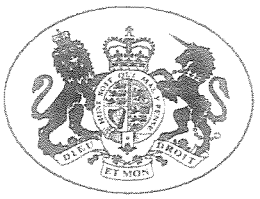

[2019] UKFTT 449 (PC)

REF/2018/0694

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

BETWEEN

DECLAN JOSEPH HARKIN

APPLICANT

and

GENESIS HOUSING ASSOCIATION LIMITED
(Industrial and Provident Society No. IP31241R)
now known as NOTTING HILL GENESIS (Charity no. 7746)

RESPONDENT

Property Address: Land on the north side of 7 Strode Road, Willesden

Title Number: AGL439945

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

On: 22nd May 2019

Applicant representation:	Mr James Sandham of Counsel instructed by Streathers Solicitors LLP
Respondent representation:	Mr David Mold of Counsel instructed by Winckworth Sherwood Solicitors

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D E C I S I O N

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1. By application dated 20th March 2018, the Applicant applied to be registered as the proprietor of a parcel of land ("the Yard") on Hawthorn Road, Willesden Green, on the basis of adverse possession said to have been enjoyed since 1980 at

the latest. The Applicant, together with his wife Samantha Harkin, are the registered joint proprietors of commercial premises known as 189 High Road, Willesden Green, London NW10 2NN ("No.189"). At the date of the application, the Yard formed part of the Respondent's registered title NGL337701, which comprised residential premises known as 7 Strode Road, Willesden Green, London NW10 2NN together with other premises. The Yard has been allocated the provisional title number of AGL439945. The Respondent objected to the application, and on 14th August 2018 the dispute was referred to the Tribunal. I heard the case on 22nd May 2019, prior to which I had a site view of the disputed land in the company of the parties and their representatives.

2. The physical layout of the area is as follows. Strode Road is parallel and to the south of High Road, Willesden Green, which itself runs more or less in an east-west alignment. At its western end Strode Road runs into Hawthorn Road, which runs south from the High Road. 7 Strode Road is the last house at the western end, on the north side of the street, and its western flank wall stands on Hawthorn Road. Its garden is enclosed by a fence running alongside Hawthorn Road. The (northern) end of the garden is enclosed by a back fence. To the north of that fence lies the Yard, which is itself enclosed by fences on three sides and by double gates where it adjoins Hawthorn Road. It is, therefore, completely enclosed and self-contained. Historically, the Yard formed part of 7 Strode Road as registered under title NGL337701. No. 189 occupies a corner site, with a frontage to the High Street and the opposite side of Hawthorn Road. It is at a distance of around 50 metres from the Yard, and is in use for the purposes of a business trading as "Willesden Salvage".

3. The Applicant's application was made under the transitional provisions of the Land Registration Act 2002 ("LRA 2002"), namely on the grounds that more than 12 years' adverse possession had been enjoyed prior to the commencement date of the LRA 2002 (13th October 2003) and therefore the Respondent held the Yard upon trust for him by virtue of section 75 of the Land Registration Act 1925 ("LRA 1925"). Critically, however, he could not demonstrate 12 years' adverse possession without relying on the adverse possession of a Mr James McDonald, who claimed to have been in possession of the Yard from 1979 to 1998. In 1998

he retired from his business, and handed over the keys to the gates of the Yard. There was no actual transfer or written instrument whereby Mr McDonald's interest in the Yard was conveyed or assigned to the Applicant.

4. The Respondent's objection to the application was based on implied consent, said to have been given in 2009 and 2013. However, its position changed and the implied consent argument has been abandoned. Instead, the Respondent pleads in the Statement of Case that the Applicant is not entitled to rely on Mr McDonald's period of adverse possession, and that he himself cannot establish 12 years' possession prior to 2003. I shall explain the argument in more detail below.

5. This is one of those rare cases where the facts underlying the claim to adverse possession are not disputed. Mr McDonald made a witness statement in which he stated that he had entered into possession of the Yard shortly after he had acquired nos.191-193 Willesden High Road, where he carried on business refurbishing domestic white goods and electrical equipment. He needed an area to store his goods and for that reason entered the Yard, repaired the gates on Hawthorn Road, and installed new locks. The Yard was already fenced off from 7 Strode Road and he maintained the fences. He remained in exclusive possession between 1980 and 1998 using it for the purposes of his business. In 1998 he retired (and sold his business premises in the flowing year). He knew the Applicant (who had neighbouring business premises), and simply handed over the keys to the Yard gates to him on his retirement. Since that time he has not set foot in the Yard. Mr McDonald verified his statement on oath but his evidence was accepted by the Respondent without challenge.

6. The Applicant also made a witness statement. This confirmed the evidence of Mr McDonald as to the handing over of the keys. He entered into possession of the Yard at that time, and gave details of his occupation and use of the Yard subsequent to 1998. In summary, he gave evidence of exclusive factual possession leading up to the time when he made the disputed application. Again, he verified this statement on oath, but no part of his statement was challenged.

7. Accordingly, the Applicant has been able to establish that exclusive factual possession of the Yard was enjoyed by Mr McDonald, between 1980 and 1998,

and by himself between 1998 and the date of the application – and indeed until the present time. I use the phrase "*excusive factual possession*" in the way it is explained in the leading case of J.A.Pye (Oxford) Ltd v Graham & anor [2002] UKHL 30. Under normal circumstances the necessary intention to possess would be inferred from the exclusive factual possession, and there is nothing in this case which would prevent that inference from being made. Indeed, the Respondent does not suggest otherwise.

8. The Applicant argues that he is able to aggregate the period of adverse possession enjoyed by Mr McDonald with the period of his own adverse possession between 1998 and 2003. Since Mr McDonald had been in adverse possession since 1980, more than 12 years' adverse possession would have been enjoyed prior to 13th October 2003, and the Applicant would be entitled to be registered. However, the Respondent has a counter-argument, which Mr Mold set out in his Skeleton Argument and developed orally before me. He submits, entirely accurately, that in or about 1991 or 1992, after Mr McDonald had been in adverse possession for a period of 12 years, section 75 of the LRA 1925 took effect. From that time on the Respondent (or its predecessor as registered proprietor) held the title to the Yard on a bare trust for McDonald, to be transferred to him at his request. Mr McDonald therefore owned an equitable interest in the Yard when he handed over the key to the Applicant and allowed him into possession, in 1998. This was not an effective assignment of his equitable interest, since it was not in signed writing and did not therefore comply with section 53(1)(c) of the Law of Property Act 1925 ("LPA 1925"). Mr Mold argues that, on the facts, Mr McDonald simply abandoned possession of the Yard without transferring any interest in it to the Applicant. Since the Applicant had not been in adverse possession of the Yard prior to 1998, he is unable to show 12 years' adverse possession prior to 2003, and his application – based on the transitional provisions of the LRA 2002 – must therefore fail.

The Applicant's case

9. Mr Sandham, for the Applicant, submits that this analysis is legally and factually misconceived. His argument, and the authorities upon which he relies, are set out

at paragraphs 18 to 33 of his skeleton argument, and may be summarised as follows:

(1) If a squatter (S1) takes adverse possession of A's land, and then S1's possessory title is transferred to a second squatter (S2), the limitation period applicable to A's action to recover possession from S2 commences on the date that S1 goes into possession.

(2) There is no requirement for any formal transfer of the possessory title from S1 to S2. It is enough for S1 to abandon his factual possession and intention to possess in favour of S2 – see Adverse Possession (Jourdan and Radley-Gardner) 2nd ed. at para. 34.19-34.20.

(3) All that is required for this principle to operate is that the successive periods of adverse possession should be continuous, without any hiatus. It was explained in this way by Neuberger LJ in Tower Hamlets LBC v Barrett [2006] 1 P & CR;

> *"36. The central point in this connection is what bars the paper owner from claiming possession is a continuous period of 12 years of dispossession—see s.15(1) of, and para.1 of Sch.1 to, the 1980 Act. Accordingly, unless there is a hiatus between the periods of possession of successive squatters (in which case para.8(2) of the Schedule would prevent the second squatter being able to rely on the period of adverse possession by the first) the second squatter, whether he has purchased from the first squatter or dispossessed him in some other way, can rely on the first squatter's period of adverse possession. This view is supported by Asher v Whitlock (1865) L.R. 1 Q.B. 1 and Willis v Earl Howe [1893] 2 Ch. 545."*

(4) Mr Sandham submits that the Respondent's reliance on the alleged "abandonment" of possession by Mr McDonald is irrelevant and misconceived. This is because the Respondent's title had already become statute-barred before McDonald went out of possession. More importantly, perhaps, is the fact that Mr McDonald did not abandon possession in favour of the Respondent, but in favour of the Applicant.

Whatever may be the position as between Mr McDonald and the Applicant, the position of the Respondent cannot have been improved, since where successive squatters have collectively exceeded the limitation period, the paper title is barred – see Jourdan & Radley-Gardner at para. 6-53.

(5) There is a distinction between cases where the second squatter (S2) ousts the original squatter (S1), and cases where the S1 voluntarily passes the land to S2. In the first case S2 will not obtain a title as against S1 until a fresh limitation period has expired as between S1 and S2. In the second case, it has been held that S1 cannot recover possession from S2. Nicholls LJ considered the point in Mount Carmel Investments Ltd v Peter Thurlow Ltd [1988] 1 WLR 1078 (at 1086) as follows:

> *The thrust of the plaintiff's claim under this head was that, even if the plaintiff itself was barred from recovering the property because the adverse possession, enjoyed initially by Mr. Renwick and ultimately the defendant, had continued unbroken for over 12 years before the proceedings were started by the plaintiff, that did not affect Mr. Renwick's right to recover the property from the defendant. He was in possession of the property until at least April 1974, so that the defendant had not barred his title to recover the property from her when, some 10 years later, the second writ was issued on 16 October 1984 by the plaintiff, claiming through Mr. Renwick by virtue of the assignment.*
>
> *In our view this argument is well founded in this case if, but only if, the defendant's continuation in occupation after Mr. Renwick ended his connection with the property was contrary to his will. If squatter A is dispossessed by squatter B, squatter A can recover possession from squatter B. and he has 12 years to do so, time running from his dispossession. But squatter A may permit squatter B. to take over the land in circumstances which, on ordinary principles of law, would preclude A from subsequently ousting B. For example, if A sells or gives his interest in the property, insecure as it may be, to B. These*

principles of law are well established and are to be found conveniently summarised in Megarry and Wade, The Law of Real Property, 5th ed. (1984), p. 1036.

(6) Mr Sandham also relies on a decision of Vos J (as he then was) in Site Devlopments Ltd v Cuthbury Ltd [201] EWHC (Ch.) 10. This was a case where the applicant for a possessory title (CREL) of land described as "the blue land" was obliged to rely on successive periods of adverse possession enjoyed by its predecessor (KIL) and also by squatters in adverse possession of the blue land prior to KIL's possession. Of particular relevance for the purpose of these proceedings is that the party resisting adverse possession relied on the same argument as the Respondent relies on here – namely, that once a title under section 75 has been obtained, the squatter's interest can only be transferred in compliance with the formalities provided by section 53 of the LPA 1925. That argument was rejected for the reasons explained by the Judge:

175. Mr Wilson has argued, again ingeniously, that, once the 12 year period expires as it did here (notionally anyway before the first known transfer on 5 June 1975), the squatter's (here BKUC) right became an accrued rather than an inchoate right, which can only be transferred formally by writing in compliance with section 53 of the Law of Property Act 1925 as a beneficial interest in land under the trust arising under section 75 of the Land Registration Act 1925. In my judgment, this response does not work for the Defendants, because a squatter can rely on any period of 12 years arising whenever it asserts its claim. Mr Wilson might be right if the squatter wanted to assert its 12 years at some stage in the past, but CREL asserts its rights through KIL, which acquired the Brown Land on 4 April 1986. If, as a matter of fact, KIL's transferor relinquished possession to KIL at that time, KIL has since passed the rights it acquired formally to CREL. In short, KIL could rely on the 11 years and 364 days possession immediately preceding the transfer to it, and then later assign its 12 years possessory rights

whether from one day after the transfer to it, or from later on, to CREL.

176. The question then resolves itself into one of fact, rather as it did in the Mount Carmel Investments case. In my judgment, as a matter of fact, each successor company relinquished possession of the Blue Land to its successor, when it transferred the Brown Land. There is no evidence that any of the transferors sought to retain any interest in Blue Land thereafter.

177. In these circumstances, Mr Dagnall's 4th and 5th points, namely that a trust resulted from the transfers of surplus assets, and that the earlier transferors are estopped from denying that KIL acquired their squatter's rights, are not needed and do not arise.

178. I, therefore, hold that KIL was able to take advantage of BKUK's adverse possession rights, and acquired the Blue Land by adverse possession on or immediately after 6th April 1986. CREL is able to take advantage of KIL's rights as its successor, and the Blue Land is, therefore, now held by Cuthbury for CREL on trust under section 75 of the Land Registration Act 1925 and the transitional provisions in the Land Registration Act 2002.

10. In my judgment, there is no answer to the Applicant's submissions as summarised above. Mr Mold was reduced to arguing that the decision of Vos J in the Site Developments case was "*wrong*". Given that the authority is binding on this Tribunal, this was a surprising submission to make. I asked him if he was arguing that the case was decided *per incuriam*, and, if so, on what grounds, but he did not respond other than to repeat that the decision was wrong. Quite apart from the fact that the decision is binding on me, it is quite plainly correct. There is a fundamental fallacy at the heart of the Respondent's case on the law. Mr Mold submits that once a squatter has obtained an equitable interest in the land through the operation of section 75 of the LRA 1925, the squatter's interest in the land can only be transferred in compliance with section 53 of the LPA 1925. It is no doubt true that an equitable interest in land can only be disposed of in accordance with

the provisions of section 53(1)(c) of the LPA 1925. However, a person in possession has a separate legal title based on the fact of possession (or "seisin") itself – see Asher v Whitlock (1865) LR 1 QB 1, as referred to in Tower Hamlets LBC v Barrett cited above. An ousted squatter has a sufficient title to bring proceedings for possession against the squatter who ousted him. In my judgment, the fact that a squatter has acquired an equitable interest in the registered title under section 75 does not of itself determine the separate legal estate in the land that he holds by virtue of possession. Once he has obtained the registered title his Asher v Whitlock title will determine, but until that point he retains all his rights deriving from his possession – including the right to sue a squatter who dispossesses him. By the same token, he can transfer his interest *qua* squatter (as opposed to equitable owner) by informal means.

11. It therefore follows that the Applicant is entitled to apply for a title based on adverse possession by reference to any period of 12 years preceding the commencement of the LRA 2002. He himself was in adverse possession from 1998 onwards, and he is entitled to rely on the period of adverse possession enjoyed by Mr McDonald from 1980 onwards. This adds up to more than 12 years, and the Applicant can establish, as against the Respondent, a sufficient period to bar its title by bringing section 75 of the LRA 1925 into play.

12. I shall therefore direct the Chief Land Registrar to give effect to the Applicant's application dated 20th March 2018. I propose to order the Respondent to pay the Applicant's costs, and I direct the Applicant to file and serve on the Respondent within 14 days a Statement of Costs incurred since the date of the reference. The Respondent will then have 14 days to file submissions both as to the incidence and quantum of the costs, and the Applicant may respond 7 days thereafter. I will then consider the matter further.

Dated this 17th day of June 2019

Owen Rhys

BY ORDER OF THE TRIBUNAL