway maintainable at public expense....." He was asked if at the date of signing this notice the Council's understanding was that the end of Forge Lane (including the disputed land) did not form part of the highway network, and somewhat reluctantly he conceded the point. He was also asked if he was able to identify any work done by the Council to this part of Forge Lane. He referred to the maintenance records which he had supplied, but accepted that he was unable to say if any of these related to this specific part of Forge Lane.

20. **Mr Gareth Lloyd-King**. He is one of the Council's Estates Surveyors. His statement was directed to the Council's efforts to dispose of the western end of Forge Lane, which led to the tender process in 2013 to which I have already referred, when Ms Sommer offered to buy the land. In the course of his work, he visited the site in October 2012 and took some photographs, which were in evidence. Apart from the evidence of the appearance of the disputed land, his evidence was not directly relevant to the adverse possession claim.

FINDINGS OF FACT

21. Both Ms Sommer and Mr Neanor verified their statements on oath, and were cross-examined at some length. For the Council, Mr Terrell, Mr Keeble and Mr Lloyd-King verified their statements on oath, and were cross-examined. However, the Council did not call any of the other witnesses to give evidence. Mr Kear had passed away, but no explanation was given in relation to the other witnesses. Their statements are of course admissible, but the absence of any testing of their statements by cross-examination necessarily reduces the weight to be attached to them.

22. My conclusions on the facts are as follows:

    (a) Work on the driveway to Treherne commenced in or about 2000, and was completed by 2002 at the latest. The work consisted of clearing the site, and laying a surface finished with stone scalpings. The driveway extended all the way to the edge of the usable carriageway of Forge Road and included part of the Disputed Land. Once the driveway had been laid, it would have been clear

to any observer that it was comprised within the curtilage of Treherne and was exclusively used by the occupiers of Treherne for the purposes of parking vehicles and access to the house.

(b) At the same time that the driveway was constructed, topsoil was laid over the garden area – the area to the west of the driveway, and between the edge of Forge Road and the front wall of Treherne.

(c) Originally, this garden area was at a slightly higher level than the road itself, but the works carried out by Mr Kear in 2009 raised the level of Forge Road to more or less the same as the garden area.

(d) At the same time as the topsoil was laid, tree branches were cut back and shrubs were planted. At this point the garden area would have been visibly distinguishable from the carriageway and self-evidently a landscaped area.

(e) Since the original creation of the garden area, the Applicants have added further planting and maintained the area as a garden.

(f) The Council has not maintained or carried works on any part of the disputed land since 2000. In all probability it has never done so.

(g) Since 2000, the only persons who have actually made use of and maintained the Disputed Land are the Applicants, and those authorised by them.

23. In making these findings of fact, I have accepted the totality of the evidence given by Ms Sommer and Mr Neanor. Their recollection of the incorporation of the disputed land into the curtilage of Treherne was coherent and supported by the contemporaneous documents. They did not exaggerate their evidence, and were able to rebut some of the adverse points made by the Council's witness statements. For example, Mr Neanor's evidence regarding the location of Tara's camper van (i.e that it was not kept on the Disputed Land at all). By the same token, the Council did not bring to the hearing any of the neighbours whose statements they relied on. No explanation was given for this, but the result is that these statements could not be tested or challenged directly by the Applicants. I cannot therefore place much weight on those statements, and certainly prefer the evidence of Ms Sommer and Mr Neanor where there is a conflict. Mr Terrell's evidence consisted largely of his photographs. He was of course not interested in Treherne when he was on site – his job was to capture images of the work carried out by Mr Kear on the other side of Forge Road. The photographs therefore only tangentially captured images of the Disputed Land,

form which little of value could be gleaned. He did say that he recalled the appearance of the Disputed Land when he made the video film. He said that the area for a few feet immediately to the west of the driveway had the appearance of a cultivated area, but the rest of the garden land was overgrown. Mr Terrell would not have had any professional interest in the exact appearance of the Applicants' front garden, and it would have been difficult to distinguish between a cultivated area of this type which was unkempt and one which was not cultivated at all. As Mr Daly tactfully suggested to Ms Sommer, even the landscaped areas in the Old Forge were somewhat unkempt.

ADVERSE POSSESSION

24. It follows from the above findings of fact that the Applicants are able to demonstrate exclusive factual possession of the disputed land for a period exceeding 10 years prior to the date of the application. It must be borne in mind that the nature and extent of the possession required depends on the nature of the land to which the claim is made. That is clear from this passage cited in Pye v Graham: "*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*". The Council has never claimed that this land is anything other than highway verge. It has never put the land to any use, or maintained it. Incorporation of the Disputed Land into a gravelled driveway exclusively serving Treherne is manifestly sufficient, in my judgment, to amount to treating the land as an occupying owner would do. As to the garden area, this is a small piece of land between the carriageway and the wall and adjacent to the driveway to the east. In my judgment, even the relatively minor acts of planting shrubs and clearing and maintaining the area, even on a sporadic basis, amounts to factual possession in these circumstances. It must be borne in mind that this area has never been used by anyone else, and manifestly does not form part of the carriageway of Forge Road.

25. That leaves the issue of intention to possess. Generally, that intention would be inferred from the acts of possession themselves. Mr Daly cross-examined both Ms Sommer and Mr Neanor about their lack of reaction to the Council's proposal to sell the end of Forge Road, including the Disputed Land. They were both asked why they had not challenged the Council's right to sell the Disputed Land, if they were in

possession of it and (according to Ms Sommer) believed that she owned it. Ms Sommer could not give an explanation other than to say that her possession of the Disputed Land had never been challenged and that it was expedient to say nothing. It seems to me that this is a perfectly natural explanation. If she was hoping to acquire a much larger area of land it would not be politic to raise the dispute relating to the small area of land which she was clearly in possession of. Furthermore, the intention must be an intention to possess – not own.

26. Under normal circumstances, since I have found that the Applicants were in exclusive factual possession for a period of ten years, with the required intention to possess, that would result in success for the Applicants. However, there are two other issues which might prevent the Applicants from succeeding in their claim. These points have already been mentioned. First, whether the Disputed Land forms part of the public highway, in some sense at least, and therefore the R v Smith decision applies and adverse possession cannot have been enjoyed. Secondly, whether the Council can rely on the conditions under paragraph 5 of Schedule 6 and, if so, whether the Applicants can satisfy any of them.

IS THE DISPUTED LAND PART OF THE PUBLIC HIGHWAY?

27. In R v Smith it was held that it was not possible for the highway authority's title to a highway maintainable at public expense to be barred by operation of the Limitation Act 1980. The terms of section 263 of the Highways Act 1980 provided the critical element in the decision of the Court of Appeal. Section 263(1), which is based on statutory provisions stretching back to the Highways Act 1835, provides for the statutory vesting of highways as follows: "*Every highway maintainable at the public expense, together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority for the highway.*" Both Elias and Mummery LJJ held that the terms of this section were determinative of the appeal and prevented adverse possession. Mummery LJ pointed out that:

> *57. In principle the existence of a right of way over land, whether it is a private right of way or a public highway, does not necessarily prevent a person from claiming adverse possession of that land under the Limitation Act 1980. See for example, Roberts v. Swangrove Estates Ltd [2007] 2 P & CR 326 at 341; affirmed [2008] CH 439; and JA Pye (Oxford) Ltd v. Graham [2003] 1 AC 419 in which part of a large expanse of land, the title to the whole of which was extinguished by adverse possession, was subject to a public footpath.*

58. In the case of highways maintainable at public expense section 263 of the Highways Act 1980 is critical. It expressly vests a highway maintainable at the public expense in the authority who are for the time being the highway authority for the highway. In the face of that statutory vesting of title it is accepted on behalf of Mr Smith that he can only succeed if he can establish that the public right of way has been extinguished over that part of the land to which he claims adverse possession: in other words that there is no longer a public highway over that land to be vested by force of statute in the highway authority. In my judgment it has not been shown that that has occurred by operation of law either under statute or at common law.

28. In the present case, of course, the Disputed Land is registered within the Council's title. It might be that it does not therefore need to rely on section 263 in order to make its title. However, on any footing, in order to defeat the Applicants' claim the Council must establish that the Disputed Land has at all material times been part of a public highway. As Mummery L.J pointed out in the Smith case, there is nothing to prevent a squatter from obtaining title to land subject to a public footpath (Pye v Graham) or to the bed of a river subject to public rights of navigation (Roberts v Swangrove). As I read R v Smith, it is only if each and every part of the land in question is subject to public rights of way that the claim to adverse possession is defeated. I must therefore consider whether each and every part of the Disputed Land is subject to public rights of passage.

29. Before turning to the relevant evidence, it is worth recalling the physical appearance and situation of the Disputed Land. Forge Road itself runs west from the junction with Osbaston Road. It is metalled and clearly maintained as far as the most westerly of Forge Cottages – no. 7. It is tarmaced further west, to a point just past the driveway entrance into Treherne. There is a short stretch which is roughly surfaced, more like a track, with grass and moss prominent. This terminates at a farm gate leading into private land. The photographs taken by the Land Registry surveyor show this change in the surface. In other words, the western end of Forge Road does not actually lead anywhere. Where a highway is established by long user, almost invariably it will lead to a place to which the public has access. The electricity works to the south of Forge Road might have been such a place, but the entrance to the works was further east. It is anomalous for a highway to come to a dead end, in the absence of express adoption or dedication. The Disputed Land itself is, of course, not

even part of the existing carriageway but lies to the north of it partially enclosed by the boundaries of Treherne.

30. Quite apart from this general observation, there are more compelling reasons why in my judgment the western end of Forge Road – past no.7 Forge Cottages – is not and never has been a public highway, or even subject to pedestrian rights of way. The following factors are relevant:

    (a) The Council's title to the land on which Forge Road is constructed originates with a Lease dated 9th November 1897. This includes an express covenant on the part of the Council to maintain and repair the section of road between A and B on the Lease plan. This section equates the length of road between the junction with Osbaston Road and no. 7 Forge Cottages. The same covenant was given in an Underlease to the Monmouth Electric Company of the electricity works to the south. The matter was considered by Counsel in 1956. Counsel took the view that the Council remained liable on the covenants to repair and maintain the road. Manifestly, the obligation to keep the road in repair does not arise from any public law right – such as adoption or dedication – but from the private law obligations contained in the leases.

    (b) It seems Counsel opined in 1956 that "*even if the road is adopted as a public highway (it has probably become such by public user over the last 20 years) the covenants to the head lessor and underlessee remain...*" The public user would not have extended to the length of Forge Road beyond No. 7 Forge Cottages (point A on the lease plans) since there was nowhere beyond this point for the public to go. There is certainly no evidence before me of any such public user, on vehicle or on foot.

    (c) The Council's own List of Streets does not include any part of Forge Road to the west of No. 7 Forge Cottages.

    (d) Consistently, certainly since the 1980's, the Council has represented that this stretch of Forge Road is a private road and not subject to highway rights. This is evident from its replies to Local Authority searches given to a number of purchasers of land on Forge Road, including the Applicants, when they enquired with regard to the parcel of land which now includes Treherne. These are in evidence, and in some cases the Council has helpfully identified the adopted part of Forge Road in yellow colouring. This is the stretch whose

western end is No.7 Forge Road. Thus the Council was well aware that the western end of Forge Road was not a public highway.

(e) Long before this dispute arose, it is interesting to note that Mr Neanor had written to the Council's legal departments, seeking to clarify the status of the end of Forge Road *"In view of the uncertainty as to the status of the end of Forge Road....."* He marked the accompanying plan in such a away as to exclude the Disputed Land which he assumes was simply not part of Forge Road.

(f) The Council has been unable to demonstrate any maintenance of the road beyond the adopted stretch. It is improbable that the Council would have spent public money on maintaining a road which it regarded as private.

(g) The Council decided to sell the entire stretch of Forge Land to the west of no.7 Forge Cottages. In the Officer's report it was stated that: *"The site consists of an open piece of ground .... that has been used as an access lane....MCC's Highway department has advised that there are not any highway rights over the land."* Clearly, it would not have been possible to sell highway land unless a stopping-up order had been made.

(h) In her letter to Mr Neanor dated 22nd August 2008, Ms Swanson, one of the Council's legal officers, wrote this: *"From what I understand the area offered for sale has never been officially adopted and therefore is not one maintainable at public expense."* The area offered for sale comprises the western end of Forge Road.

(i) In October 2014 the Council exercised its powers under section 228 of the Highways Act 1980 to declare the western end of Forge Road as a highway maintainable at public expense. The preamble states that the road had not hitherto been a highway maintainable at public expense. In the event the notice was withdrawn.

(j) In October 2013 the Council dedicated three new footpaths. One of these – 124 – was stated to commence at the kissing gate (immediately to the west of Treherne) and *"continues at a width of 3m in an East South Easterly direction a distance of 58 m along a track to point C"*. The attached plan shows the footpath running along the southern side of Forge Road, opposite the Disputed Land but not including it. I have heard no evidence as to the width of Forge

Road at this point, but I cannot think that a width of 3 metres is sufficient to include any part of the Disputed Land.

31. The only counter to the overwhelming evidence that the unadopted section of Forge Road has never been subject to public rights of way, is a "Historical Document Report", which was prepared by one of the Council's Highways officers. This document concludes that the entire length of Forge Road, as far as the field gate, forms part of the public highway network, dismissing the historic treatment of this part of Forge Road as an error. This conclusion is based on various inferences drawn from historic maps, none of which appear to me to be convincing in the slightest. There is no evidence whatsoever that there has been public use of this part of Forge Road, and none is referred to. Indeed, I regard this Report as a self-serving exercise, carried out in July 2016, and designed to bolster the Council's objection to the Applicants' claim. The author of the report was not called to give evidence, and neither the Applicants nor the Tribunal therefore had an opportunity to test the conclusions. The views of the Highways officer as to the history of the site, and its status as highway, has no particular force and is certainly not binding on this Tribunal. In my judgment, the evidence demonstrates beyond doubt that the end of Forge Road (west of the adopted part which terminates at no. 7 Forge Cottages) is not, and never has been, subject to public rights of way. That disposes of the Council's objection based on the assertion that the Disputed Land forms part of the highway.

DO THE APPLICANTS HAVE TO SATISFY THE PARAGRAPH 5 CONDITIONS?

32. Finally, therefore, I must consider the NAP and whether or not the Council can rely on the paragraph 5 conditions. It will be recalled that the Council failed to tick the box in the NAP form which specifically referred to paragraph 5. Paragraph 3 of Schedule 6 of the Act provides a mechanism whereby the registered proprietor can require the Land Registry to deal with the squatter's application under the paragraph 5 conditions. He must give notice to the registrar that he wishes paragraph 5 to apply. Mr Daly, in his skeleton argument, focused his submissions on the alleged inability of the Applicants to satisfy the paragraph 5 conditions. I drew to his attention the failure to tick the correct box on the NAP form, and to the authority of Beacon v Hopkins to which I have referred above, and invited both parties to address me on the point.

33. In Beacon v Hopkins, Mr Justice Vos considered, in great depth, the relevant provisions of the Act, the Land Registration Rules 2003, and the Land Registry Practice Guide. In that case, Mrs and Mrs Beacon had applied by form ADV1 to the Land Registry for registration of a strip of land within their title under paragraph 1 of Schedule 6 to the Act. The form ADV1 confirmed that the Beacons intended to rely only on the Third Condition in paragraph 5(4), which included the ownership belief condition. The form ADV1 attached also a statutory declaration by the Beacons. On 11 July 2008 Mr Hopkins (the registered owner) wrote to Miss Jane Wood at the Land Registry, saying that he had used the strip on numerous occasions over the years for the maintenance of the adjacent building (the granary) and that the Beacons were making a "*totally spurious claim*", saying: "*They are fully aware, and always have been, this land does not belong to them*" and that Mrs Beacon had read up on the internet what is required for a claim and *"they will say and do whatever it tells them is required whether or not it is true."*

34. The following passage from the judgment indicates the manner in which Mr Hopkins completed the form NAP:

> 11. On 8 September 2008 form NAP was completed by Mr Hopkins. The form in panel 5 says "Place 'X' in the appropriate box or boxes". Mr Hopkins placed a cross only in the box marked "I object to the registration on the grounds stated in panel 6" and not in the other two boxes, which said: "I consent to the registration of the application" and "I require the Registrar to deal with the application under Schedule 6 paragraph 5 to the Land Registration Act 2002 ." Mr Hopkins responded to Mr and Mrs Beacon's statutory declaration in panel six and attached a document entitled "Renunciation of statutory declaration". His response included paragraph 20 (in response to paragraph 20 of the Beacons' second statutory declaration) which stated:
>
> *"Not agreed. The title is registered with me and they have not been in possession of the land. If Mr & Mrs Beacon believed the land was theirs, why did they not query their land registry title when it was issued in March 2002?? Or any other ordinance or boundary plan??"*

35. The Judge held that the relevant test was that "the form NAP in this case must be such that a reasonable registrar would have been left in no reasonable doubt that it was a notice invoking paragraph 5." to give effect to the Applicants' application in Form AP1 dated 29th October 2015. In the subsequent paragraphs of his judgment, he considered the effect of the NAP form as Mr Hopkins had completed it:

> 61. In my judgment, a reasonable registrar receiving the form NAP might reasonably have thought that Mr Hopkins had not intended to tick the box

> requiring him to deal with the application under paragraph 5. He might have thought a mistake had been made, but, if he had, that would not have been an end of the matter, because he ought then to have looked at the Form NAP and the attached renunciation as a whole to see whether, looked at fairly, reasonably and objectively, there was only one conclusion to be reached, namely that he was requiring the Registrar to invoke paragraph 5, despite the fact that he had omitted to cross the relevant box.
>
> 62. Had the reasonable Land Registrar then asked himself the Mannai question, would he have been left in no doubt that a notice was requiring him to invoke paragraph 5 so that this was a valid notice under paragraph 3(2)? I do not think so. Whilst I accept that the notice makes clear in the renunciation that Mr Hopkins wanted to contest the factual question of whether the Beacons genuinely thought the strip was theirs, it does not inevitably follow that he must have wanted to invoke paragraph 5. As Mr Tanney has submitted, he might just have been contesting everything that the Beacons said, but wishing formally to rest his case on an objection and an argument that they had not adversely possessed for the requisite period so as to fall within paragraph 1. There might be good reasons for that. Again, as Mr Tanney submitted, the giver of a form NAP might not want to expose himself to the costs of a contest about the squatter's reasonable beliefs when he did not need to do so.
>
> 63. Put simply, I have formed the clear view, despite my sympathies for Mr Hopkins's predicament, that the form NAP that Mr Hopkins served was not clear to a reasonable recipient and could easily have been construed as having deliberately refrained from invoking paragraph 5. That is perhaps demonstrated by the Land Registry's actual response, to which I have already referred. It is for these reasons that I have concluded that Mr Jones was wrong to submit that "it must have been absolutely obvious" to the Land Registrar that Mr Hopkins was invoking paragraph 5. Whilst I understand the *cri de coeur* in the submission that "It is an absurd and manifest injustice that [Mr Hopkins] was in the circumstances not permitted to rely on paragraph 5", I am bound to say that I think that the proper meaning of the rules, taken together with the proper application of the Mannai test, force me to the conclusion that the form NAP in this case was not adequate to provide paragraph 3(2) notice, so that it did not require the Registrar to invoke the paragraph 5 procedure.

36. In the present case, the Council gave details of its objection in the form of six numbered paragraphs in Panel 6 of the form NAP. Paragraph 5 opens with these words: "*The Council also contests that the application can't be dealt with under paragraph 5(2) and (4) of Schedule 6 of the Land Registration Act for the following reasons.....*" Further sub-paragraphs then follow, most of which are directed to contesting that the Applicants were in factual possession of the Disputed Land for the required period. Sub-paragraph (e) is in these terms: "*The following statements, submitted as part of the Council's evidence, state the Land has not been maintained by the Applicants, nor have they given any indication that they thought they owned the*

Land for the requisite period of ten years...." There is then a list of eight names, of those witnesses who had made statements.

37. The question is whether a reasonable registrar would have been left in no reasonable doubt that it was this was a notice invoking paragraph 5. In Beacon v Hopkins (see paragraph 57 for example), there was considerable discussion of the Land Registrar's duties where he receives an ambiguous form NAP. Vos J thought that the Registrar should as a matter of practice contact the person serving the NAP, to clarify the meaning where possible, without imposing an actual duty to do so. It will be recalled that the Land Registry's Case Summary included the following passage: "*The Objector did not request that the registrar deal with the application under paragraph 5 of Schedule 6 to the Land Registration Act 2002. Clarification was sought from the Objector given the content of paragraph 5 of the NAP.*" Evidently, therefore, the Registrar was unsure as to whether the objector (the Council) was invoking the paragraph 5 conditions, and sought clarification. However, this did not result in any alteration to the form NAP or service of a substitute. In my view, therefore, the ambiguity of the notice remains. Indeed, the very fact that the Registrar sought clarification of the form NAP indicates that there was reasonable doubt as to its meaning and effect. In my judgment, it is incumbent on an objector to take the very simple step of ticking the correct box in the form NAP, particularly where, as here, he has been alerted to the Registrar's doubts as to its meaning. Reading the text of paragraph 5 in Panel 6, it is quite uncertain whether the Council is dealing with the estoppel condition, or the reasonable belief condition, or both or neither. The Applicants were entitled to proceed on the basis that paragraph 5 of Schedule 6 was not engaged, and indeed they pleaded as much in paragraph 1.1 of their Statement of Case. The Council's reply to this is to be found in paragraph 10 of its Statement of Case, which simply says this: "*The Respondent requested the missing information and submitted a NAP on 20th February 2014. The Respondent omitted to tick the box requiring the application to be dealt with under paragraph 5 of Schedule 6 of Land Registration Act 2002.*" This does not seek to argue that the NAP taken as a whole invokes paragraph 5, or some similar point. It appears to accept that the NAP was defective. Taking all these factors into account, I therefore conclude that the Registrar was not obliged to deal with the application under paragraph 5 of Schedule

6 to the Act, and the Applicants are not required to prove any of the paragraph 5 conditions.

38. I have considered whether I should make findings of fact against the possibility that my conclusions on the NAP point are wrong. However, I do not think that this would be appropriate in the circumstances. As the Statements of Case make clear, this case has not been fought out on the basis that either paragraph 5(2) or (4) applies. Although some of the evidence adduced might relate to the "reasonable belief" condition, this would only be tangentially. There was no examination of the estoppel claim whatsoever. Neither issue was directly addressed in the evidence and I do not think it would be either fair or indeed possible to make findings of fact without hearing complete evidence on the point.

CONCLUSION

39. It follows that I shall direct the Chief Land Registrar to give effect to the Applicants' application in Form ADV1 dated 30th October 2013. The Applicants are also entitled to their costs, if they have incurred any, but subject to the limitation contained in the Civil Procedure Rules. If they wish to make a claim for costs, they should do so within 7 working days of the date of this Decision, and serve a copy on the Council. It may respond within 7 days thereafter.

Dated this 1st day of December 2017

Owen Rhys

BY ORDER OF THE TRIBUNAL