

[2019] UKFTT 0718 (PC)

REF/ 2018/0046

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) SHAUN WILLIAM MANSFIELD
(2) KERRY SUSAN MANSFIELD

APPLICANTS

and

GERALD ARTHUR LUSCOMBE

RESPONDENT

Property Address: Land on the north side of Hill Head, Chittlehampton, Umberleigh

Title Number: DN686138

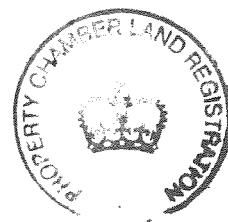
ORDER

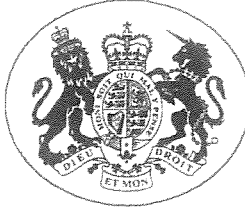
The Tribunal directs that the Chief Land Registrar do cancel the application of the Applicants dated 5th July 2017 for first registration of land on the north side of Hill Head, Chittlehampton, Umberleigh.

Dated this 14th October 2019

Michael Michell

BY ORDER OF THE TRIBUNAL





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Property Address: Land on the north side of Hillhead, Chittlehampton, Umberleigh,
Devon EX37 9RG

Title Number: DN 686138

Before: Judge Michell

Sitting at: Alfred Place, London
On: 10th July 2019

Applicant Representation: In person
Respondent Representation: In person

DECISION

*ADVERSE POSSESSION OF UNREGISTERED LAND – OPEN LAND BY ROAD BUT AT
HIGHER LEVEL THAN ROAD – WHETHER FACTUAL POSSESSION – WHETHER
INTENTION TO POSSESS*

Cases referred to:
J A Pye (Oxford Ltd) v Graham [2003] AC 419

1. Mr and Mrs Mansfield have applied to HM Land Registry for first registration of an area of open land in the village of Chittlehampton in Devon. The area of land is roughly triangular in shape and I shall refer to it for ease of reference as “the Triangle”. Mr and Mrs Mansfield claim to have acquired title to the Triangle by adverse possession. Mr Luscombe and his wife are the owners of a house and garden, which adjoins the Triangle. Their title is registered under Title Number DN221009. Mr Luscombe objected to the application on the grounds that Mr and Mrs Mansfield were not in possession of the Triangle for the requisite period. Mrs Luscombe was not an objector. The Triangle is not part of the land registered under Title Number DN221009. The matter was referred to the Tribunal for determination.

2. I inspected the site on the afternoon before the hearing and was accompanied by the parties. The Triangle adjoins on its longest side a road. This is a narrow lane of the type often found in Devon. It is called Hill Head. The surface of the Triangle is about 1.5 to 2 metres higher than the road. The shortest side of the Triangle adjoins the garden of Mr Luscombe’s house, Hillhead. There are three large trees in Mr Luscombe’s garden, close to the boundary with the Triangle. Along this road there is a metal post and chicken wire fence with the remains of a privet hedge in some parts. The third side of the triangle is marked partly by the remains of a low bank, which is covered in vegetation and in part by the side wall of a cob barn. The land on the other side of the bank slopes away downhill from the bank. At the time of my inspection the vegetation on the surface of the Triangle had been recently cut. The ground was quite rough underfoot with no obvious signs of cultivation.

Background

3. Mr and Mrs Mansfield purchased a house in Chittlehampton in September 1994. The house is called The Old Forge House. It has no garden but only a concrete yard and outbuildings. The Old Forge House is about 100 yards away from the Triangle. At the same time, Mr and Mrs Mansfield purchased a plot of land at Hill Head. The land comprises an old orchard and vegetable garden and a barn. It is now registered under Title Number DN349904 This land adjoined the Triangle. Mr and Mrs Mansfield say that the contract of sale also included the Triangle. The vendor was Mr Henry Strudwick. Mr Strudwick had registered title to the orchard, vegetable garden and barn under title number DN268970 but he did not

have a registered title to the Triangle. Mr Strudwick made a statutory declaration dated 17th August 1994 in which he stated

“Adjacent to [the land in Title Number DN268970] is an additional piece of land” [the Triangle] “which I verily believe was conveyed to me in or about 1969. I cannot find any trace of any title deeds to [the Triangle].

I confirm that throughout my ownership of [Title Number DN268970] I have regarded [the Triangle] as my own and have used it as of right without the consent or permission of or objection by any person or institution.

I verily believe that [the Triangle] is owned by me”.

Mr and Mrs Mansfield were registered as proprietors of the orchard, vegetable garden and barn under title number DN349904 on 22nd November 1994. At the time they moved to The Old Forge House, Mr and Mrs Mansfield had a son, Arun who was aged 2 and a daughter, Maisie. Their daughter, Eleanor was born in 1995.

4. In February 2013, Mr and Mrs Mansfield sold The Old Forge House and moved to High Bickington, a village five miles from Chittlehampton. In September 2014 Mr Mansfield got a job in Liverpool and the family moved to Liverpool.

5. In 2015 Mr and Mrs Mansfield applied for and subsequently obtained planning permission to develop the old barn by converting it into a two-bedroom house. The development would be facilitated if the Triangle or part of it could be used as part of the development.

6. Mr Luscombe and his wife bought Hillhead in 1987. They have lived there ever since. Their daughter, Kimberley was born at Hillhead in 1994 and has lived there except for when she was at the University of Bristol between September 2013 and July 2017.

Photographic Evidence

7. Mr Luscombe produced an aerial photograph on the back of which is written the date “26th March 1980”. Mr Luscombe was given the photograph by Mr and Mrs Murch, who live at 6 Hill Head, being the cottage adjoining the barn in Mr and Mrs Mansfield’s title. The photograph appears to show the Triangle separated from Mr Luscombe’s garden by a row of low bushes. A number of cultivated vegetable plots are visible in Mr Luscombe’s garden. There is no sign of cultivation visible on the Triangle. The Triangle is separated from the land in Mr and Mrs Mansfield’s title by a row of trees or bushes. The row of trees or bushes

is a continuation in a straight line of the row of trees or bushes that separates Mr and Mrs Mansfield's land from Mr Luscombe's garden.

8. Mr and Mrs Mansfield produced some photographs:

- (i) An aerial photograph taken in 1999 and obtained from the internet site, "getmapping.com". This photograph appears to show that there was then no row of trees or bushes or other tall vegetation between the Triangle and the land in Mr and Mrs Mansfield's title. Trees can be seen in the area of the boundary between Mr Luscombe's garden and the Triangle.
- (ii) An aerial photograph from "getmapping.com" said to have been taken between 2005 and 2007. The view of the Triangle in this photograph is very similar to that in the 1999 aerial photograph. A white rectangle is visible in the photograph on Mr and Mrs Mansfield's land, close to the boundary with the Triangle.
- (iii) A Google Streetmap image taken in 1999 of Hill Head shows the front of 6 Hill Head and the barn. The bank along the road frontage of the Triangle can be seen. Nothing other than vegetation can be seen on the Triangle.
- (iv) Another Google Streetmap image taken in June 1999 shows the surface of the Triangle, covered in vegetation with a small pile of dead branches.
- (v) An aerial photograph from "getmapping.com" and dated 2010 shows no real difference in the Triangle and the adjoining land from the earlier aerial photograph, except that the white rectangle on Mr and Mrs Mansfield's land close to the border with the Triangle is not visible in this photograph.
- (vi) Two Google Streetmap images taken in April 2010 shows the surface of the Triangle much as it appears in the June 1999 image.
- (vii) An aerial photograph from "getmapping.com" dated 2015 shows the Triangle covered in green vegetation.
- (viii) A photograph taken by Mr Mansfield in 2017 but printed in reverse (so that the Triangle appears to the left of the barn and not to the right as it is in reality) shows the front of the barn, the bank along the front of the Triangle with the vegetation trimmed. Nothing appears on the surface of the Triangle other than some dead branches.
- (ix) Another photograph taken by Mr Mansfield in 2017 shows the side of the barn from the rear and the land beside it, with the Triangle to the front. There is rough vegetation on the Triangle.

(x) A photograph taken by Eleanor Mansfield in 2019 shows the Triangle with the supporting bank, after it had been trimmed and the chicken wire fence along the boundary with Mr Luscombe's garden.

(xi) Other photographs produced by Mr and Mrs Mansfield show a summerhouse, chicken, a gathering of family and friends with the family dog and a trampoline on Mr and Mrs Mansfield's land.

9. There are also photographs taken by the Land Registry surveyor when he surveyed the Triangle in 2017. These photographs show the Triangle to have been overgrown then with rough vegetation.

The Evidence

10. The evidence of the use of the Triangle by Mr and Mrs Mansfield and their family is as follows.

11. Mr Mansfield said that there was no discernible boundary between the land in their title and the Triangle. He and his wife maintained the Triangle as part of their garden. In 1994 to 1995 they did not do anything in their garden or the Triangle other than to clear some pathways, set up some rope swings on the trees on their land and clear two or three areas for their children to play on. They cleared the whole of their land and the Triangle in 1996. The maintenance involved using a strimmer on the land at least four or five times a year during the growing season. From 2008 they spent less time maintaining the garden and the Triangle but up until 2016, the Triangle was cleared about twice a year. They also kept the vegetation on the bank trimmed to assist visibility of cars travelling along the road and to make parking, loading and unloading into the barn easier. For three or four years they grew courgettes on the Triangle. They grew runner beans on the Triangle for about 2 years in 2005 and 2006. In 2002 they put a trampoline on the Triangle. Though in his witness statement, Mr Mansfield said that the trampoline stayed on the Triangle for a few years until it was removed in 2007, in cross-examination he said that the trampoline was on the Triangle for a few months. On occasions they cut willow branches on their land and brought them onto the Triangle for in tied bundles for collection. They cut some rudimentary steps into the bank to gain access from the road to the Triangle. The other use made of the Triangle was for general leisure pursuits such as children's parties and barbeques and for the children to play.

12. Eleanor Mansfield gave evidence that she could remember having picnics on the Triangle, playing on the Triangle and chasing chicken when they had escaped from their run on the Mansfield's land onto the Triangle. She could only recall one occasion on which the Luscombe's daughter had come onto the Triangle or the orchard.

13. Masie Mansfield gave evidence of having played on the Triangle and it being used for barbecues and picnics.

14. Mr Luscombe's evidence was that the Mansfields had cleared the orchard, set up a trampoline and swings in the orchard, kept chicken in the orchard and used the orchard for growing vegetables and harvesting willows. He said that the Mansfields had never to his knowledge used the Triangle for growing vegetables. The only time he was aware the Mansfields did anything on the Triangle was in 2015 when they cleared it for a wildlife survey. He had put up the chicken wire fence between his garden and the Triangle about 15 years ago to stop his dogs escaping and to keep the Mansfields' chicken from coming into his garden. Mr Luscombe said that he had not made any real use of the Triangle.

15. Mr and Mrs Mansfield produced a number of witness statements from family, friends and local residents but did not call the witnesses to give oral evidence or be cross-examined. Several of the deponents stated that they had seen Mr and Mrs Mansfield and their family members on the Triangle and that they had maintained it and left bundles of lengths of cut willow to be collected for use in basket making.

16. Mr Luscombe produced a witness statement made Mr and Mrs Murch of 6 Hill Head. Mr and Mrs Murch were not called to give evidence and so could not be cross-examined. The contents of their statement are similar to the evidence given by Mr Luscombe. Save that Mr Murch stated that the Triangle was used by a Mr Stone, a previous owner of Hillhead as a part of his garden and that Mr Murch used to help Mr Stone with the gardening, the statement adds nothing to Mr Luscombe's evidence.

17. Mr Luscombe also produced a witness statement made by his daughter, Kimberley Luscombe. Kimberley Luscombe did not give oral evidence. She said that she played in the orchard with the Mansfield children but never on the Triangle because it was overgrown and

not safe to play on. She said that the undergrowth on the Triangle had been cut down only once in the last 20 years.

17. Where the statements contained in the witness statements of witnesses who were not called to give evidence contradict the evidence of the parties and witnesses who did give oral evidence, I can place no reliance on those statements.

Adverse Possession: Law

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

(per Lord Browne-Wilkinson in *J A Pye (Oxford Ltd) v Graham* [2003] AC 419 at paragraphs 36, 37).

19. Legal possession is comprised of two elements:

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

20. Factual possession has been described as follows:

“It signifies an appropriate degree of physical control. It must be a single and [exclusive] possession...Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ...Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting

factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.”

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

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

Findings

22. I accept Mr Mansfield’s evidence that he cut the rough vegetation on the Triangle by passing a strimmer over it from time to time and he trimmed the supporting roadside bank, that he grew runner beans in 2 years and courgettes during about 3 years in patches on the Triangle. A trampoline was put on the Triangle for several months. He and his family and guests walked on the Triangle and had picnics on it from time to time. He left bundles of willows on the land temporarily for collection by third parties. He cut rudimentary steps into the bank to make it easier to get up onto the Triangle and from thence onto the land he and his wife owned.

23. I do not consider that Mr and Mrs Mansfield had factual possession of the Triangle. The Triangle is a piece of land that could have been used as a garden for cultivating ornamental plants or crops or as an orchard or for storage or for the keeping of poultry or other animals. I am not satisfied that Mr and Mrs Mansfield dealt with the Triangle as an occupying owner would be expected to have dealt with it. All that they really did on the Triangle other than to grow some vegetables in patches for only about 3 years, was to cut down the vegetation on occasions and walk over it. Placing bundles of willow on it for a short time pending collection is not indicative of user as an occupying owner. They did not

plant anything on the Triangle (other than the few beans and courgette crops); they did not clear anything other than the vegetation; they did not dress the soil or otherwise seek to improve the ground; they did not create any paths across the land or put any structure on it (other than the temporary placement of the trampoline); they did not put their chicken house and run on the Triangle or keep animals on it; and they did not fence the Triangle. The limited use made of the Triangle by Mr and Mrs Mansfield fell short of what would be expected of an occupying owner.

24. Even if what Mr and Mrs Mansfield did on the Triangle could be regarded as making the use of it that could be expected of an occupying owner, their conduct did not show an intention to possess the Triangle. They did not by their acts demonstrate unequivocally an intention to exclude the world at large from the Triangle. I do not consider that the true owner would have thought that Mr and Mrs Mansfield were in possession of the Triangle. The true owner may have seen that the vegetation had been cut with a strimmer from time to time but I do not consider the strimming would have made a dramatic change to the appearance of the Triangle. The true owner would have seen Mr and Mrs Mansfield and their children carrying on those activities that are frequently carried on, on open land in the countryside, such as having a picnic or playing. The trimming of the vegetation on the bank was done in order to help visibility for cars using the lane. If the true owner had seen the rudimentary steps cut into the bank by Mr Mansfield, he would not have known that Mr and Mrs Mansfield were in possession of the Triangle. The cutting of the steps was equally consistent with using the Triangle to get to the orchard beyond. At most, I consider the true owner would have noticed that Mr and Mrs Mansfield were using the Triangle but he would not have concluded that they intended to exclude everyone else from the Triangle, including the true owner.

Conclusion

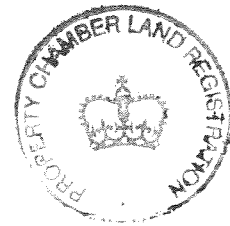
25. Mr and Mrs Mansfield have not established that they were in adverse possession of the Triangle for a period in excess of 12 years prior to the date of their application for first registration. I shall direct the Chief Land Registrar to cancel the application.

26. My preliminary view is that Mr and Mrs Mansfield should be ordered to pay Mr Luscombe's costs of the proceedings. The usual practice where the Tribunal makes an order as to costs is to order the losing party to pay the costs of the winning party. I am not aware of any reason in this case why the usual practice should not apply. The costs Mr Luscombe can

claim are limited to the costs recoverable by litigants in person under the Litigants in Person (Cost and Expenses) Act 1975. If Mr Luscombe wishes to make an application to the Tribunal to make an order for costs, he should send a written application to the Tribunal and to Mr and Mrs Mansfield by 5pm on 28th October 2019. If Mr and Mrs Mansfield oppose the making of an order for costs in favour of Mr Luscombe, they should serve written submissions on the Tribunal by 5pm on 11th November 2019.

BY ORDER OF THE TRIBUNAL

Michael Michell



DATED 14th October 2019