

REF/2016/0724

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

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

**BETWEEN**

**(1) JAMES ROBINSON  
(2) SIMON WILKINSON  
(3) PETER GREGORY**

**APPLICANTS**

**and**

**(1) SIMON HOUGHTON  
(2) MICHELLE ELIZABETH HOUGHTON**

**RESPONDENTS**

**Property Address: Land on the east side of New Lane, Stanton Hill, Sutton-in-Ashfield**

**Title Number: NT515706**

**Before: Judge Michell**

**Sitting at: The Nottingham Justice Centre**

**On: 27<sup>th</sup> September 2017**

Applicants Representation: Mr Peter Gregory for himself and his co-Applicants

Respondent Representation: In person

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**DECISION**

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*APPLICATION FOR FIRST REGISTRATION BASED ON ADVERSE POSSESSION-  
APPLICATION BY TRUSTEES OF ALLOTMENT ASSOCIATION- TRUSTEES TENANTS*

*OF NEIGHBOURING LAND- WHETHER FACTUAL POSSESSION- WHETHER INTENTION TO POSSESS- WHETHER LAND AN ACCRETION TO THE TENANCY*

**Cases referred to**

*Prudential Assurance Co Ltd v. Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87

*J A Pye (Oxford Ltd) v Graham* [2003] AC 419

*Tower Hamlets LBC v. Barrett* [2005] EWCA Civ 923

*Holland v. The Neville Estate Company Ltd.* REF 2005/ 0776

1. The Applicants (“the Trustees”) are the current trustees of the property of the Long Reign Allotment Gardens (“the Association”). An application for first registration was made initially in the name of the Association. However, the Association is an unincorporated association and as such, is not capable of holding land. The Trustees were substituted as applicants by order of the Tribunal dated 17<sup>th</sup> March 2017.
2. The application relates to an area of land (“the Plot”) adjoining New Lane in the village of Stanton Hill. It adjoins an area said to be 31,365 square metres leased to the Trustees by Mr Dominic Williams (“Mr Williams”) under a tenancy agreement dated 1<sup>st</sup> September 2011 for a term of 30 years from 1<sup>st</sup> September 2011. This area is used as allotments. The Association or a predecessor association had rented this area since some time prior to 1960 and let it out in allotments. The application land is triangular in shape. It borders the land let by Mr Williams on the east side, the public highway on the northwest side and land of which the Respondents are the registered proprietors on the south side.
3. I inspected the Plot in the presence of the parties’ representatives on the afternoon before the hearing. The Plot is now cultivated as one or more allotments, with flowers and vegetables being grown on it and chicken kept in one part. I accessed the land from a gate in the hedge which divides the land from New Lane. The gate is currently locked with a padlock. The Plot can also be accessed from the larger allotments site to the east. There is currently a portable wire mesh and steel fence dividing the Plot from the western part of the land to the south. The eastern part of the land to the south is part of the garden of 19 Bainbridge Terrace, the home of the Respondents. There is a wooden panel and concrete post fence between the garden and the application land. One panel had been removed as at the time of my inspection.

Law as to Possession

4. Paragraph 18(1) of Schedule 12 to the Land Registration Act 2003 provides as follows

“Where a registered estate in land is held in trust for a person by virtue of section 75(1) of the Land Registration Act 1925 immediately before the coming into force of section 97, he is entitled to be registered as the proprietor of the estate”.

Section 75(1) of the Land Registration Act 1925 provided

“The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts”.

5. Section 15 of the Limitation Act 1980 provides as follows:

“15(1) No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

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

6. Section 17 of that Act provides

“Subject to—

(a) section 18 of this Act; .

at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished”.

Section 18 deals with settled land and land held on trust and is not relevant. The “period prescribed by this Act” is 12 years from the date on which the right to bring a claim for possession accrues – section 15(1). This is modified in the case of the bringing of an action by the Crown to substitute a period of 30 years – see Schedule 1 para 10. Schedule 1

paragraph 12 contains the following provision dealing with the period applicable where a person brings a claim for possession in respect of land formerly vested in the Crown:

“Notwithstanding s. 15(1) of this Act, where in the case of any action brought by a person other than the Crown, ...the right of action first accrued to the Crown .., the action may be brought at any time before the expiration of

(a) the period during which the action could have been brought by the Crown ...; or

(b) twelve years from the date on which the right of action accrued to some person other than the Crown ...;

whichever period first expires”.

7. Schedule 1, paragraph 1, provides as follows:

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

8. Schedule 1, paragraph 8, provides:

“(1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as ‘adverse possession’) and where under the proceeding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

(2) .....

(3) ... ..

(4) For the purpose of determining whether a person occupying any land is in adverse possession of land it shall be not assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter’s present or future enjoyment of the land.

This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case."

9. Thus, the right of action to recover the land is barred whenever 12 years have elapsed from the time when any right of action accrued. It does not have to be a period immediately before an action is brought. When the right of action to recover the land is barred, the title of the person formerly having the right to bring the action is extinguished.

10. The question to be answered when considering whether a person occupying land is "in adverse possession" for the purpose of Schedule 1 paragraph 8 to the Limitation Act 1980 is "...whether the Defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner... Beyond that... the words possess and dispossess are to be given their ordinary meaning."

(per Lord Browne-Wilkinson in *J A Pye (Oxford Ltd) v Graham* [2003] AC 419 at paragraphs 36, 37). A group of persons acting jointly for the purposes of an unincorporated association can be in adverse possession – see *Holland v. The Neville Estate Company Ltd*. REF 2005/0776 – a decision of the Adjudicator to HM Land Registry.

11. Legal possession is comprised of two elements:

- (1) A sufficient degree of physical custody and control ("factual possession"); and
- (2) An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). "What is crucial is to understand that, without the requisite intention in law there can be no possession. Such intention may be, and frequently is, deduced from the physical acts themselves." (*ibid* paragraph 40).

12. Factual possession has been described as follows:

"It signifies an appropriate degree of physical control. It must be a single and [exclusive] possession... 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.”

(per Slade J in *Powell v McFarlane* (1977) 38 P and CR 452 at pp. 470-471, cited at paragraph 41 in *J A Pye (Oxford) v Graham*).

13. What is required for the intention to possess is the intention to exclude the whole world, including the true owner of the paper title, from the land so far as is reasonably practicable and so far as the processes of the law will allow – see per Slade J. in *Powell v. McFarlane* above. The intention must not only be the subjective intention of the squatter but the squatter must also show by his outward conduct that he has such an intention. The intention must be manifested by unequivocal action – see *Prudential Assurance Co Ltd v. Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87. The use of the land must be such that the true owner, if he took the trouble to be aware of what was happening on his land, would know that the squatter was in possession

“It would plainly be unjust for the paper owner to be deprived of his land where the claimant had not by his conduct made clear to the worlds including the paper owner, if present at the land, for the requisite period that he was intending to possess the land” – per Peter Gibson LJ in *Prudential Assurance Co Ltd v. Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87

14. The application was made on 20<sup>th</sup> October 2015.

#### The Evidence

15. The only person who gave evidence on behalf of the Trustees was Mr Peter Gregory. He became a member of the Association in 1991 and a member of the Executive Committee of the Association in 2006. He became treasurer of the Association in 2009.

16. Mr Williams leased land to the Association for use as allotments. Prior to the current lease made in 2011, the Association had previously paid rent to Mr Williams on the basis of what Mr Gilbert called a “rolling six-month tenancy” and had done so since 1960. No earlier lease document was produced. Mr Gilbert said that he had not seen any previous lease and the documents handed down through the secretary of the Association did not contain any copy lease. The 2011 lease had been negotiated so as to give the Association some greater security of tenure so as to make it easier for it to obtain grant funding.

17. Mr Gregory said that he was shown around the application land in the spring of 1992 by Mr T Moyes. The Applicants produced a manuscript schedule for “Plot 108” with the name Mr T. Moyes and setting out a list of annual payments received for the years 1995 to 2002 (inclusive) with the dates of payment. The payments are listed in 4 columns, headed “rent”, “levy”, “secs pay” and “NALGAH”. Mr Peter Gilbert said the schedule was taken from a file in his possession, containing records in respect of each of the allotment plots. Mr Peter Gilbert said that “NALGAH” was a national association for allotment gardens. There was a plan in the Association’s office hut on which the plots are marked and numbered. There are marked on the plan 107 plots shown on the land leased from Mr Williams and the plan shows the Plot, numbered as plot 108. One of the plots has been converted into a track. That is why in an article in the April 2017 issue of “Shout”, a community magazine for an area including Stanton Hill and containing an article about Long Reign allotment gardens, the writer states that “the site is divided into 106 plots”.

18. Mr Peter Gilbert said that after Mr Moyes had the application land, it was let by the Association to Tony Brown from 2003 until 2011. The Applicants did not produce any documentary evidence showing a letting of the application land to Tony Brown for the full period of 2003 to 2011. They produced a schedule headed “Plot Number 108” with the name “Mr T Brown” recording annual payments for the years 2007, 2008, 2009 and 2010. This was produced from a file in Mr Gilbert’s possession containing records of rents paid for allotments. Mr Brown’s address had been obscured on the copy disclosed. Mr Gilbert said that this had been done because Mr Brown was not well and he did not want to have him involved in the proceedings.

19. Mr Gilbert said that in 2006 the gate in the hedge between the plot and the road was locked and that the Association had a key to that gate.

20. Mr Gilbert said that Tony Brown became increasingly ill during the period of 12 to 18 months before he gave up the plot. The committee of the Association identified a problem with the plot in 2010 in that it was not being well-maintained. Mr Gilbert said that cultivation of the plot did not stop completely in 2010. There were some crops growing on the land in 2011 when the Association went onto it. There were some leeks, kohlrabi, and some brassicas although there was no evidence as to who had planted them. There were also a lot of weeds. He said that a large greenhouse and sheds on the land at that time “needed significant attention” and that the garden was “neglected” though not “abandoned”. He said that a lot of rubbish had accumulated on the plot.

21. After 2011 some members of the Association, including Mr Gregory had gone onto the plot to carry out some gardening work. Nothing had been planted in the Plot for a year after the Association took it back. Mr Gilbert had dug over and rotovated a border just inside the hedge between the plot and the road. A member of the Association grew some tomatoes in the greenhouse on the plot.

22. Mr Gilbert’s evidence was that the plot was not re-let when given up by Tony Brown in 2011. It was let to Mr Mark Jones in 2015. He planted two rows of potatoes and grew some tomatoes in the greenhouse. The land cultivated for the potatoes was about 10 per cent of the area of the plot. [What evidence from Applicants of what was done on the land?]

23. Association’s AGM minutes 6.12.2012 includes minutes of report by the chair, Dave Tunstall and to his referring to future projects as including “the development of the much neglected “secret garden” or plot 108 to give it its correct title”.

24. Mr Gilbert said that the Association did not have a written constitution before 2007. The constitution provides at paragraph L 1)

“... the Allotment Executive Committee shall cause this title to:

(a) all land held by or in trust for the Association which is not vested in the Official Custodian for Charities; and;

(b) all investments held by or on behalf of the Association;

to be vested either in a corporation entitled to act as custodian trustee or in not less than three individuals appointed by them as holding trustees”.



The Applicants were appointed to be the trustees of the Association's property at a meeting of the executive committee of the Association, after the proceedings had been commenced. No evidence was produced as to the identity of any previous trustees.

25. The Respondents say they were not excluded from the Plot and rely on a concrete slab path that ran along the end of their garden to the fence with the plot. Mrs Houghton's evidence was that the Respondents purchased 19 Bainbridge Terrace in 2004. Mr Houghton was registered on 23<sup>rd</sup> September 2004 as proprietor of the two titles, NT134346 comprising the house at 19, the front garden and rear yard and a piece of garden to the side of the house and NT 314432 comprising the part of the garden of 19 in the eastern corner (i.e. the piece with a concrete slab path running along its eastern side). At the time of the purchase, there was a picket fence between the plot and the side garden of Number 19. There was a gate between the greenhouse and the garage to the side of Number 19, giving access to an area between the fence and a hedge on the plot. The Respondents' predecessors had dumped garden waste in this area. Shortly after buying Number 19, the Respondents replaced the picket fence with a solid panel fence. The fence extended to the area where the gate had been between the greenhouse and garage. The Respondents did not leave any gateway in the new fence but the fence panels could be lifted out of the grooves in the fence posts. Mrs Houghton said that fence panels were regularly removed so as to give access onto the plot to enable the Respondents to paint the side of the panels facing the plot.

26. Mrs Houghton was registered as the registered proprietor of title NT500837 on 2<sup>nd</sup> May 2014. The land in this title is the area to west of Number 19 with two sheds on it. It adjoins the Plot along southern side of the Plot.

27. The Respondent produced a number of photographs. The photographs were prints taken from a computer file and each photograph was dated on that file. The file had been given to the Respondent by a man she identified only as being called "John". Photographs taken in November show tall weeds covering most of the ground of the Plot. Mr Gilbert said that the bed he cultivated was out of shot of the camera because it was beside the road hedge. The photographs also show the greenhouse, some wooden sheds, one having several broken windows, some large plant pots, an overturned wheelbarrow, some old chairs, and a bath filled with wood and other things.

Limitation Period

28. It is the Respondents' case that the Plot was Crown land to which a 30 year limitation period applies. This is on the basis that title the land was vested in the British Coal Corporation. The Respondents did not produce clear evidence that the land was ever vested in British Coal or vested in the Crown. Further, the assets of the British Coal Corporation were privatised before 1997 when the British Coal Corporation ceased to exist. If a cause of action for possession of the Plot did accrue to British Coal Corporation prior to privatisation and if such cause of action was to be treated as vested in the Crown, then that cause of action would have expired at latest in 2009, that being the shorter of the two periods set out in paragraph 12 of Schedule 1 to the Limitation Act 1980.

#### Factual Possession

29. The photographs show that the plot was not being used in November 2012 as an occupying owner would be expected to be using it. The plot was described in 2012 by the Chairman of the Association as "much neglected". I do not consider that the plot was in any better condition when it was taken back by the Association in 2011. Therefore, for a period of at least a year and probably longer, during the 12 years prior to the making of the application the plot was not being used as an occupying owner would have used it and so cannot be said to have been in the possession of the Applicants or their predecessors as trustees.

30. The photographs provide evidence that at some time before 2011 there had been significant use of the plot. Someone erected the sheds and greenhouses on the plot that can be seen in their decayed state in the 2012 photographs. There is no express evidence of who erected these but it is reasonable to infer that they were erected by someone using the Plot as an allotment garden. There is no evidence as to when they were erected. I accept that Mr Moyes was paying rent to the Association for the use of the Plot as an allotment garden from 1995. Mr Gilbert gave evidence that he was shown around the Plot by Mr Moyes in 1992. Though it was implicit in his evidence that Mr Moyes was then using the Plot as an allotment garden, Mr Gilbert did not give any detailed evidence of the state of the Plot on that occasion or of what Mr Moyes was doing or of the condition of the Plot in subsequent years. In the absence of such evidence, I cannot find that Mr Moyes was in factual possession of the Plot. Without a finding that Mr Moyes was in factual possession, I cannot find that the Applicants' predecessor trustees were in possession.

31. The fact of the Association collecting rent for the Plot is not enough to put the trustees in possession of the Plot if it is not established that those paying the rents were using the land as occupying owners would use it. Since the Trustees had no physical occupation or possession of the Plot (at least prior to 2011) they need to establish that their tenant was occupying the Plot in the way that an occupying owner would have occupied it.

32. In finding that the Trustees have not established factual possession, I do not rely on the Respondents' case that they went onto the Plot. Their gaining access to the part of the Plot nearest their fence once a year by removing a fence panel and walking onto the plot to paint their fence would not have been such as to have meant the Plot was not in the possession of the Trustees if they or their tenants had been cultivating the Plot so as to have been using it as an occupying owner would have done for the full period of 12 years.

#### Accrual for Benefit of Landlord

33. Had the Trustees established that they had been in possession for the requisite period then I would have found that the possession accrued for the benefit of their landlord with the consequence that Mr Dominic Williams would have had the right to be registered with possessory title and not the Applicants.

34. In *Tower Hamlets LBC v. Barrett* [2005] EWCA Civ 923 Lord Justice Neuberger (as he then was) said

“26. The doctrine was clearly stated by Parke B. in *Kingsmill v. Millard* (1855) 11 Exch. 313, at 318, in the following terms

“It is laid down in all the cases – whether the inclosed land is part of the waste, or belongs to the landlord or a third person – that the presumption is, that the tenant has inclosed it for the benefit of his landlord unless he has done some act disclaiming the landlord's title. ..The encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit”.

Neuberger LJ said that the presumption was based on a rebuttable presumption of fact. His Lordship said that the doctrine was too well-established to be overruled by the Court of Appeal but he expressed scepticism about the application of the doctrine in relation to land owned by a third party unless the land to which possessory title is acquired is very close to the demised land and occupied by the tenant together with that demised land.

35. In this case the ownership of the land is not known. The landlord, Mr Williams does not claim that he is the owner. It adjoins the land let by Mr Williams and was occupied by the tenants together with the let land in the sense that it was let out by them to tenants for use as an allotment in the same way as they let out the land belonging to Mr Williams.

36. The question then arises whether the Applicants have rebutted the presumption that they possessed the application land for the benefit of their landlord, that is, as an addition to the land let to them. How is the presumption to be rebutted? By evidence that as a matter of fact the trustees in possession did not intend to possess the land for the benefit of their landlord as an accretion to the land held under the tenancy.

37. There is no evidence about the intention of the trustees prior to 2006. There is no evidence as to when the trustees first knew the application land was not part of the land let by Mr Williams. There is some indication that the Association committee may have assumed it was part of the land let. In the ST1 statement in support of the application, Mr Gregory said in box 5 that the committee “discovered” that the land was not included in the land leased by the Association. In cross-examination, Mr Gregory said that the use of the word “discovered” was a mistake and the statement should have read “confirmed”.

38. If I had found that the Trustees had established that they were in possession of the Property, I would have found that they had not rebutted the presumption that they were possessing for the benefit of their landlord. The burden is on the Trustees to rebut the presumption. They cannot do so in the absence of evidence of the intention of the Trustees prior to 2006. Notwithstanding Mr Gregory’s attempt to explain away the words used in the ST1 in support of the application, I consider that this indicates the Trustees themselves did not know that the Property was not part of the land let to them and accordingly, they cannot have intended to possess otherwise than for the benefit of their landlord.

#### Conclusion

39. The Trustees have not established that they have been in possession of the Plot for a period to bar the title of the paper title owner. The land was not being used as an occupying owner would have used it during 2011 and 2012. Had the Trustees established they had been in possession for the requisite period then I would have found that their possession prior to 2011 enured for the benefit of their landlord, Mr Williams and so did not give the Trustees the

right to be registered with possessory title to the Plot. I shall direct the Chief Land Registrar to cancel the application.

#### Costs

40. The Respondents were not legally represented. Their recoverable costs are likely to be small. It may be that the parties can agree that there should be no order as to costs. If any party wishes to apply for an order for costs they should file written submissions with the Tribunal by 5pm on 22<sup>nd</sup> December 2017. In the absence of any such application, I shall make no order as to costs.

BY ORDER OF THE TRIBUNAL

*Michael Mitchell*

Dated this 11<sup>th</sup> December 2017

