[2018] UKFTT 332 (PC)

REF/2017/0227/0228

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

BETWEEN

ANNE-MARIE McNULTY
(as personal representative of Patrick Joseph McNulty)

APPLICANT

and

LEWIS RUPERT WRATTEN

RESPONDENT

Property Address: Land at Hirwaun, Rhondda Cynon Taf

Title Number: CYM90483

Before: Judge Owen Rhys

Sitting at: Civil Justice Centre, Park Street, Cardiff

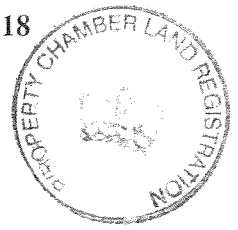
On: 4th and 5th April 2018

O R D E R

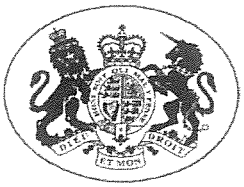
IT IS ORDERED that the Chief Land Registrar shall cancel both the applications made by Mr Patrick John McNulty in Forms ADV1 and AP1 dated 11th February 2016.

Dated this 21st day of May 2018

Owen Rhys



BY ORDER OF THE TRIBUNAL



[2018] UKFTT 0332 (PC)

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Applicant representation:	Mr Kember of Counsel instructed by Berry Smith Solicitors
Respondent representation:	In person

D E C I S I O N

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1. These references arise out of two separate applications made to the Land Registry. The first application was made in Form ADV1 and alleged that the original Applicant, Mr Patrick Joseph McNulty, had obtained a title by adverse possession to part of a parcel of land currently registered in the Respondent's name under title number CYM90483 ("the Respondent's Land"). The second,

alternative, application made by Mr McNulty in respect of the Respondent's Land alleged that prescriptive rights of way have been acquired in favour of certain adjoining land to the east registered under title number CYM572053 ("the Adjoining Land"), in which Mr McNulty had an interest. Both applications were made on 11th February 2016. The Respondent objected to both applications, and the disputes were referred to this Tribunal in March 2017. I heard this case over a period of 2 days, with a site visit taking place during the course of the hearing. Sadly, the Applicant Mr McNulty died before the reference was heard, and his wife was substituted as the Applicant for the purposes of this reference. When I use the expression "the Applicant" I am referring to both Mr McNulty and his wife unless I indicate otherwise. I heard oral evidence from four witnesses on behalf of the Applicant, all of whom made witness statements on which they were cross-examined. The Respondent, and his witness Mr Greeves, also gave evidence and were cross-examined on their witness statements. Both parties also relied on other witness statements, made by persons who did not attend to give live evidence and be cross-examined. I have taken these statements into account but for obvious reasons those statements are of lesser value.

THE LAND IN DISPUTE

2. I shall now describe the land in question. It comprises the northern section of the Respondent's Land, which originally formed part of a substantial parcel of land known as the Conveyor Site once in the ownership of National Coal Board and latterly the Coal Authority. The Respondent's Land was created out of Lot 3 when the sale of the Conveyor Site took place in 2002. It is shaped like a back to front L, with the foot of the L running east to west, and the longer part running north to south. The disputed land forms the northern section of the Respondent's Title, bounded on the south by the remainder of CYM90483, on the north by the A465 Heads of the Valleys Road, to the east by the Adjoining Land, and to the west by a parcel of land to the south of the Heads of the Valleys Road and adjacent to some playing fields. I shall refer to the disputed part of the Respondent's Land as "the Blue Land", to reflect the description used in the pleadings and evidence. A colliery tramway used to run through the Blue Land from south to north, and a raised embankment bisecting the site can still be seen

today. The land is of very poor quality, with an uneven surface and covered with clumps of grass and rushes. When I visited it during the hearing it was partially under water, although an unusual amount of rain had apparently fallen. It would have no particular value were it not for the fact that the A465 is soon to undergo conversion into a dual carriageway, with the re-zoning for planning purposes of the area to the south of the existing road. I was told that the Blue Land and the Adjoining Land were scheduled for the construction of a supermarket, which no doubt has substantially enhanced its value.

3. This is an application brought under Schedule 6 of the Land Registration Act 2002 ("LRA 2002"), on the grounds that the Applicant has been in adverse possession of the Blue Land for a period of at least 10 years prior to the date of the application – thus 10 years commencing no later than 11th February 2006. Although the Applicant claimed to have been in adverse possession since 1981, it is common ground that the Blue Land (indeed the whole of the title) was tenanted by the Respondent and members of his family until the sale in early 2002. Accordingly, it is accepted by the Applicant that it was not possible to argue that the freehold title had become barred prior to 2002, and therefore the application could not be and was not made under the transitional provisions of the LRA 2002. The Applicant alleges not only to have been in adverse possession for the required period of 10 years, but also that he is able to satisfy the second condition under paragraph 5 of Schedule 6 – namely that "*it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and (b) the circumstances are such that the applicant ought to be registered as the proprietor.*"

4. The requirements for a claim based on adverse possession are not controversial, namely exclusive factual possession coupled with an intention to possess. The leading case is J.A Pye (Oxford) Ltd v Graham [2002] UKHL 30, in which the following passage (at pp 470-471) in the judgment of Slade J in Powell v McFarlane (1977) 38 P & CR 452 was approved: *"(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."

5. An intention to possess may be inferred if the evidence supports a finding of exclusive factual possession.

THE APPLICANT'S CASE

6. The material facts relied on by the Applicant are pleaded in the Statement of Case dated 4th May 2017 as follows:

    a. Mr McNulty and his father went into possession of the Blue Land in 1981 and fenced three sides of the land, one side already being fenced, and thereby enclosed it.

    b. They erected gates in four places, which gates were kept locked and they retained the keys.

    c. From 1981 they kept their horses on the Blue Land and visited the same "on an almost daily basis".

    d. They cut the grass approximately twice per year and topped the rushes elsewhere on the Blue Land approximately three times per year.

    e. In the early 1990s

        i. they culverted two streams which flowed across the Blue Land.

        ii. In a number of places cut through the old tramway causeway.

        iii. Erected a storage shed.

        iv. Erected a compound for the horses.

    f. Every three to four years thereafter they cleaned out the culverts.

g. The Applicant's father retired in 1997 but the Applicant continued to use the Blue Land thereafter.

h. In 1999/2000 he replaced various fence posts.

i. In 2004 he "substantially repaired" the storage shed.

j. In 2009/10 the Applicant completely rebuilt the storage shed and compound.

k. In 2012 he renewed the fencing on the southern and western boundaries.

l. In 2013 he renewed the fencing on the northern (roadside) boundary and replaced the gate at point D (shown on the plan attached to the Statement of Case).

7. In relation to the estoppel claim, he pleaded the following:

a. The culverting works were carried out by the Applicant's own groundworks company, which meant that he lost a day's potential earnings.

b. *"It cost the Applicant time and money to cut the grass, to top the rushes, to maintain the fences and gates, to renew the fencing, to repair the storage shed and to rebuild the storage shed and compound."*

8. He also alleges that on three occasions – in 2002, 2008 and 2013 – the Applicant spoke to the Respondent about the Blue Land, and made it clear that he regarded himself as the owner. By failing to take any steps to evict him or challenge his possession, he "*stood by and allowed the Applicant to remain on the Disputed Land and to carry out the various works identified above, knowing that the Applicant believed that he was the rightful owner of the Disputed Land.*" The Applicant acted to his detriment "*in reliance on the Respondent's acquiescence*" and it would be unconscionable for the Respondent to seek to dispossess the Applicant.

THE RESPONDENT'S CASE

9. Mr Wratten's case, as contained in the Statement of Case, is simple. He says that the Blue Land was part of the holding which his father and uncles farmed. From

about 1980 onwards he began to work for the farming business. The Blue Land formed part of a larger area and was not fenced off from the remainder of the Respondent's Land. It was originally fenced on the northern side (along the A465), the eastern side (where it borders the Adjoining Land) and there was a thick natural hedge along the western side which he reinforced with barbed wire strands. As part of the larger holding, it was used to graze cattle between April and November, and he maintained it in the same way as the remainder of the Respondent's Land, topping the fields, cutting and baling hay and maintaining the fences and ditches on the land. Apart from maintaining the fences, he has also replaced fencing on the northern boundary and elsewhere. He denies that Mr McNulty, or his father, have ever been in exclusive factual possession of the Blue Land. He accepts that the Applicant has on occasions put his horses on the land, but only on a sporadic basis. He described him as a persistent "fly grazer" – someone who would try and graze his horses on vacant land until chased away. He says that his first meeting with the Applicant was in 2003, when Mr McNulty opened a gap in the fence between the eastern boundary of the Disputed Land and the Adjoining Land at the point marked C on the plan, and put some horses on the Blue Land. Mr Wratten says that he personally returned the horses to the Adjoining Land. The Respondent served a prison sentence in 2004/5 relating to the escape of cattle from the Respondent's Land, including the Blue Land. During this time he was aware that the Applicant was "fly grazing", and had actually constructed a shed on the Blue Land. He says that in 2008 he happened to bump into Mr McNulty at the White Lion pub at Aberdare, and once again he told him to remove his shed and horses. He says that he was met with verbal abuse. In 2009 Mr Wratten was approached by a Mr Jarvis, who had acquired the land to the west of the Blue Land, and said that he would like to buy it from him. Mr Wratten explained that he had a problem with the Applicant. Within a week a notice had been posted on the shed saying "REMOVE", and within two weeks the shed and horses had been removed. He says that he did not encounter the Applicant again until 2013, and prior to that time he continued to visit the Blue Land although he ceased to graze cattle on it. In 2013 he had another confrontation with Mr McNulty, who was in the process of re-erecting the shed that had been removed in 2009. At this time he also constructed new fences on

the northern boundary (alongside the main road) and on the eastern boundary with the Adjoining Land. Further works were carried out by Mr McNulty in 2016, fencing the boundary of the Blue Land with the remainder of the Respondent's Land to the south, and also creating a roadway through the site and forming an area of hardstanding. He says that all the works carried out by the Applicant were done in the knowledge that Mr Wratten was the registered owner and was contesting the Applicant's claims.

EVIDENCE FOR THE APPLICANT

10. As I have stated, the Applicant himself, who had made a long and detailed witness statement in support of the claim, had died before the case was heard. His statement is therefore admissible as a hearsay statement, but of course the weight to be attached to the statement must be less than would have been the case if he had been subject to cross-examination on it. If he had been present for cross-examination, Mr Wratten would have challenged much of his evidence, and his absence was therefore particularly unfortunate. For example, his first witness statement (made in November 2014) would have been put to him, in which he states that he had never met Mr Wratten prior to 2013, and had no idea that he owned the land. This is contrast to his second witness statement, in which he accepts that he met Mr Wratten as early as 2002 or 2003. These are the sort of matters that would have been explored in cross-examination.

11. However, other witnesses were called on behalf of the Applicant, as follows.

    a. Mr. Michael Jones. His brief statement says that he has known Mr McNulty for 20 years, having met him at the Usk Show in 1994, and throughout that period he has visited the Blue Land on numerous occasions. He says that "*I have known it to be fenced and the gates all padlocked. I am not aware that anyone other than Mr McNulty has had a key to the gates. Throughout this time, Mr McNulty has kept horses on the Land and he alone looks after and maintains the Land.*" In cross-examination it emerged that he was a Quantity Surveyor who had worked closely with Mr McNulty in his construction business. He said that he was more of a friend than a business contact of Mr McNulty, but when asked if he knew where Mr McNulty lived he could not say, since he had

never visited him at home. When he was challenged as to the number of times that he had visited the Blue Land, he said that he often held business meetings there – lasting between half an hour and one hour. He qualified this statement in further questioning, saying that he "occasionally" held meetings there with Mr McNulty.

b. Mr. David Evans. He seems to have worked for Mr McNulty's business in some capacity, and says that over the years he helped the McNulty family with maintaining the fences and looking after horses. He says that he helped Mr McNulty dismantle a shed which was damaged by a storm and then rebuild it. He recalls an incident in 2013 when he and Mr McNulty were on the land and were approached by Mr Wratten. According to Mr Evans, Mr Wratten acknowledged that Mr McNulty had been on the land for many years and had been "a pain in the backside". Under cross-examination various aerial photographs were shown to him, and it was put to him that the shed had been removed in 2010 and not re-erected until 2013. He denied this. He also denied the suggestion that Mr Wratten had asked Mr McNulty to leave the land when they confronted each other in 2013. He denied that he ever saw any of the Respondent's cattle on the Blue Land.

c. Mr. Stanley Rowlands. He says that he first met Mr McNulty at a horse market in Brecon in 1992. He goes on to say: "*I have visited the land regularly throughout the time that I have known the McNulty family. Over this time there has been no other persons occupying the Land, other than those given permission to do so from time to time by Mr McNulty. During the same period, I have known Mr McNulty to maintain the Land and to maintain the fences and gates surrounding it.*" He confirmed that Mr McNulty kept horse on other land, to the east of the Blue Land – namely the Adjoining Land, to which he acquired a title by adverse possession. There were stables and a compound, accessed by what has been described as the concrete road. This is on the farthest side of the Adjoining Land from the Blue Land.

d. Mr. Paul Spencer Jones. He is one of the joint owners of the Adjoining Land, together with Mr McNulty – having acquired a possessory title. He stated that the McNultys put up fences and gates in the early 1990s, and maintained them ever since "*to my certain knowledge*". Mr McNulty had a built a shed or stable on the Blue Land in the early 1990s, but was unable to explain why it was not possible to see this on any aerial photograph prior to the early 2000s. He also recalled Mr McNulty stationing the rear section of a Ferraris delivery van on the Blue Land, but more often on the Adjoining Land by the concrete road.

THE RESPONDENT'S EVIDENCE

12. Mr Wratten made a witness statement on 15th September 2016, upon which he was cross-examined. He said that he became involved in the family farming business in around 1981. At that time the Respondent's Land was accessed either by a gate on the A465 – Gate "A" on the plan – or via a gate (Gate "B") – at the end of the Welfare Road to the west of the site. There were no other gates, contrary to the Applicant's case. Part of the land was sub-let to a Mr Tommy John, but he had handed back the Blue Land by that time. The western boundary of the Blue Land was formed by a thick hawthorn hedge reinforced with two strands of barbed wire. By 1989 Mr John had returned the remainder of the land and the entire site was grazed. At paragraphs 27 to 31 of his witness statement he explained how he has been treated as the owner of the Blue Land by third parties. Generally, he reiterated what he had said in the Statement of Case.

13. In addition to Mr Wratten, Mr Colin Greeves gave evidence for the Respondent. Mr Greeves is a retired Area Officer of the Farmers Union of Wales, and in that capacity assisted Mr Wratten from October 2004 onwards. He was asked to attend at the Respondent's Land in November 2004, to assist in the removal of cattle from the land at a time when Mr Wratten was serving the prison sentence relating to the escape of cattle from his land. I refer to this in more detail below. In his statement he says that he helped to remove cattle from the land, including the Blue Land. He also says that there was no problem obtaining access to the land, and did not have to unlock any padlocks or gates to do so. Under cross-examination, he said that he definitely recalled three head of cattle on the Blue

Land, which he accessed via Gate B at the end of the Welfare Road (at the north-western end of the Respondent's Land). There was at that time no barrier or fence separating the Blue Land from the remainder of the title. There was also one horse on the Blue Land. He discussed this horse with Mr Wratten's cousin Carol Abbott, who had been left in charge of the land during his absence. She said that she would speak to the owner of the horse who lived in the village. She later told him that she had spoken to the owner but had received verbal abuse. Mr Greeves believed this person to have been Mr McNulty. He also said that he visited the land, including the Blue Land, every 10 days or so after November 2004 during the period that Mr Wratten was serving his sentence, to keep an eye on it. He never had any difficulty in accessing the land and did not see Mr McNulty there.

FINDINGS OF FACT

14. Having regard to the evidence, my findings are as follows:

    a. Neither Mr McNulty nor his father went into exclusive factual possession of the Blue Land in the 1980s as he claims.

    b. Until approximately 2013, there were only two ways of accessing the Blue Land, namely through the opening "A" on the main road, or through the main gate "B" accessed via the Welfare Road to the west of the site.

    c. They did not fence it or carry out works on it other than:

        i. The construction of the first shed in or about 2004.

        ii. The replacement of the shed in 2013 and creation of an access through the boundary hedge.

        iii. The erection of the northern fence in 2013;

        iv. The erection of the eastern and southern fence (separating the Blue Land from the remainder of the Respondent's Land) in 2016.

        v. The construction of a new roadway in 2016 and associated cutting through of the tramway embankment.

d. From time to time over a number of years Mr McNulty put one or more horses on the Blue Land, but the main focus of his activities was on the Adjoining Land where he had a much larger stables and compound.

e. His activities amounted to what Mr Wratten picturesquely described as "fly-grazing" – persistent acts of trespass not amounting to exclusive possession.

f. Mr Wratten grazed cattle on the Blue Land until November 2004.

g. Mr McNulty removed the original shed in 2009 after being requested to do so (by Mr Jarvis) and did not replace it until 2013.

h. Mr Wratten met Mr McNulty in 2003 and asked him to remove his horses. Mr McNulty had broken down the fence dividing the Blue Land from the Adjoining Land to obtain access. Mr Wratten physically returned Mr McNulty's horses to the Adjoining Land.

i. Mr Wratten met Mr McNulty at the White Horse pub in 2008. He told him to remove the shed he had constructed but was met with verbal abuse.

j. Mr Wratten met Mr McNulty on the Blue Land in 2013 when he was re-erecting the shed which had previously been demolished in 2009. Again, Mr Wratten told him to remove his horses from the Blue Land and Mr McNulty refused.

k. Mr Wratten has been treated as the owner of the Blue Land since his purchase of it in 2002 in the respects set out in his witness statement.

15. In making these findings of fact, it will be apparent that I have preferred the evidence of Mr Wratten and Mr Greeves to that of Mr McNulty and his witnesses where there is a conflict. The main evidence relied on by the Applicant was that of Mr McNulty, but of course this evidence could not be tested and necessarily the weight to be attached to it is significantly reduced. Apart from Mr Evans, who was present at the confrontation between Mr McNulty and Mr Wratten in 2013, none of the other witnesses were in a position to give evidence with regard to the three such events, in 2003, 2008 and 2013. The real conflict, therefore, between the Applicant's four "live" witnesses and Mr Wratten and Mr Greeves,

relating to Mr McNulty's claimed activities on the Blue Land. In particular, there is a conflict between what Mr Kember (for the Applicant) himself described as the principal elements of her case – the alleged enclosure of the Blue Land from the 1980's onwards and the padlocking of the gates – and Mr Wratten's claim that Mr McNulty was no more than a persistent trespasser.

16. In resolving this conflict, I have also had regard to the material relating to the prosecution of Mr Wratten in the Merthyr Tydfil Magistrates' Court in 2004. The relevant documents are at pages 165 to 170 of the Bundle. The history of the prosecution is set out in the statement dated 8th September 2004 of Sarah Baldwin-Jones, H.M Inspector. It seems that Mr Wratten was something of a serial offender, the particular issue being his neglect of the fencing surrounding his various land holdings (including the Blue Land) resulting in the escape of his cattle onto adjoining land. This eventually led to the Order pursuant to section 42(1) of the Health & Safety to Work Act 1974, which included the following: *"TO ENSURE THAT STOCK PROOF FENCING BE ERECTED AROUND THE LAND AT HIRWAUN COMMON OWNED BY THE DEFENDANT AND TO ENSURE THAT THE GATE IS PROPERLY MAINTAINED AND PADLOCKED AT ALL TIMES. THIS WORK TO BE COMPLETED WITHIN 2 MONTHS FROM 6TH MAY 2004."*

17. Ms Baldwin-Jones inspected the various parcels of land owned by Mr Wratten in July 2004, in order to ascertain whether he had complied with the s.42 Order. In relation to the Hirwaun Land, she says this: "*I then inspected fencing work completed at Hirwaun Common owned by the defendant. I noted that there was an area of new fencing along one small patch of ground facing the playground area. However, a large proportion of the fencing remained untouched, including fencing along the roadside of the A465 dual carriageway road. The fencing in this location was severely damaged and could easily be defeated by animals wishing the [sic] exit the field by this route.*" Mr Wratten confirmed that he was occupying not only the Hirwaun Land, but also the land between the Blue Land and the Welfare Ground – hence the reference to the playground area. However, what is apparent from this statement is that the fencing was poor, and "*severely damaged*" alongside the A465. Mr Kember urges me to read the statement as referring only to the land to the west of the Blue Land with a frontage to the main road, but I see nothing in the statement to justify that gloss. This statement is

made by one of Her Majesty's Inspectors with a view to the punishment of Mr Wratten for the breach of the May Order. It must be taken that she was aware that he owned and occupied the Blue Land, which has a frontage to the A465, and I do not see why her statement should not be taken at face value. She does not say that she was unable to gain access to the Blue Land, or that it was not in the occupation of Mr Wratten. Furthermore, the Order itself refers to one gate only giving access to the Hirwaun Land. Her statement completely undermines the Applicant's case, which is that from the 1980s onwards, he and his father fenced the Blue Land, created four gates around it, maintained the fences and padlocked the gates.

18. The Applicant's case was further undermined by the evidence of Mr Greeves. Mr Greeves was closer to being an independent witness than any of those of the Applicants. It is true that he had been involved with Mr Wratten in his professional capacity as a Farmers Union officer, but he was now retired and had no personal connection with the Respondent. I accept his evidence in its totality. The significance of this evidence is that he was present on the Blue Land in late November 2004 and early 2005, and was able to access it without difficulty; in other words, there were no locked gates as the Applicant claims, and no fence separating the Blue Land from the remainder of the Respondent's Land. He also collected the Respondent's cattle from the Blue Land in November 2004. This gives the lie to one of the central planks of the Applicant's case, namely that the land had been enclosed since the 1980s. Furthermore, it is evidence that the Respondent was continuing to use the Blue Land at least until late 2004. Various criticisms were made of Mr Greeves's evidence by Mr Kember, and of course some details were vague, unsurprising given the passage of time since his visits to the land in 2004 and 2005. However, his recollection that he had unfettered access to the Blue Land, and of the presence of Mr Wratten's cattle on it, was absolutely clear. Of course, as a matter of law the Applicant need only show 10 years' adverse possession expiring in February 2016, so evidence of the situation in 2004/2005 would not normally be critical. However, Mr McNulty's case is that he had been in exclusive factual possession of the Blue Land from the 1980s onwards, initially with his father. In other words, the land had been enclosed at that time, the gates locked and thereafter he had been in exclusive

control of it. Given the evidence of Mr Greeves, and the statement of Ms Baldwin-Jones, that is clearly untrue, which in my judgment casts very considerable doubt on the veracity of the claim generally.

19. Mr Wratten's evidence was essentially unshaken, despite a very through and robust cross-examination by Mr Kember. His evidence went to two main issues. First, the extent to which he used the Blue Land after 2002, and, correspondingly, the extent to which Mr McNulty was in possession of it. Secondly, the conversations with Mr McNulty that took place between 2003, 2008 and 2013. I accept Mr Wratten's evidence to the effect that it was not until 2013 that Mr McNulty began to make serious attempts to enter into possession of the Blue Land, with the reconstruction of the shed and the erection of the northern fence. This was followed by the erection of further fences in 2016, and the creation of the new roadway across the Blue Land. I also accept his account of the conversations which he had with Mr McNulty over the years. His evidence as regards the conversation in 2008 – at the White Horse pub – was particularly interesting. Mr McNulty refers to this conversation at paragraphs 26 and 27 of his statement. According to him, he told Mr Wratten that the Blue Land was his, that he was in possession of it, and that if he, Mr Wratten, had any issues with that he should speak to his own solicitor. He says Mr Wratten did not reply to this. Mr Wratten's recollection was rather different. He says that at the time of the White Horse meeting, he had just been successful in another case, Wratten v Blayney, in the High Court, in which he had defeated a claim to adverse possession of some other land owned by him. He told Mr McNulty that he was well aware of the requirements for such a claim, and knew that Mr McNulty was not in possession of the Blue Land. He told him that directly, and asked him once again to remove his horses. My impression of Mr Wratten is that he is not the sort of person who would shrink from putting his own point of view across, and I do not accept that he would have meekly allowed Mr McNulty to claim that he was in exclusive possession of the land, even verbally, if he had genuinely believed that there was a danger of losing it. I also accept his account of the other meetings with the Applicant in 2003 and 2013. Overall, Mr Wratten's oral evidence was very largely consistent with his witness statement, and I was given no reason to doubt its veracity.

20. By contrast, I did not find the evidence of Mr Jones, Mr Evans, Mr Rowlands and Mr Spencer-Jones to be reliable. As I have said, I consider that elements of Mr Jones's evidence were incredible. For example, it is manifestly absurd to suggest that he would hold regular business meetings with Mr McNulty on the Blue Land, a rough parcel of open land, when Mr McNulty lived close by, albeit that under cross-examination he changed his evidence to say that he only met him there occasionally. Mr Jones, who professed to be a close friend of Mr McNulty, did not even know where he lived and had never visited him at his home.

21. Mr Evans evinced a degree of animus towards Mr Wratten. According to Mr Wratten, he had been employed in Mr McNulty's business, although this point was not put to him directly. It was his evidence that the original shed erected on the Blue Land had been damaged in a storm, and had been immediately re-erected. It was put to him that the shed had been dismantled in 2009, which he denied. However, an aerial photograph (49) was shown to him, which shows the shed lying in pieces on the ground. It has every appearance of having been dismantled, as opposed to having been damaged by a storm as he insisted. This is entirely consistent with Mr Wratten's evidence that Mr McNulty had dismantled the shed as a result of Mr Jarvis's intervention.

22. The statement made by Mr Rowlands consisted of six short paragraphs. Again, he refers to Mr McNulty maintaining the Blue Land and the fences around it since 1992. Under cross-examination, he accepted that Mr McNulty used a building and compound on the eastern side of the Adjoining Land, accessed via a concrete road. He also said that he had used the shed on the Blue Land for the purposes of "mouthing" horses, but he was unable to recall when the shed first appeared, and had considerable difficulty in locating it, and the paddock which he referred to, when asked to look at photographs of the site. If indeed Mr Rowlands himself kept horses on the Blue Land, and worked on them there, it is very surprising that he did not mention this in his statement. My impression is that he was much more familiar with the stable and compound on the Adjoining Land, and in all likelihood it was there that he kept his horses. Mr Spencer-Jones has an interest in the outcome of this case, since he is one of the owners of the Adjoining Land (together with others, originally including Mr McNulty and now his estate) and

stands to benefit if the claim is successful. The claimed easement benefits the Adjoining Land. Mr Spencer-Jones's witness statement is very short, running to six short paragraphs. He claims in his statement that Mr McNulty erected fences and gates around the Blue Land in the early 1980s, and that he had grazed horses on the land from the late 1980s/early 1990s, and "*The Land was well fenced and it had the benefit of a stable, which Mr McNulty had constructed.*" Mr Wratten put a series of aerial photographs to him from which it was apparent that there was no building on the Blue Land until after 2000. I have already explained why I have concluded that the Blue Land was not securely fenced and gated until much later – 2013 onwards – at the same time as the new stable was erected. I do not therefore accept Mr Spencer-Jones's evidence as reliable.

THE LEGAL CONSEQUENCES

23. In the light of these findings of fact, it follows that the Applicant is unable to establish, on the balance of probabilities, that Mr McNulty had been in exclusive factual possession of the Blue Land for a period of 10 years ending on the date of the application. Clearly, he has on occasions been present on the land, even to the extent of erecting a building on it. Even bearing in mind the nature of the land in question, however, I consider that his actions are more in the nature of a persistent trespasser than a person "*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.*" Intermittent, or even regular, grazing of animals on a third party's land has rarely been treated as sufficient on its own to constitute adverse possession (see for example Jourdan and Radley-Gardner's Adverse Possession (2nd ed.) at 13-60 onwards). Given the nature of the Blue Land, the absence of enclosure, the fact that Mr Wratten initially grazed the Blue Land, has had free access to it at all material times, and has been treated as the owner, it is impossible in my view for the Applicant to establish either exclusive factual possession, or the required intention to possess. As Slade J pointed out in Powell v McFarlane at pages 470-2: "*In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. he law will thus, without reluctance, ascribe possession either to the paper owner or to persons*

who can establish a title as claiming through the paper owner..... The question of animus possidendi is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession." If Mr Wratten is treated as remaining in possession, manifestly Mr McNulty could not have been in sole possession.

24. In any event, and even if I were wrong about that, the Applicant is unable to satisfy the estoppel condition, under paragraph 5(2) of Schedule 6, which the Applicant expressly relies upon. This condition requires the Applicant to prove that *"it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and (b) the circumstances are such that the applicant ought to be registered as the proprietor."* This is a two-fold requirement. First, the Applicant must establish the "equity by estoppel" and concomitant unconscionability. Secondly, the Applicant must establish that the correct way of giving effect to the estoppel is by registering the Applicant as proprietor. This is a reference to section 110(4) of the LRA 2002, which allows the Tribunal to give effect to the estoppel (if proved) in some other way.

25. The Applicant's entire case on estoppel rests on the following propositions. First that he has expended time and money on carrying out works of maintenance and improvement to the Blue Land. Secondly, that the Respondent *"stood by and allowed the Applicant to remain on the Disputed Land and to carry out the various works identified above, knowing that the Applicant believed that he was the rightful owner of the Disputed Land."* The Applicant says that he acted to his detriment *"in reliance on the Respondent's acquiescence"*.

26. I have made the relevant findings of fact with regard to the three meetings between Mr McNulty and Mr Wratten. Even on his own evidence (see paragraphs 24 and 27 of his witness statement), Mr McNulty accepts that Mr Wratten asked him to remove his horses from the Blue Land. The Applicant's case at its highest relies solely on the fact that Mr Wratten did not bring

possession proceedings against him despite (according to Mr McNulty's disputed evidence) being aware of his claim to be in possession. Manifestly, that is not enough to create an estoppel – it is the essential basis of the claim to adverse possession itself. Accordingly, any works carried out by Mr McNulty were done in the face of Mr Wratten's robust assertion of his title. As to the works themselves, I have accepted Mr Wratten's evidence that the main works of fencing and improvement occurred during and after 2013, when Mr McNulty's solicitors were pursuing an earlier claim for adverse possession and were well aware that Mr Wratten was challenging it. If any works were carried out prior to that date they were of minimal value. For example, the claim that the two streams across the land had been culverted is a gross exaggeration. The state of the land at the site inspection was seriously waterlogged, and I was shown a length of narrow plastic pipe which was said to represent part of the culverting. It is common ground that Mr McNulty has constructed a shed on the land but this is not a substantial building and is more of a temporary structure. Even if I had been satisfied that Mr McNulty could satisfy the terms of paragraph 5(2)(a) – establishing the "equity by estoppel – I would not have considered that this warranted registration as proprietor under paragraph 5(2)(b).

THE EASEMENT CLAIM

27. That leaves the second limb of the application – the claim to a prescriptive easement over the Blue Land. A prescriptive easement may be acquired if 20 years' long user can be proved, "*as of right*". The Applicant's claim must fail for two reasons, one a matter of law, and the other as a matter of evidence. As the Applicant has acknowledged, the Blue Land was comprised within the Wratten farm tenancy until he purchased it in 2002. The application was made in February 2016. For the application to succeed, therefore, the Applicant would have to prove long user commencing no later than February 1996. At that time, and for a further period of 6 years, the alleged servient land was tenanted. It is settled law that where the servient land is in the possession of a tenant, it is not possible to prescribe against the freehold estate. The law will not presume a grant (which is the basis of prescription) by a person who is anything less than the absolute owner – see Gale on Easements (20th ed.) at 4-75 and 4-76.

28. Secondly, and ignoring for the moment the legal impediment, the Applicant has been unable to prove the long user required to establish a right. It will be apparent from my findings of fact that the entrances to the Blue Land asserted by the Applicant, and the roadway, were not created until much later than 1996, thus rendering access across the Blue Land impossible. Indeed, there is a singular lack of evidence to support the claim of regular access over the Blue Land in favour of the Adjoining Land. None of the witnesses called by the Applicant even purported to deal with the easement issue in their witness statements. The notion that such access was regularly enjoyed is inherently improbable, given the rough and virtually impassable nature of the Blue Land, and the presence of a perfectly adequate access to the Adjoining Land on the eastern side, by means of the concrete road. For all these reasons, the claim to a prescriptive easement must fail.

CONCLUSION

29. I shall therefore direct the Chief Land Registrar to cancel both the applications dated 11th February 2016. As to costs, in this Tribunal they generally follow the event. Mr Wratten represented himself, and is restricted in the amount of costs a litigant in person can recover by virtue of the Civil Procedure Rules (which apply in relation to costs in this Tribunal). If he wishes to make a claim for costs he should submit to the Tribunal, and serve on the Applicant, a statement of costs, with an explanation and supporting vouchers (if any). This should be done within 7 days of this Decision, and the Applicant may respond within 7 days thereafter.

Dated this 21st day of May 2018

Owen Rhys

BY ORDER OF THE TRIBUNAL