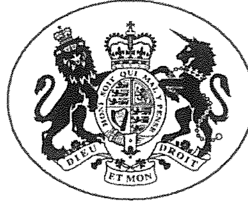

[2018] UKFTT 210 (PC)

PROPERTY CHAMBER
FIRST - TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

REF/2016/1144-1151

BETWEEN

Mr ROBERT GRANT ARNOLD

APPLICANT

and

(1) Ms LAURA ANNE MAUREEN MANN
(2) Mr JEREMY NICHOLAS MANN
(3) Ms KATE DANIEL
(4) Mr ANDREW JOHN DANIEL
(5) Ms LORRAINE BROOKS
(6) Mr MICHEL WILLIAM PETER QUITTELIER
(7) Mrs SUZANNE CLARE SCANLAN
(8) Mr ANDREW BINT

RESPONDENTS

Property Address: Land adjoining 61 and 63 New Barn Lane, Prestbury, Cheltenham GL52 3LB

Title Number: GR397886

Before: **Dr Anthony Verduyn sitting as Judge of the Property Chamber of the First-tier Tribunal**

Sitting at: **Gloucester and Cheltenham County Court and Family Court hearing centre, Kimbrose Way, Gloucester, Gloucestershire GL1 2DE**

On: 10th and 11th January 2018

Applicant represented by Mr Gareth Gregory, solicitor of Midwinters Solicitors of Cheltenham

Respondents represented by Mr Martin Hodgson of Counsel instructed by David Wyld & Co of London

DECISION

1. Mr Arnold applied on 30th September 2015 to be registered as freehold proprietor of land adjoining 61 and 63 New Barn Lane, Prestbury, Cheltenham GL52 3LB (“**the Land**”). The Land was unregistered, and he claimed adverse possession for a period of 12 years and more, back to 3rd July 2002 when he purchased 61 New Barn Lane (“**No.61**”). He bought the neighbouring property, 63 New Barn Lane (“**No.63**”), on 7th February 2003. They occupy the eastern-most plots of a row of houses on New Barn Lane, but separated from the highway by a private service road with its own pavement along the frontages and a hedge. The Land is the service road, verge and hedge immediately between No.61 and No.63 and the highway. There is an opening between the service road and highway for vehicles, opposite 55 New Barn Lane, and at the southeast end a pedestrian opening, which has been gated (“**the Gateway**”) and then closed by the Applicant.

2. The Application has been resisted by neighbours on New Barn Lane who also front the service road and assert rights over the entirety of it. These are the Respondents and they own house numbers 45 to 59 New Barn Lane (odd numbers), with the exceptions of 49 New Barn Lane, which is also a property owned by the Applicant, and 55 New Barn Lane (but Mr Meredith, as occupied of this property since 1995, was called as a witness by the Respondents).

3. The paper title owner of the Land has been identified and applied to be registered in respect of the service road. This application was successful (title number GR408261), save that it remains pending in respect of the Las this was the subject of the prior application of the Applicant. In November 2016 GR408261 was transferred to 3LB Land Limited, a company formed by residents to hold, restore and maintain the service road for the benefit of frontagers. Neither the original paper title owners, who was William Kedward (following an assent in about August 2016 from William John Kedward and Ann Weller as executors of the late William Henry Bowd and Lillian Jane Kedward), nor 3LB Land Limited, are Respondents, but they are not required to be parties as the Respondents have sufficient standing to object to first registration on the ground of

adverse possession. Indeed, it is hard to see how such parties could add to the evidence to be adduced in this reference, and I am unsurprised that they were not joined as Respondents.

4. The Land Registry, by letter dated 12th May 2016, indicated it was willing to approve the Applicant's application in respect of part of the Land (the Blue Land as defined below). Notice of the application was only then given by letter dated 10th June 2016 to the 7th Respondent, Ms Scanlon, as adjoining owner at 59 New Barn Lane in reference to the Land. Objections were then received. Ultimately the Land in its entirety was subject to reference to the Tribunal, and is considered afresh against all the available evidence.

5. I visited the Land on the first morning of the hearing attended by the representatives of the parties, the Applicant and four of the Respondents, and Mrs Jean Bint. The legal representatives accompanied me to view the Land and its immediate environs. The Land comprises the former service road and its pavement outside No.61 and No.63 (shaded yellow on the Land Registry illustrative plan – "**the Yellow Land**") and a verge to its east and south (shaded blue on the Land Registry illustrative plan – "**the Blue Land**"). The latter was unmetalled and, to the south, comprised some hardstanding with lamppost, modest amenity land and a hedge against the highway beyond. I am told there was a french drain in this part of the Blue Land, but nothing was visible. I was also told it led to a soakaway which the Applicant located in the Blue Land, but the Respondents assert is identified by a depression visible just to its west. The hedge is a very long-standing feature. The verge to the east, like the pavement of the service road, is now subsumed in a recently laid gravel surface, and again it is used as amenity land. It is separated from 65 New Barn Lane by a large, old brick wall. As already noted, to the south-east corner was a pedestrian route, at some point gated, between the service road and the highway. This was now blocked. By using the former Gateway people could avoid the somewhat narrow pavement of the highway, between hedge and carriageway, when proceeding to nearby shops to the east and park to the south. The Land has been gated from the rest of the service road since 23rd December 2017. The service road was reasonably well maintained to the opening between it and the highway at New Barn Lane. The verge showed signs of some use and tending and, beyond the opening to the highway, a caravan was stationed upon it behind a chain fence. Save for the Land, the service road appeared unexceptional.

6. The relevant law is not in dispute between the parties. The Land was unregistered, and the application is to be determined under the Limitation Act 1980. Hence it is required that the Applicant demonstrate 12 years of adverse possession. The legal concept of possession was authoritatively stated in Pye v Graham [2003] 1 AC 419 at [40]:

   "there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")."

7. On the subject of "factual possession" the following statement from Powell v McFarlane (1977) 38 P & CR 452 was approved in Pye v Graham at [41]:

   "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."

   Consistent with this statement, possession cannot be held by a number of people independently at the same time, meaning severally rather than jointly, as held in Brazil v Brazil [2005] EWHC 584 at [32-33] and [43].

8. The intention to possess was also discussed in Pye v Graham at [43]:

   "... Once it is accepted that in the Limitation Acts, the word "possession" has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear

that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess ... Slade J reformulated the requirement (to my mind correctly) 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..."

9. Possession must be adverse, but this does not add a great deal to the test, since it means no more than it must be without the permission of, or licence from, the paper title owner. Possession under lawful title cannot be adverse possession, as observed in Buckinghamshire CC v Moran [1990] Ch 623 at 636.

10. Finally, for the purposes of this review, the intention to possess must be manifest to the legal owner, were that owner to attend the land in question. In Powell v McFarlane (1977) 38 P&CR 452 at 480 Slade J explained:

> "In view of the drastic results of a change of possession, however, a person seeking to dispossess an owner must, in my judgment, at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the Claimant is not merely a persistent trespasser, but is actually seeking to dispossess him."

11. The same point was made by Peter Gibson LJ in Prudential Assurance Co Ltd v Waterloo Real estate Inc [1999] EGLR 85 at 87G:

> "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 world including the paper owner, if present at the land, for the requisite period that he was intending to possess the land ..."

12. Adverse possession does not, of course, operate to extinguish any existing easement over the land claimed (see Gale on Easements (20th edition, 2016) §1-91.

13. Turning to the evidence adduced before the Tribunal, the Applicant, Mr Arnold was the only witness called in support of his application. The original application to the Land Registry was short on detail, and he confirmed the content of his Statement of Case before the Tribunal. This contained more detail of his activity on the Land, listing a range of actions by date. It was initially supported by documents arranged in 23 enclosures. Some aspects of this material were immediately curious. I note that Mr Arnold asserts that he has occupied and maintained the Land outside No.61 and No.63 exclusively "from July 2002", but that is the date of purchase on No.61 and he did not buy No.63 until the following February. No.63 is the end property, but there is no explanation of how exclusive possession was taken of the Land in front of No.63 prior to its purchase. Several of the photographs appended to the March 2017 Statement of Case are dated prior to 2015, as one might expect, but it is clear that their actual date is significantly later than stated. Mr Arnold explained that the date given refers to the feature in the photograph, and not the photograph itself, hence a new list of documents was provided to the Tribunal in May 2017 with corrected dates. Only four photographs pre-date 2015 (enclosure 3 dated 2003, enclosure 6 dated 2012, enclosure 9 dated 2014 and enclosure 31 dated 2006). Enclosure 3 is annotated with an arrow to indicate the location of a soakaway. That arrow appears to indicate that Mr Arnold installed the soakaway outside the Land, but in October 2017 a corrected version was produced with the arrow now inside the Land. The printer provided a covering letter explaining the error was on its part. Mr Arnold, of course, initially used the photograph with the arrow in the wrong place, notwithstanding that it was not as he apparently intended it to be. I also note that two of the three photographs which accompanied the original application to the Land Registry were not duplicated in the statement of case and so remain undated (the exception is enclosure 31 dated 2006), of these one shows the former gate on the pedestrian route from service road to highway.

14. The general shortage of early photographic and documentary evidence is explained by Mr Arnold in terms of him having provided collected documents from 2002 to his original solicitors, Star Legal. He blames them for losing his documents. For their part (as Mr Arnold explains matters) they deny having received the documents and, therefore, admit having not returned any to him when their instruction ceased. From the documents available, I note that Mr Arnold demonstrably did show some interest in the Land in 2002, at least in so far as it was immediately in front of No.61. The vendor's solicitor wrote to Mr Arnold's solicitor on 24th May 2002 detailing the curtilage, suggesting that the service

road had not been maintained in "very many years", and stating that a sewer was laid beneath it by permission of "Mr Kedward" about 20 years previously. Item number 3 in that letter states: "The Late Eric Franks planted rose bushes and narcissi and kept the area tidy either by his own efforts or, more recently, by employing someone to do it for him." This would appear to be a reference to the Blue Land opposite No.61, a point confirmed by a letter to Mr Arnold from his own solicitor dated 5th June 2002, where it is also observed: "It is clear from this letter that no claim to ownership of this piece of ground was made by the late Mr Franks and therefore you do not have any rights over this piece of ground." Mr Arnold renewed his interest in 2007 because he was interested in purchasing 65 New Barn Lane, again as demonstrated by a solicitor's letter. It is dated 18th September 2007 and relates recent investigation into possessory title for the service road: "To apply for possessory title, you would need to continue to act as though you've owned the roadway e.g. by maintaining trees/hedge adjoining the main road etc. […] If you managed to get possessory title of the roadway (in approximately 2014 – 12 years after you started maintaining it), this would be beneficial to a prospective buyer of no.65 …" A draft statutory declaration is referred to, but not disclosed.

15. I consider it surprising that it has proved impossible to produce more contemporaneous documents for most activities in the period prior to 2015. Mr Arnold has managed to find solicitors correspondence to show interest in the Land as detailed above, but with items of some significance missing. There are a few photographs, but little else. Whilst I do not discount that documents are said to have been lost, what those documents were is not detailed, nor why only some of the documents from solicitors have been found and disclosed. These apparent omissions are of concern, and I do not consider it appropriate to make any assumptions that good quality or significantly probative evidence went missing. I am also concerned that the Applicant needed to repeat the disclosure exercise and update the arrow on an enclosure, as detailed above. The latter two points demonstrate that it is appropriate to treat Mr Arnold's evidence with caution as he is a witness who, in his own case, has been shown to be careless about the strict accuracy of his evidence.

16. The substance of Mr Arnold's evidence is that he was told in 2002 that there was no adverse possession of the Land by his predecessor in title, but he plainly was interested

sufficiently to investigate the circumstances. In 2007 that interest was renewed when he considered purchase of 65 New Barn Lane, but his solicitor referred merely to maintenance of the trees and hedges on what can only be the part of the Blue Land between service road and highway. Mr Arnold says that from 2002 to 2005 he parked two commercial vehicles on the Land, and in 2003 laid gravel hardstanding to this end carved out of part of the verge on the Blue Land, under which (he says) was placed the first soakaway (re-dug in 2005). Also in 2003, he states that new tarmac was laid to service road and pavement. In cross-examination he accepted there had been contributions to the cost of this by neighbours, but he insisted that was for the parts in front of each of their respective properties. The photograph illustrating the tarmacking was re-dated by Mr Arnold to 2012, and is instructive, because it shows that the front garden to No.61 was differentiated from the new tarmac by brick edging (the front garden being laid to what appears to be gravel). Mr Arnold says the brick edging was installed in 2006. The tarmac laid in 2003 extended to the wall at the east of the service road and to frontages and verges. Mr Arnold records repairs in 2004/5, after a water leak, and in 2011 for pot holes. A photograph re-dated to 2014 shows the arrangement. The lamp post and power supply are also stated to have been put in during 2003. In 2004 Mr Arnold states he pointed the eastern wall, removed builder's rubble and created a feature rockery. It is not clear whether this was where Mr Franks had his plants, but it cannot have been far from there. Mr Arnold says he increased the hard-standing in 2007, and put logs and garden equipment on the land in 2008. Between 2003 and 2005 he says he cut the hedge to highway side at the request of the Council (later he says from 2002 to 2017), and in 2008 lopped the trees at the request of a utility company. Between 2010 and 2016 flooding was a problem, which ended in the installation of the french drain. Improvements to the garden on the Blue Land are asserted for 2009, 2012 and 2014, with log storage added in 2015, and garden furniture in 2015-2016. In 2016 there was general resurfacing with gravel, ending differentiation between service road and front gardens of No.61 and No.63, and Mr Arnold began taking insurance in respect of the Land. He then asserts generally that he stored logs, plants and other items, and parked three vintage vehicles, on the Land between 2002 and 2017. These, then, were his assertions as to exclusive possession.

17. In cross-examination relating to the soakaway, Mr Arnold was clear that this was located on the Land and denied discussions with neighbours about anything to do with the Land. It was put to Mr Arnold that people used the Land as part of the service road and used the

Gateway freely until it was closed up entirely. He suggested that many people had asked permission, but did not detail this. When challenged on statutory declarations sworn before this application was made, and detailing use of the service road and Gateway, he offered no explanation save to assert that his own statement was the truth. He was challenged on maintenance of the hedge, on the basis that this was a communal effort, but Mr Arnold insisted that he paid his gardener to cut the hedge on the Blue Land and stated it was included in gardening invoices from December 2014 disclosed in the Trial bundle (albeit lacking particulars of the works done). Mr Arnold stated that he maintained separate accounts for each house, and paid gardening out of the account for 49 New Barn Lane, as that was where the gardener left her tools. It was pointed out by Counsel that gardening from 2014 was not disputed, but Mr Arnold insisted that receipt before that date were lost by his former solicitors. In re-examination, he re-emphasised that each of the frontagers looked after the hedge in front of their respective properties. In respect of the Gateway, Mr Arnold said this was blocked off during Gold Cup week, when race-goers were inclined to try to park on the service road and use the hedge as toilet facilities (hence, also, his evidence that the service road entrance was also closed by residents in this period). Mr Arnold insisted the Gateway was also closed at his discretion at other times, and that he merely relocated the gate when BT objected to it being against the telecommunications pole.

18. Against the evidence of Mr Arnold, the Respondents were called (individually, of course, although for ease of reference some of them are grouped below) and some witnesses. The tenor of their evidence was the unhindered and open use of the Yellow Land (especially for parking) and shared (or at least non-territorial) action relating to the hedge including the Blue Land.

19. Mrs Laura Mann and Mr Jeremy Mann, the 1st and 2nd Respondents both of 47 New Barn Lane since June 2014 confirmed their statements of case. They adduced statutory declarations from John Bernard Lannon in 2007 and Louise Aitchison in 2014, which asserted rights of way and parking over the entire service road (and for which, as noted above, Mr Arnold had no answer save the truth of his own statement). They asserted their own user of the service road and pedestrian access through the Gateway, which Mr Mann explained was convenient for walking the dog and using a pushchair as the pavement to

the east was wider after the gate than in the stretch between hedge and highway. They exhibit Google Streetview stills showing the Gateway apparently open in 2009, 2011, 2014 and 2015. In respect of the hedge to the highway, Mr Mann asserted that he cut that, although the picture for this is dated March 2017, hence after the application was made. They also maintain that logs were only put on the land during the period they were owners of No.47 (although they were a little unclear whether these were new) and asserted that Mr Arnold had arranged garden furniture as appears in one of the photographs when his girlfriend moved in to one of the houses and it remained in situ only then for a very short period of time.

20. Mr Mann was taxed in cross-examination on his assertion that he parked on the Yellow Land at times. He accepted that he was challenged by a tenant of Mr Arnold on one occasion, but parked there nevertheless. He accepted this was not a regular parking space for him, but was occasional use when necessary. His general demeanour as a witness, and the fact that he volunteered that he had on one occasion been challenged about parking on the Yellow Land, gave him the appearance of (and I find him to have been) a credible witness.

21. Mrs Mann in cross-examination corroborated occasional parking on the Yellow Land, as people used spaces as need arose and without seeking permission from anyone. Again, she appeared a credible witness of fact.

22. Mrs Kate Daniel and Mr Andrew Daniel, the 3rd and 4th Respondents both of 45 New Barn Lane since December 2013, confirmed their statement of case. This states that the vendor of their property said there was a gentleman's agreement to maintain the service road collectively (although Mr Arnold as owner of 49 New Barn Lane then joined with the owners of 45 and 47 to lay gravel to their end of the service road, distinguishing it from the rest), and that it appeared as a single entity in 2014, as evidenced by an aerial photograph taken when their home was being extended. In June 2016 Mr Arnold resurfaced the Land with gravel, but they state he spoke to them about this and said that Mrs Bint had refused to join in so it was limited to the far end only. They, too, assert use of the Gateway and an absence of control by Mr Arnold until June 2016, when the application for adverse possession as made. They deny his claim to exclusive possession.

In respect of the hedge, they assert that they have witnessed general cutting to the highway side by Mr Bint and Mr Quittelier, and the collection of garden items on the Land dates, according to their recollection, from 2016.

23. In cross-examination, it was fairly clear that pedestrian use was made of the Gateway by Mr and Mrs Daniels and their family, but there was little else use by them of the far end of the service road. There was a photograph of their children with Christmas lights erected by Mr Arnold against the eastern wall, but permission for access to take photographs was disputed by Mr Daniel, as was the suggestion to Mrs Daniel that she specifically complemented Mr Arnold on his works. She observed that things would come and go from his end of the service road. Mr and Mrs Daniels both presented as credible witnesses for the period of their occupation of their home.

24. Mr Michel Quittelier, the 6th Respondent of 53 New Barn Lane since October 2003, confirmed his statement of case. He stated that his father used the Gateway until his death in May 2013. His daughter and her friends rode bicycles on the service road along its full length between 2007 and 2009 ,and he says that he was compelled to cut the hedge to the highway side of the Land as elsewhere. He states that parking was not exclusive to Mr Arnold and that furniture on the Land only appeared in 2014, and planting did not start until after 2004. He states that he was told by Mr Arnold's partner not to interfere with the pallet used to close the Gateway, who referred to "their property", until then use was as of right. In chief, Mr Quittelier agreed that the hedge was overgrown in 2004. In cross-examination he accepted that the gardener may have done work for Mr Arnold on the Blue Land, but he said he cut the service road side of the hedge, as he had cut the highway side. I formed the impression that Mr Quittelier was a straight-forward and truthful witness, not seeking to embellish his evidence.

25. Ms Lorraine Brooks and Mr Simon Andrew Bignall, the 5th Respondent and a witness respectively, both of 57 New Barn Lane since 2009, confirmed their statements. Ms Brooks disputed exclusive possession of the Land by Mr Arnold and referred to a statutory declaration dated 7th July 2009 from Claire Victoria Wellings, seller of No.57 confirming 5 years' use of the service road as of right. Ms Brooks asserts that she has parked freely on the Land, and she and Mr Bignall had cut the hedge on the Blue Land.

Pedestrian use of the Gateway is also asserted. The core of her evidence is that Mr Arnold made many changes during 2016 and she was concerned that the hedge on the Blue Land was seriously damaged during bird breeding season. In chief she accepted that the hedge was cut as necessary, depending on the work of others, but she states it was done by her and Mr Bignall soon after they moved in during 2009. She saw Mr Quittelier do it on one occasion. Mr Bignall had a hedge pole cutter so could reach the higher parts, but would only do this September to March, when birds were not breeding. Use of the Land for parking including Mr Bignall's van and vehicles when guests stayed, but was not constant. It was always without seeking permission, though neighbours may be told if the car overhangs a driveway as a matter of courtesy. In cross-examination she stated she recognised the hard-standing said to have been put in by Mr Arnold, but she did not know who created this or why. She saw others use it apart from Mr Arnold and had no reason to believe it was solely his. Though appropriately tested in cross-examination, Ms Brooks presented as a compelling witness, especially in respect of the use of the hard standing.

26. Mr Bignall was also a compelling witness. He confirmed that he alone of the residents had a petrol driven pole hedge cutter, so when he did the higher parts of the hedge he did the whole lot (out of the bird breeding season, he was keen to note). As a landscape contractor, he also had a spraying licence, and treated all the verge lands accordingly until 2016 when the Land was blocked off. He also asked the Council sweeper driver to sweep the service road. In cross-examination he was unshaken: he sometimes worked with Mr Arnold on the basis that everyone helped each other out, but basically he was content to work along the service road and did not consider that he should only do the piece outside his house. He did not work on the Land with permission, though he might put a note in the car window if he parked on the hard standing, in case it needed to be moved for any reason (not just for Mr Arnold's benefit). Again, Mr Bignall was a compelling witness for the Respondents.

27. Mr Michael Meredith provided a statement to Ms Brooks. He was resident at 55 New Barn Lane from 1995. His case, like the Respondents, was that the Land was no different to elsewhere on the service road. There had been little repair before Mr Arnold arrived and contribution was paid for the work he had done. It was not clear to me why he should be disbelieved.

28. Ms Suzanne Clare Scanlan, the 7th Respondent of 59 New Barn Lane since 1996, confirmed her statement of case (a lot of which is an analysis of Mr Arnold's documents and photographs). She states she moved to 59 New Barn Lane with her family and asserts that the service road, hedge and verges were maintained communally. Residents generally maintained the land immediately opposite their respective properties, but this was not exclusive. Matters only really changed in June 2016 when Mr Arnold began excluding his neighbours, closing up the Gateway and cutting into the hedge. After resurfacing the service road with tarmac, there were problems with drainage and Mrs Scanlan says that Mr Arnold approached her to suggest he try digging a soakaway in front of her house on the opposite side of the service road. This was done on what is now company land. She also states she contributed £350 as her share of the cost of tarmacking, which was not specific to her property, and she does not recall other works to the surface like the filling of potholes. She notes that the rockery predated Mr Arnold's purchases. She and other frontagers had letters from the Council about the hedge, hence she joined in communal cutting of it. She had expected to join in the laying of the french drain, and inquired of Mr Arnold what she would need to pay. She states she was surprised when he said it would be for No.63 and No.61 only. In chief, Mrs Scanlan was clear that parking was not with permission and was freely execised even over the Land. She was generally consistent with her statement.

29. In cross-examination Mrs Scanlan observed that the previous owner of No.63 had planted a cherry tree and maintained a rockery on part of the Land, and the previous owner of No.61 may have mowed the Land, but she could not tell. She agreed that the service road was not tarmacked in her time before Mr Arnold arrived, but she maintained her payment was a share of the whole and not referable to the road outside her house. She also maintained that permission to park on the Land was not conventionally sought. She even said a camper van was parked there and a request of Mr Arnold was only for a power supply, and then from the house not from the Land. Whilst on the documents it appeared that Mrs Scanlan was strongly committed to her case, in evidence she came across as a credible and measured witness, grateful for some kindnesses and assistance from Mr Arnold, but nevertheless clear that he was not possessed of the Land (at least until 2016).

30. Mr Andrew Bint, the 8th Respondent of 51 New Barn Lane since birth in 1970, confirmed his statement of case. He confirmed the use of the Gateway and asserted that people parked on the Land without permission. He had parked a car on the hard standing for some months in 2009/2010. In chief he made clear that he parked only once on the Land, when he placed his late father's car on the hardstanding, and then as a matter of courtesy he spoke to Mr Arnold about this. In cross-examination, he explained he eventually sold the car to Mr Arnold. He confirmed that a former flowerbed of roses, tended by Mr Franks, had been where part if the hard-standing was, otherwise there was grass outside No.61 before Mr Arnold purchased it, and a small rockery. As with other providers of short witness statements, I see no reason to disbelieve Mr Bint's evidence.

31. Mr Richard Jeremy Osborn was called to give evidence. He confirmed the truth of his statement, which was to the effect that he was a regular visitor to Mrs Scanlan. He often parked outside No.61, as it was out of the way at the end of the service road. He witnessed use of the Gateway, and saw that Mr Arnold put out furniture on the service road, but only temporarily and he never saw it used. In oral evidence he confirmed his parking was without any permission sought, usually up to the wall but occasionally later on the hard-standing installed by Mr Arnold. His evidence was unshaken.

32. Ms Joanne Colman was called to give evidence. She confirmed the truth of his statement, which was to the effect that when she visited Mr Scanlan she parked in much the same manner as Mr Osborn, and without seeking permission. She was sometimes there for a few hours or overnight. She was not cross-examined.

33. Mrs Rosemary Brooks was called to give evidence. She confirmed the truth of his statement, which was to the effect that when she visited her daughter, Ms Lorraine Brooks at 57 New Barn Lane from July 2009 and confirmed using the Gateway and seeing others do so also. She also saw the entire service road used for parking by people other than Mr Arnold. In cross-examination she stated that their daughter and Mr Bignall to her knowledge had parked on the Land and people other than Mr Arnold. She and her husband regularly stayed at No.57 when their daughter and Mr Bignall were away. I see no reason to doubt her evidence.

34. I have been invited to read the statements from Mr Matthew Lewis Page, Mr Darren Michael Wake and Ms Astrid Dorrington, but their statements are very short, they were not called to give evidence (without any good reason) and I do not consider I can attach any weight to them. I was also asked to read the somewhat longer statement of Ms Jessica Ellen Sherbourne, who was said to be unwell. I do not consider that this adds to the evidence which was called and, in her absence, I do not attach weight to it.

35. In closing Counsel for the Respondents maintained the case set out in Counsel's pre-hearing skeleton argument that there was simply not exclusive possession for the period of 12 years. He had easements over the Land and maintaining the road was within his legal rights at all time. There was no obvious claim to the Land itself, and the evidence was that maintenance was substantially collaborative. The Blue Land was used as a pedestrian route and tending to this land was to the visual benefit of the residents, rather than an assertion of title.

36. The solicitor for the Applicant submitted that the actions of Mr Arnold went significantly beyond mere maintenance of the surface of a right of way, he replaced verge with hardstanding, installed lighting and drainage, improved the garden parts and, after 2015, installed the french drain and put down gravel. As to the community spirit, before 2003 nothing was being done. The installation of hardstanding in 2003 was confirmed by Mr Bint, and, although there is a want of photographic evidence from Mr Arnold, the same is true of the Respondents. When it comes to parking on the Land, he observed that in the case of Central Midlands Estates Ltd v Leicester Dyers Ltd [2003] 2 P&CR DG1 it was held that parking "may" in certain circumstances demonstrate taking possession, even though in that case it did not. Mr Arnold did more than use the Land for parking, he improved it and his continued activity demonstrated his possession of it. Indeed, Mr Arnold's positive actions contrast with the mere parking by others, which may be said not to dispossess him accordingly. As stated in Gale on Easements (noted above) adverse possession can be subject to the easements of others. Mr Arnold's intention to possess the Land was demonstrable by his activities upon it. He has accordingly made good his claim and should be registered. If the Tribunal were against Mr Arnold on this, then it is asserted that the claim to the Blue Land and even parts of the Yellow Land which may not have been surfaced when Mr Arnold bought his properties, can still be made out.

37. Notwithstanding the skilfully made submissions on behalf of the Applicant, I have no hesitation in dismissing Mr Arnold's application on the evidence and having seen the site. The evidence adduced by Mr Arnold is simply insufficient to establish factual possession for the requisite period. The site as seen on inspection was in the factual possession of Mr Arnold: there were gates and posts across the service road as an extension of the western boundary of No.61; the edging along that line and the gravel differentiated the surface of the enclosed land from that of the service road and its pavement, but did not differentiate the surface from the front gardens of the original plots to No.61 and No.63; the Gateway was obstructed; and, garden was laid out on the Blue Land in areas where parking would not take place. These key features, though, had not been present prior to 2016 and they facilitated the application, but were not indicative of the historic arrangement. I am satisfied from the Respondents' evidence and the evidence of their witnesses, that possession did not arise in fact before 2016.

38. I do not doubt that Mr Arnold had expressed interest in the Yellow Land and Blue Land so far as it was immediately outside No.61 when he bought it in 2002, the contemporaneous correspondence from solicitors shows as much, but it does not show that he intended to seek adverse possession of it. I find that this was something he did not canvas before 2007, when he again corresponded with his solicitor, this time in the context of purchase of No.65. At that point he plainly referred to maintaining the trees and hedges, but there is no evidence that anything more was done. One would expect a solicitor to refer to the most important acts signifying possession, but none are indicated. Furthermore, contrary to the terms of that letter, maintaining hedge and trees would not indicate possession in a case such as this. Such activity is equivocal and perfectly well explained by the desire to keep the aspect from the houses neat and tidy in appearance. The matters relied upon for possession prior to 2007 are inadequate: Mr Arnold was entitled to park on the service road, as every other frontage appears to have been doing. As part of an easement which included parking, he was entitled to make up the surface, which is what he did with a modest area of hardstanding in about 2003. At about the same time he re-laid tarmac, but for this he sought and obtained contribution for others, and I am satisfied that this was not on the express basis that he would pay for his part and they for their parts, but even if I were wrong in that, merely paying to tarmac the surface of the service road where it would be most used by Mr Arnold is no more than his rights pursuant to his easement of a right of way with parking. It was no more an act of adverse

possession, than was the tarmacking of the areas in front of his neighbours' houses was acts of possession on their part. A soakaway was dug, but not only was that also consistent with improving his right of way and parking (especially since it drained the edge of the service road where Mr Arnold commonly parked), but I find on the balance of probabilities that the soakaway was located as evidenced by the Respondents and outside the Land. I prefer the Respondents' evidence on this point, and it seems to me common sense to drain the hard standing on land to its west, rather than underneath the surface of it. I do not consider that Mr Arnold would have wanted to park on the soakaway that he dug and risk compromising it by collapsing its content or edges. That Mr Arnold was not asserting possession at this time is also clear from the edging to the front gardens of No.61 and No.63 installed he says in 2006, the bricks of which demarcated the land to which he had title from the pavement and service road. The installation of a street light and mains electricity, which may have exceeded his rights, were not truly acts of possession of the Land, but for his own amenity. The logs and garden equipment I do not find on the balance of probabilities to be present at this time. Gardening probably did start in this period, but again goes to visual amenity of part of the Land and not possession of any of it. Such gardening had been carried out by predecessors in title and, to a limited extent, by neighbours and is simply not indicative of appropriation of the Land in question.

39. The solicitors letter in 2007 could have inspired appropriation of the Land at that point, but I find that it did not. Mr Arnold did not buy 65 New Barn Lane, and I do not find that his activities after 2007 were significantly different to those before, until 2016. Most of the material he relies upon is simply more of the same that preceded it: surface repairs to the highway, cutting hedges and lopping trees, improving the visual appearance of tended areas and plenty of parking. I accept the evidence of the Respondents and their witnesses that none of this gave rise to the impression that Mr Arnold was taking possession of the Land. They continued to park without seeking permission on the service road outside No.61 and No.63. If Mr Arnold's tenant objected (and there was evidence for this happening only once), it was disregarded. Mr Bint spoke to Mr Arnold in 2009/2010 about leaving his father's car on the hardstanding, but generally the Land was used indifferently from the rest of the service road, and Mrs Scanlan's visitors positively preferred to use the end outside No.63 as the most out of the way place to park. Fundamentally Mr Bint was being polite, rather than acknowledging another person's title by possession. There was no assertion of control by Mr Arnold, even though parking was

a mere easement for all. There was also, I note, no signage to be relied upon by Mr Arnold.

40. Mr Arnold draws a contrast between his activity in respect of the service road and the hedge, and the inactivity reported in previous years. It seems to me, and I find, that there was a history of inactivity on the part of frontagers and very little done in general. Whilst Mr Arnold did get some works done to the road surface and to improve the area outside No.61 and No.63, he still did not do a great deal. The Council wrote to several frontagers about the state of the hedge, so it cannot have been well maintained by him or any one of them. I do, however, accept that there followed intermittent activity of a non-territorial nature, with Mr Bignall in particular being community minded in using his tools and skills for the benefit of all. I also accept the evidence that Mr Quittelier and others also cut more than just the hedge outside their houses. Whilst Mr Arnold may have been more active than most, he was not unique in what he did. Furthermore, until about June 2016, I do not consider that anything he did would have amounted to an assertion of possession of any of the Land and I accept the evidence of the Respondents and their witnesses that there was a fundamental departure at that point and associated with the application itself.

41. It was in or about 2016, I find, that Mr Arnold sought to close the pedestrian route to the Gateway. The photographic evidence is that this route was open in general until that point, and I accept the evidence of the Respondents and their witnesses to that effect. The route was not controlled by Mr Arnold, save in respect of its occasional closure during Gold Cup week (when the service road was also sometimes closed): this was not an act of possession in enclosing the Land, but intending to stop the service road side of the hedge being used as though it were a public toilet. Such closure was obviously unobjectionable, but otherwise blocking this route was reprehensible, since it forced neighbours to exit through the vehicular link to the highway and use the narrower public footpath along the side of the road. Even were my finding on adverse possession to be different, there would be no basis in law for closing this pedestrian route.

42. In summary I find that there were no sufficient acts of possession in respect of any part of the Land before about June 2016. I find that the idea of adverse possession was not canvassed before 2007 (which is too late for the period of 12 years), but even then, I do

not find that Mr Arnold makes out either acts of possession or the intention on his part to possess the Land. If I were wrong about the latter, then the photographic evidence (such as it was) did not reveal a scene manifesting such an intention to possess, and I accept the evidence of the Respondents and their witnesses that such intention was not apparent on the ground. This changed in 2016 when Mr Arnold made what amounts to a land grab, resurfacing and actively enclosing the Land, and substantially interfering with the easements of his neighbours (in respect of rights of way, with and without vehicles, and parking) apparently in the name of adverse possession. The claim according fails on all essential limbs and the Company may pursue its application for registration of the Land.

43. In respect of costs from the date of the reference to the Tribunal on 14th December 2016, these should usually follow the event, meaning that the costs of the successful Respondents should be paid by the Applicant, unless some good reason can be given for doing otherwise. The Tribunal does not make orders in respect of costs incurred before the date of the reference. The Respondents should accordingly provide a schedule of the relevant costs to the Tribunal and the Applicant within 21 days of the date of the Order in this case. The Applicant should provide any objection in principle to the award of costs, or any objection to any items comprising costs, or the scale of costs in general or individually by item, to the Tribunal and the Respondents within 21 days thereafter. Any reply by the Respondents to the Applicant's submissions should be made to the Tribunal and copied to the Applicant within 7 days thereafter. The decision on costs will then be made on the papers.

ORDER

Upon the trial of this Reference

And upon hearing the Applicant represented by his Solicitor and the Respondents by Counsel

The Chief Land Registrar is directed to dismiss the Application made by the Applicant dated 30th September 2015 in Form FR1 for first registration of the Land adjoining 61 and 63 New Barn Lane, Prestbury, Cheltenham GL52 3LB (Title Number: GR397886).

Dated this 22nd March 2018

Anthony Verduyn

BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL