[2017] UKFTT 679 (PC)

REF/2016/0247

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) SAFDAR IQBAL
(2) MUMTAZ IQBAL

APPLICANTS

and

BUCKINGHAMSHIRE COUNTY COUNCIL

RESPONDENT

Property Address: Land adjacent to 29 Hamilton Road, High Wycombe, Buckinghamshire, HP13 5BH
Title Number: BM395827

Before: Judge Malcolm Sheehan QC
Sitting at: 10 Alfred Place, London WC1E 7LR
On: 7 June 2017
Site visit: 6 June 2017

Applicants Representation: Mr Peter Bysshe of Kidd Rapinet LLP
Respondent Representation: Mr Michael Feldman, instructed by HB Public Law

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DECISION

KEYWORDS Jurisdiction / Whether the Tribunal is limited to determining objections raised at the time of the Reference / Application for first registration of possessory title based on adverse possession / Whether disputed land forms part of a public highway / Whether elements of claim for adverse possession established

CASES REFERRED TO: Silkstone and another v Tatnall and another [2011] EWCA Civ 801, Regina (Smith) v Land Registry (Peterborough) [2010] EWCA Civ 2000, Harvey v Truro Rural District Council [1903] 2 Ch 638, Attorney General v Beynon [1970] Ch 1, Hale v Norfolk County Council [2001] Ch 717, J A Pye (Oxford) Ltd v Graham [2002] UKHL 30, Powell v McFarlane (1979) 38 P&CR 452, Bligh v Martin [1968] 1 WLR 804, Buckinghamshire County Council v Moran (1988) 86 LGR 472, J Alston & Sons Ltd v BOCM Pauls Ltd [2008] EWHC 3310 (Ch)

Decision

1. For the reasons set out herein I direct that the Chief Land Registrar shall give effect to the Applicants' original application as if the objection to the original application had not been made.

The Reference

2. I am concerned with an application for first registration ("the Application") dated 12 March 2015 made by Mr Safdar Iqbal and Mrs Mumtaz Iqbal (collectively "the Applicants"). The application concerns a strip of land ("the Land") adjacent to and to the north west of 29 Hamilton Road and, in part, 29A Hamilton Road, High Wycombe. The Applicants are the registered proprietors of both 29 Hamilton Road (which is registered under title number BM212288) and 29A Hamilton Road (which is registered under title number BM277707). The Land has been given the provisional title number BM395827.

3. By their application the Applicants apply to be registered with a freehold possessory title of the Land. The Respondent is Buckinghamshire County Council which objected to the application for first registration by letters dated 25 June, 3 August and 1 September 2015. The Respondent is the relevant highway authority. In brief, the Respondent asserted in its objections that the Land formed part of a defined public footpath, known as HWU/32/1 or High Wycombe public footpath number 32 ("footpath 32"). As such it is categorised as a highway over which, on the Respondent's case, the Applicants could not establish adverse possession as a matter of law.

4. The Land Registry was unable to resolve the dispute between the parties and it was referred to the First-tier Tribunal by the Chief Land Registrar pursuant to s.73(3) of the Land Registration Act 2002 on 12 April 2016 ("the Reference").

5. I should note at the outset that the topography of the Land is very notable. The Land is a very steep slope which descends down from the Applicants' rear garden to a mainly flat pathway at the bottom of the slope. Thus, while the Land is no more than a few metres wide at its broadest it consists of a banking on a very significant gradient.

The Issues

6. The Applicants' Statement of Case is dated 16 May 2016 and the Respondent's Statement of Case is dated 16 June 2016. A consideration of the Statements of Case, the skeleton arguments submitted on behalf of the parties and the Applicants' list of issues, which was broadly agreed by the Respondent, shows that there is a large degree of agreement about the applicable law. It was agreed at the hearing that there are three principal issues that arise for determination in respect of the Reference:

   6.1. Firstly, whether the Tribunal's jurisdiction is limited to determining the matters raised by the Respondent by way of objection at the time of the Reference ("the first issue");

   6.2. Secondly, whether the Land forms part of a public highway, namely footpath 32. In the event that I determine that it does, the Applicants accept that their application for registration as possessory title holders must be cancelled ("the second issue");

   6.3. Finally, if I hold that the Tribunal has jurisdiction to consider the issue contrary to the Applicants' position, whether the Applicants have made out their case for registration of possessory title based on adverse possession ("the third issue").

7. I should note for completeness that following the hearing, at my request, I have been supplied with a better quality version of the working copy of the definite map for footpath 32. I will refer to this as the "current definitive map" herein and I annexe it to this Decision.

The First Issue: Jurisdiction

8. The first issue that requires determination is a legal issue going to the extent of the Tribunal's jurisdiction. In short, the Applicants contend that the Tribunal has no jurisdiction to hear the third issue because it was not raised by the Respondent prior to the Reference. The Applicants' position is articulated in their skeleton argument and was expanded upon in oral submissions by Mr Bysshe. The issue was responded to in Mr Feldman's oral submissions at the hearing.

9. Although the issue is one that goes to jurisdiction I decided at the hearing, after discussion and without objection by the parties, that I would reserve my determination of the issue until the provision of this Decision. I also decided that I would conduct the hearing on the basis that I had jurisdiction to determine the third issue. I adopted this course because, however I determined the issue of jurisdiction, either party might wish to appeal this determination and, if they did so successfully, my determination of the third issue may be useful in avoiding the use of unnecessary court and party resources.

10. The factual basis of the Applicants' argument on jurisdiction is not disputed. As noted above, the Respondent objected to the Application on 25 June, 3 August and 1 September 2015. As usual when a reference is made, the Reference was accompanied by a Case Summary document. The Case Summary is required by rules 3 and 5 of The Land Registration (Referral to the Adjudicator to HM Land Registry) Rules 2003 ("the Referral Rules 2003").

11. The Case Summary is required by rule 3 of the Referral Rules 2003 to include a number of matters including *"details of the objection"* to the application. The Case Summary is circulated to the parties for comment before a reference is made. The Case Summary for this Reference is dated 12 April 2016 and deals with the objection in the following terms:

> *"The Objector has objected to the application on the grounds that the Property comprises highway land with a specific classification of public footpath and is maintainable at the public expense"*

12. Prior to the making of the Reference, the Respondent did not raise issue with the Applicants' factual assertion that they had been in adverse possession of the Land for the

requisite period. The Respondent's objection was based on its position that the Land was highway land. The Respondent first put the Applicants' factual assertions about adverse possession in issue in its Statement of Case. Paragraphs 10-11 of the Respondent's Statement of Case disputes the Applicants' factual contentions in relation to adverse possession.

13. The Applicants argue that given the undisputed factual position summarised above, the jurisdiction of the Tribunal is limited to determining the second issue. The Applicants argue that the Tribunal cannot consider the third issue because, as a matter of law, the Tribunal has no jurisdiction to do so unless the third issue was raised by the Respondent by the time of the Reference.

14. The legal basis of the Applicants' argument is as follows:

14.1. Section 73 of the Land Registration Act 2002 ("the 2002 Act") deals with objections to applications to the registrar. Section 73(7) provides as follows:

"If it is not possible to dispose by agreement of an objection to which subsection (5) applies, the registrar must refer to matter to the First-tier Tribunal"

14.2. Section 108 of the 2002 Act deals with the jurisdiction of the Tribunal. Section 108(1)(a) states that the Tribunal's jurisdiction includes *"determining matters referred to it under section 73(7)."*

14.3. The effect of section 108(1)(a) is, for these purposes, to restrict the Tribunal's jurisdiction to determining the objection or objections that have been raised at the time of the reference.

14.4. On questioning, Mr Bysshe confirmed that it was the Applicants' position that for these purposes "the matter" in section 73(7) should be read as meaning the same thing as "the objection".

14.5. The Applicants therefore argue that the Tribunal is limited to considering "the matter", which in this case is the second issue alone. As this is a question of a statutory jurisdiction, the Applicants argue that there is no discretion on the part of

the Tribunal to allow new issues/objections to be raised after the Reference has been made.

14.6. The Applicants further state that the circulation of the Case Summary in draft gave the Respondent a full opportunity to raise any further grounds of objection to the Application and they did not do so.

14.7. The Applicants also state that there would be no need to set out any objection in detail to the registrar if a party is able to raise fresh grounds of objection after proceedings have been referred to the Tribunal.

14.8. Mr Bysshe also referred to the language of the Referral Rules 2003. Although he accepted that it may not take the matter further, he contended that the use of the words "matter" and "objection" in the Referral Rules 2003 was consistent with his argument that they had the same meaning in section 73(7) of the 2002 Act.

15. In his oral submissions Mr Feldman argued that the Tribunal had jurisdiction to deal with the third issue both on a proper interpretation of section 73(7) of the 2002 Act and because the approach advocated by the Applicants would produce a situation in which a Respondent would be unable to challenge the evidence relied on in support of the necessary legal elements required to make out the basis of the application for registration.

16. I agree with the Respondent and hold that the Tribunal has jurisdiction to consider the third issue for the following reasons:

16.1. As a matter of construction, I consider that it is significant that the legislature chose to use both the words "objection" and "matter" in section 73(3) of the 2002 Act. Section 73(3) provides that it is the "matter" that should be referred to the Tribunal and section 108(1)(a) states that the Tribunal must determine the *"matters referred"*.

16.2. If the intention was that the "matter" should mean the same thing as the "objection" then it would have been easier and clearer for section 73(3) to simply have stated that the "objection" be referred to the Tribunal and for section 108(1)(a) to require the Tribunal to determine the "objection". The fact the legislature did not

do so but chose to use a different word to describe what is referred to and considered by the Tribunal is, in my view, indicative of an intention that what is referred to in sections 73(3) and 108(1)(a) is not limited to "the objection".

16.3. If "matter" and "objection" do not have the same meaning then it is necessary to consider what is meant by the "matter". Although I was informed at the hearing that there is no authority on this point, there is some assistance to be gained from the case of *Silkstone and another v Tatnall and another* [2011] EWCA Civ 801, albeit that the case considered the meaning of "matter" in other circumstances. *Silkstone* was a case in which the Court of Appeal considered whether a party could withdraw their "case" from the Adjudicator (effectively the previous name of this Tribunal) on the day of hearing.

16.4. The Silkstones had registered a unilateral notice against Mr Tatnall's property. Mr Tatnall applied for to the Land Registry to cancel that notice and the Silkstones objected to that application. As a result of that objection "the matter" was referred to the Adjudicator. On the day of the hearing the Silkstones sent a fax to the Adjudicator stating that they had withdrawn their objection to Mr Tatnall's application.

16.5. It was then argued that the withdrawal of the objection by the Silkstones brought an end to the Adjudicator's jurisdiction as it was the objection that had been the subject of the reference. Giving the judgment of the court Rimer LJ held at paragraph 48 that:

> *"A reference to an adjudicator of a "matter" under section 73(7) confers jurisdiction on the adjudicator to decide whether the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that has provoked the making of the application"*

16.6. While the context is different, Rimer LJ's approach was that the term "matter" should be understood to include the merits of the application itself rather than be limited to a consideration of the merits of the objection that had been made. In this case the underlying application is the Applicants' application and I consider that it is

consistent with the approach in *Silkstone* to hold that the Tribunal has jurisdiction to consider, as part of the "matter" referred to it, the merits of the underlying application as well as the merits of the objections that have been made to it.

16.7. This approach to what constitutes the "matter" referred is endorsed in *A Practical Guide to Land Registration Proceedings* at 7.4 where the authors state:

> *"moreover, in presenting the case on the underlying dispute, the parties are not restricted to the arguments previously put forward to the Registrar in respect of the application or objection, as the case may be. That there is such a restriction has been argued on more than one occasion, but there is no authority for such a proposition."*

16.8. In my view, the Referral Rules 2003 do not assist the Applicants on this point. Rule 3(2) does provide that the Case Summary should set out *"details of the objection"* but it also requires that *"details of the disputed application"* are given. A Case Summary will therefore typically provide brief details both of the contentions made by the applicant in support of the application and by the respondent in support of the objection.

16.9. The provision of a Case Summary is a requirement which arises under Rule 3 of the Referral Rules 2003 *"when the registrar is obliged to refer a matter"* but there is no statement to the effect that the Case Summary itself is to define all of the issues that can be considered before the Tribunal. In fact Case Summaries are typically much shorter documents than the Statements of Case relied on by the parties once a reference has been made.

16.10. I do not accept Mr Bysshe's submission that there would be no need for the parties to articulate the basis of their objections in correspondence with the Land Registry if they are also entitled to raise new matters of objection following the making of a reference. Pursuant to section 73(6) of the 2002 Act the registrar must consider whether an objection is groundless and the registrar is entitled to require details of an objection for this purpose. Indeed, this happened in respect of the Respondent's objection in this case. The Land Registry wrote to the Respondent on

28 July 2015 indicating that the matters raised at that stage did not provide *"grounds to support the objection"*. A party that does not provide sufficient details of its objections to the registrar risks a decision by the registrar to proceed as if the objection had not been made.

16.11. My view set out above on the meaning of "matter" and its effect on the Tribunal's jurisdiction is supported by a consideration of the consequences if the position were otherwise. The Applicants have emphasised that their submissions are based on jurisdiction. If the Applicants' submissions are correct it would follow, therefore, that the Tribunal would be unable to consider the third issue. This would be the case even assuming, for the purposes of testing the Applicants' argument, it was apparent that there was a fatal legal or evidential difficulty with the Applicants' case. Despite this, the Tribunal would be obliged to proceed without reference to the fatal difficulty because of a lack of jurisdiction. In my view, this would be an undesirable outcome but, for the reasons I have set out above, it does not arise as I am satisfied that I have jurisdiction to consider the third issue.

The Relevant Law in relation to the second issue

17. It is apparent from the skeleton arguments and from the oral submissions that there is a good deal of agreement between the parties as to the relevant law, particularly as it relates to the second issue, although there is a clear disagreement as to how the relevant law should be applied to the evidence.

18. Section 27 of the National Parks and Access to Countryside Act 1949 ("the 1949 Act") required local authorities to prepare surveys of footpaths, bridleways and certain other highways in their area.

19. Section 32(4) of the 1949 Act provided that the relevant highway authority should prepare a definitive map of such footpaths, bridleways etc. and by section 32(4) of the 1949 Act, where a definitive map exists it is conclusive evidence of the existence of a footpath. By section 32(4)(c), where a definitive map shows the *"position or width"* of the footpath the same is also conclusive evidence of those matters.

20. The relevant parts of the 1949 Act were repealed by the Wildlife and Countryside Act 1981 ("the 1981 Act"). By section 53 of the 1981 Act relevant local authorities were obliged to update and maintain definitive maps and statements of public rights of way. By section 56 (1) (a) of the 1981 Act, where a definitive map and statement shows a footpath that is deemed to be conclusive evidence that on the date indicated on the map the public had a right of way on foot over the highway shown.

21. Section 130(1) of the Highways Act 1980 ("the 1980 Act") imposes a duty on highway authorities to *"assert and protect the rights of the public to the use and enjoyment of any highway of which they are the highway authority, including any roadside waste which forms part of it"*. By section 130(5) a highway authority is empowered to bring or defend legal proceedings to prevent obstruction of or encroachment on the highway.

22. In *Regina (Smith) v Land Registry (Peterborough)* [2010] EWCA Civ 200, the Court of Appeal considered whether a squatter could obtain title by adverse possession of land which was part of the public highway as shown on the relevant definitive map. It was held that, where section 263 of the 1980 Act vests title to a highway maintainable at public expense in the relevant highway authority, a squatter is unable to obtain title by adverse possession. The highway authority's title could only be extinguished in the circumstances set out in paragraph 15 of the judgment of Arden LJ.

23. It is unnecessary to set out the relevant law in more detail in this judgment because, as noted above, the Applicants accept that if the Respondent establishes that the Land forms part of a public highway then they will not be able to establish adverse possession of the land. This admission was made in correspondence in an email dated 16 December 2016 in which it was stated:

> *"For the purposes of this case, [the Applicants] will now admit that their claim for a possessory title to this piece of land cannot succeed if your clients are correct in saying that it forms part of a public highway"*.

24. I note, however, that in the Applicants' skeleton argument they argue, on the basis of paragraph 15 of *Smith*, as referred to above, that the steep slope of the Land is such that

any highway on it would be unusable and accordingly the highway can be considered as having been destroyed.

25. There is no dispute that a public footpath runs to the north west of 29 Hamilton Road. The key dispute is about the extent of that footpath and whether the Land forms part of the public highway.

26. As far as the relevant law is concerned, the Respondent relies on *Harvey v Truro Rural District Council* [1903] 2 Ch 638. In that case Joyce J held that there was an *"ancient and present fence"* that had been *"put up or constructed in reference to the highway"*. He went on to state as a matter of principle that:

> *"In the case of an ordinary highway running between fences, although it may be of a varying or unequal width, the right of passage or way prima facie, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the entire of it as the highway, and are not confined to the part which may be metalled ... all the ground that is between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption."*

27. Joyce J in *Harvey* also states that *"mere disuse of a highway cannot deprive the public of their rights"* even if an act of encroachment were to exist for more than 40 years.

28. The Respondent also relies on paragraph 7-037 of the sixth edition of Sara on Boundaries and Easements. This paragraph deals with the extent of the highway and includes the following propositions:

    28.1. There are conflicting authorities as to whether there is any legal presumption that all the land between fences and/or hedges on the edge of a highway forms part of the highway. In *Attorney General v Beynon* [1970] Ch 1, it was held that *"the mere fact that a road runs between fences, which of course includes hedges, does not per se give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put by reference to the highway, that is to separate the adjoining closes from the highway or for some other reason"*

28.2. In *Hale v Norfolk County Council* [2001] Ch 717, it was held that there was no presumption and that whether fencing was erected to demarcate the highway will depend on factors such as *"the nature of the district through which the road passes, the width of the margins, the regularity of the line of hedges, and the level of the land adjoining the road; and ... anything else known about the circumstances in which the fence was erected."*

28.3. It is the view of the author of Boundaries and Easements that where *"the evidence is inconclusive the assumption that the highway extends over the whole space between fences will usually apply."*

29. The Applicants also rely on the same passage in *Hale* in their submissions.

The contentions of parties and evidence on the second issue

30. The Respondent's position on the second issues can be summarised as follows:

30.1. Footpath 32 is a sunken footpath or hollow way. Its extent includes not only the pathway that runs along its lowest point but also the entirety of the mainly steep slopes on either side of the pathway and therefore it includes the Land.

30.2. The current definitive map shows the boundary between the Land and the Applicants' land by a thin solid black line which runs along the end of the Applicants' garden at the top of the steep slope that falls away below.

30.3. Although the current or previous definitive maps do not specify the width of footpath 32 this is explained by the fact that the width varies over its length.

30.4. The extent of footpath 32 can be discerned by looking at the 1876 first edition Ordnance survey map of the area ("the 1876 map") which, when overlaid onto the current definitive map, shows that the extent of the right of way matches the current width of footpath 32 including the bankings on both sides. The Respondents state

that the 1876 map shows lines of trees depicted as boundary features delineating the boundary of the path from the adjoining land.

30.5. Over its course the boundary of footpath 32 and adjoining land is marked by boundary features such as chain link fences and hedges at the top of the banking that leads down to the pathway.

30.6. In the case of the footpath 32 in the vicinity of the Land, the boundary of the footpath is indicated on the west side by a number of man-made and natural features, including chain link fencing and brush and on the east side by an historic tree line which ran along the top of the banking until a number of these trees were cut down by the Applicants. The legal presumption that the highway runs from fence to fence accordingly applies and the extent of footpath 32 extends to include the bankings on both sides of the pathway.

30.7. Footpath 32 was originally a drovers' way used for the passage of animals. The steep slopes on either side of the pathway have been worn away by usage over time but were originally a useable part of the way before this erosion took place and thus the steep slopes form part of the original and current extent of the highway.

30.8. The Respondent accepts that there are places away from the Land where sections of the sloping parts of footpath 32 have been fenced off but such actions are illegal encroachments on the highway.

31. The Applicants' position on the second issue can be summarised in broad terms as follows:

31.1. The current definitive map does not specify any width for footpath 32. The actual width of footpath 32 is the width of the pathway presently used and does not include the steep banking on either side of the flat pathway at the bottom on the bankings. Accordingly footpath 32 does not form any part of the Land.

31.2. The bankings on either side of the pathway could never been used as a pathway as their sides are too steep.

31.3. The Respondent has not produced any evidence in support of its contention that footpath 32 was an ancient drovers' way or that the bankings were created by usage of the pathway whether by animals or others and the Applicants deny that a depression of this width and depth could have been created in this way.

31.4. Even if the bankings were created by user the effect of this user was to render the bankings unusable due to their steepness. Once unusable that part of the highway previously containing the bankings should be considered to be "destroyed" within the meaning of paragraph 15 of *Smith* and accordingly the Respondent's title to the land has been extinguished.

32. There are a number matters that are not in dispute in relation to the second issue. These include matters set out in the witness statement of Helen Frances, dated 25 August 2016, which was not disputed and accordingly Ms Frances did not attend the hearing to give evidence. In her witness statement she states:

32.1. The first definitive map to include footpath 32 was prepared pursuant to the requirements of the 1949 Act.

32.2. She notes that a Memorandum issued by Ministry of Town and Country Planning for the use of local authorities was issued in January 1950 and gave advice to local authorities preparing definitive plans for the purposes of the 1949 Act. She notes that in relation to recording the width of a public path, the following advice was given:

> *"If the surveying authority require particulars to be furnished of the width of any public paths, these should be given in the schedule, as far as possible. If, for example, a way was set out in an Inclosure Award as a public footpath 4 feet wide ... these widths can and should be specified. Again, there is a legal presumption (in default of evidence to the contrary) that where a way runs between defined boundaries such as hedges or walls, the public right of way extends over the whole width between those boundaries, and this width can also be specified. Where, however, a path runs in the open, though the width dedicated to public passage may be, and often is, greater than that of the*

"beaten track", it will seldom be possible to ascertain exactly what that greater width is, and in such cases no width should be stated, unless proof of it can be produced which would satisfy a court of law"

32.3. Ms Frances exhibits the September 1951 official record sheet relevant to footpath 32. She states that this record sheet forms part of the Buckinghamshire definitive map and statement. The official record sheet states of footpath 32 that it *"commences at Hamilton road and runs in a North Easterly direction between high banks to junction of footpaths 31 and 33".* The record sheet states that the entry should state *"the width of the way where known, e.g. from an Inclosure Award."* Despite this no statement about the width of footpath 32 is included on the record sheet. The record sheet does record that footpath 32 was shown on a map deposited under the Rights of Way Act 1932.

32.4. Ms Francis comments that the lack of a width description for footpath 32 is consistent with the other footpaths in the High Wycombe area, none of which include any statement of width. She states that *"this may be because High Wycombe was not subjected to an earlier inclosure award".*

33. The current definitive map is annexed to this Decision, as noted above. It is stated to be based on Ordnance Survey material. It is common ground that there is no statement of the width of footpath 32 on the current definitive map and statement. The current definitive map includes a key on the right-hand side. That key indicates that public right of way footpaths are marked by long thick black dotted lines. As can be seen, a long thick black dotted line is marked on the current definitive map showing the course of footpath 32. It was apparent from the useful site inspection held on 6 June 2017 that the thick black dotted line follows the line of the pathway at the bottom of the "valley" formed by the slopes on either side of the pathway.

34. The current definitive map includes a number of other markings that are not identified in the key. In particular, there is a line of long thin green dotted lines which largely, but not entirely, run along the top of the "valley" which contained the pathway. There are also two lines of short thin green dotted lines which, in the main, run along either side of the long thick black dotted line referred to above. In the Respondent's letter dated 3 August

2015 the Respondent states that *"the thin green broken lines mark the bottom of the slope, the thick green lines indicate the top of the slope"*.

35. In addition, part of the Land is also marked by short thin black dotted lines of the same type used to indicate a pavement and kerbside on other parts of the current definitive map. As is usual for this scale of Ordnance Survey map, the current definitive map also includes solid black lines of the sort usually used to denote physical boundary features such as fences or walls. A thin solid line runs along most of the top of the rear garden of 29 Hamilton Road along the line where the top of the slope descends to the pathway below. The Respondent states in its letter dated 3 August 2015 that *"this black line indicates the boundary of the footpath with these properties"*. I discuss the content of the current definitive map further below.

36. There are further documents which are relied on by the parties as being relevant to the extent of the highway issue:

    36.1. The earliest depiction of what is now known as footpath 32 that was produced as evidence is a section of a surveyors map created between 1822 and 1835 ("the 1820s map"). This shows the recognisable course of the current footpath 32 terminating at what was then called the Horse Shoes public house. While the pathway is clearly discernible the 1820s map does not provide any statement about the width of the path nor does it show any boundary features on the part of the map in the vicinity of the Land.

    36.2. The next relevant piece of historical evidence is the 1876 map. This shows a pathway which also recognisably follows the same course as the current footpath 32. Marked throughout the length of the relevant section of the 1876 map are two inner lines of small, thin, closely spaced lines which appear to follow the route of the current pedestrian pathway. On either side of these lines at right angles are a series of short unbroken lines which appear to depict the steep sides of bankings at either side of the pathway. I note with interest that, while in other parts of the 1876 map these right-angle lines join up with each other to form an outer solid line parallel to the route of the inner lines, there a number of small gaps in what would otherwise be the outer line as it borders the Applicants' property in the vicinity of the Land.

36.3. I also note that just to the south west of the area in which the Applicants' property is now situated, the 1876 map shows an area where the two inner lines are depicted but where there are no adjoining short unbroken lines to the south. This suggests that there is no banking to the south of the inner lines in this part of pathway but the inner lines remain the same distance apart.

36.4. Trees are depicted at various stages along the course of what is now footpath 32. I will set out my views on how they are depicted and its significance below.

36.5. As mentioned above, the Respondent has prepared a version of the current definitive map that has superimposed onto it the course of the pathway as shown on the 1876. This shows that the course of the pathway remains the same and that the total dimensions of the bankings and pathway appear similar to those depicted on the current definitive map.

36.6. The Applicants rely on a much more recent document. The Respondents' first letter of objection to the Land Registry dated 25 June 2015 stated that the full width of the Land *"is required for maintenance and any improvement works that may be required in the future. If the claim is accepted the area for access would be too narrow and would impede public access."* The Applicants point out that this letter suggests that the first objection raised by the Respondent was based on maintenance requirements rather than a contention that the Land was part of the public footpath itself.

37. I heard evidence from the First Applicant, Mr Iqbal. He also confirmed as true the content of his statutory declaration dated 23 February 2015 and his witness statement dated 12 August 2016. The majority of this evidence is relevant to the third issue and is set out later in this Decision. He did, however, deal with matters of some relevance to the second issue:

37.1. He stated that he and his wife purchased 29 Hamilton Road in 1995. At this time title to the property was unregistered but it then included the land currently registered under title numbers BM212288 and BM277707. The transfer plan for the

purchase of the property included the Land as part of the property that was being transferred.

37.2. On the application for first registration following purchase the Land Registry declined to include the Land within the title of BM212288 because *"no title was shown and no evidence of acquisition of it by adverse possession was lodged"*. It is noteworthy, therefore, that at the time of the purchase no documentary title to the Land could be shown.

37.3. Mr Iqbal was cross-examined as to matters such as the proper interpretation of the 1876 map and whether footpath 32 was originally a drovers' way. These were clearly and understandably matters outside of his knowledge and he was accordingly unable to assist.

37.4. Mr Iqbal was also cross-examined about a meeting that took place between him and Ms Corinne Waldron of the Respondent on 30 January 2015. This meeting is referred to in Ms Waldron's letter of 25 August 2015. Mr Iqbal did not accept that the content of the August 2015 letter accurately reflected the discussion in January. He said that rather than stating a clear position Ms Waldron did not have answers to his questions and merely indicated that the decision whether the Respondent would take matters further was a decision for her superiors. Mr Iqbal said that Ms Waldron did not state in January 2015 that the Respondent considered that footpath 32 included the bankings on either side of the pathway.

37.5. I have not heard evidence from Ms Waldron but in any event I do not consider that the evidence about what was and was not said at the meeting in January 2015 assists me in determining the second issue. The question of whether the extent of the designated public highway is as the Respondent contends will be determined by the relevant historical and other evidence and not by whether individual officers of the Respondent made particular statements at particular times in dealings with Mr Iqbal.

38. I also heard oral evidence from the Second Applicant, Mrs Iqbal. Her evidence was relevant to the third issue and I deal with it below.

39. For the Respondent I heard oral evidence from Ms Joanne Taylor, who is a rights of way officer with almost 30 years of professional experience. She confirmed the contents of two witness statements dated 26th August 2016 and 10 May 2017. Ms Taylor produced the historical maps that I have described above.

40. In her first witness statement Ms Taylor describes investigations that she carried out into the question of the width of footpath 32. Part of her statement includes factual statements but parts of her statement also include statements of opinion such as *"my assessment is that it is a drovers' path"*.

41. The inclusion of clear statements of opinion in Ms Taylor's statement led me to enquire whether any permission had been sought or given for expert opinion to be adduced. It was common ground that no such permission was given but it also appeared that no application to exclude statements of opinion from Ms Taylor's witness statement had been made. I was accordingly addressed at the hearing on the issue of whether the statements of opinion contained in her witness statement should be admitted as evidence.

42. Ms Taylor's statement does not comply with any of the usual requirements of an expert witness statement. Her statement is not addressed to the court and it does not contain any statement as to her understanding of the duties to the court of an expert in litigation.

43. Further, on cross-examination it emerged that not only was Ms Taylor an employee of the Respondent (having previously worked for Transport for Buckinghamshire) but that she was the person responsible for giving instructions to the Respondent's legal team as to the conduct of the litigation. It also emerged that she had not been to inspect the Land and its surroundings until the day before my site inspection on 6 June 2017.

44. In the circumstances Ms Taylor cannot be regarded as independent in the way that experts are required to be by courts and tribunals. I accept that Ms Taylor's long experience as a rights of way officer may qualify her in appropriate circumstances to give expert evidence, but given her lack of independence in this case, the fact that none of the usual requirements for the preparation of expert evidence have been followed and the fact that no permission for expert evidence has been sought or obtained, I will not admit in evidence those limited parts of her statement and oral evidence that are pure matters of

opinion. I do admit and will consider the majority of her evidence which was factual in nature.

45. As far as the other parts of her statement are concerned, Ms Taylor describes her duties as a rights of way officer and confirmed that the Respondent has not given any permission to obstruct any part of footpath 32.

46. Ms Taylor was cross-examined in detail about the extent of her involvement in the drafting of various letters written by the Respondent to Mr Iqbal in relation to this dispute. She described the extent of her likely involvement in the various letters but this line of questioning did not assist me in determining the second issue.

47. Ms Taylor was also cross-examined about the historical documents that she had produced. She accepted that none of them referred to what is now footpath 32 as a drovers' road but stated that this is what her examination of the historical maps had led her to believe. Ms Taylor accepted the self-evident proposition that she had no direct knowledge of how the steep bankings alongside the pathway, including the Land, were created.

48. Ms Taylor was cross-examined about which trees the Respondent relied on as constituting the historic tree line that it is said formed the eastern boundary between the Land and the Applicants' property. She stated that the Respondent relied on four trees including the ones recently lopped or partially cut down by the Applicants. Ms Taylor accepted that trees or other features at the top of the banking may have served the function of stock control to prevent animals from falling down the steep slope of the banking.

49. I asked Ms Taylor about the depiction of trees on the 1876 map. I suggested to her that, while trees were clearly shown along the course of what is now footpath 32, the position of many of the trees was such that they were not depicted as planted on the upper edge of either side of the bankings. Her understanding remained that the trees depicted on the 1876 map were boundary trees.

Conclusions on the second issue

50. At the hearing there was some discussion about who bore the burden of proof in establishing whether the Land formed part of the public highway given that this issue

arose as a result of the Respondent's objection. However, for the reasons I set out below, I am able to reach my conclusion on second issue sufficiently clearly that there is no need to resort to an examination of which party has the burden of proof.

51. In reaching my conclusions I was greatly assisted by my visit to the site on 6 June 2017. In particular, the site visit allowed me to understand the striking topography of the Land and to observe the trees/stumps relied on by the Respondent as constituting the boundary features of the Land on its eastern side. I was also able to observe possible boundary features along or in the vicinity of footpath 32.

52. On the site visit I was invited by the parties to walk a considerable length of footpath 32 and was able to observe that for most of its length there were some form of fences or hedges at top of either side of the bankings. However there were parts of the footpath where there was also fencing immediately adjacent to the pathway which enclosed steep sections of banking. There were also sections where there was little or no slope on one side of the pathway and in these sections there were a number of areas where some form of bush or fencing extended up to the edge of the pedestrian pathway.

53. In terms of trees, the land immediately adjoining footpath 32 is generally surrounded by trees or substantial undergrowth. The overall appearance is of a tunnel of trees and greenery. In sections it was possible to observe trees at the top of the bankings on one or both sides of the pedestrian pathway. However in other sections there were no trees at the top of the bankings. In many places along the route of footpath 32 there were trees that had either been planted or had self-seeded into the bankings themselves. In my assessment, it was not possible to observe a general line of large trees running consistently along the line of the top of the bankings on either side, although clearly trees can, and no doubt are, cut down or die back from time to time over the years.

54. Having considered all the evidence carefully and with the benefit of having had a site visit, I am unable to accept the Respondent's case that the Land forms part of footpath 32. I set out my reasons below:

    54.1. As noted above, the current definitive map does not describe the width of footpath 32. On looking at the current definitive map it initially appeared that the thin

and thick green lines might be of assistance in determining the width of the highway but the evidence was that these merely indicated the extent of the slope and the key to the current definitive map did not give any official status to the green markings.

54.2. The Respondent states that the thin solid black line that runs along the rear garden of 29 Hamilton Road at the top of the slope *"indicates the boundary of the footpath with these properties."* However there was no evidence given to substantiate that a thin solid black line was intended by the creators of the map to delineate the boundary of the footpath and, as already noted, such a line is commonly used on ordnance survey maps to denote the presence of physical features on the land.

54.3. The Respondent seeks to rely on the fence to fence presumption as discussed above in order to establish that the Land forms part of the extent of footpath 32. I have noted that there is some legal debate about whether this can properly be described as a presumption. However, even assuming for present purposes that such a presumption exists, there are three reasons why, in my view, the Respondent cannot successfully rely on it:

54.3.1. Firstly, as was apparent from the site inspection, there is no fence or similar feature running along the eastern side/highest part of the Land as it borders the Applicants' garden. While the case law discussed above is clear that a hedge as well as a fence will suffice, there is no such feature currently in place nor is there evidence that a fence of hedge previously existed in this position. At most it can be said that there is a line where the undergrowth on sections of the banking comes to an end as it reaches the level of the Applicants' garden but this does not, in my view, amount to fence or similar feature.

54.3.2. Instead the Respondent relies on a line of historic trees as delineating the boundary between the footpath and the adjoining land and Ms Taylor identified the trees the Respondent relies on as being (before in some cases they were cut down) the boundary trees. In my judgment, having seen the trees/the stumps of the trees on site, I cannot accept that they should be regarded as akin to a fence or a hedge. There were large gaps between the trees and while there were some trees on the approximate lip of the land between the Applicants' rear garden and

the banking below, there were also trees growing or trees that had recently been felled on the banking itself. In short, the trees/stumps identified to me did not appear to me as likely to have been planted to delineate a boundary between the footpath and adjoining land but rather appeared to be part of a group of trees on and by the banking.

54.3.3. Secondly, although I accept that the current absence of a feature akin to a hedge or fence on the eastern side of the Land does not mean that such features did not exist previously, the Respondent has failed to produce evidence that this was the case. The Respondent's main evidence of the historic position was based on the 1876 map. I accept that the 1876 map shows trees along the length of what is now footpath 32 but I do not share Ms Taylor's view that the 1878 map depicts a line of historic trees that were intended to delineate the boundary of the public right of way.

54.3.4. While some of the trees are depicted as being planted at the top of either side of the bankings, a number of others are depicted as growing within rather than on the egde of the bankings. In my view the 1876 map is more naturally read as depicting a footpath at the bottom of steep bankings which on either side had trees growing both within and at the top of the bankings rather than as a representation of trees forming boundary features.

54.3.5. In addition, I note as described above, that a section of the 1876 map near to the Land shows the inner lines of the pathway as continuing with the same narrow width even in a section where there is no banking on the south side. If the Respondent's argument is correct that the pathway was originally as wide as to extend from what is now the top of each banking, it would be expected that this original width would remain in those sections of the footpath where bankings has not been created by use over the years. Instead, the footpath continues to be marked as having the same relatively narrow dimensions as during its course between the bankings.

54.3.6. Thirdly, even if I am wrong about the above and there was an historic line of trees that ran along the top of the bankings, the presumption, such as it is, will

only apply where there is evidence that the "fence' was erected *"in reference to the highway"*, see the discussion of *Harvey* above. As Mr Bysshe noted in his submissions, there was no direct evidence of this in this case. In my view it would be unsafe to infer that the alleged line of historical trees was planted to delineate the boundary of the highway. The striking topography of the site means, in my view, that the presence of trees at the top of the banking is at least, if not more explicable, as a visual signal of the end of what was then a surrounding field and of the presence of a striking change of topography beyond.

54.3.7. The Respondent also refers to the existence of fences or hedges at the top of the bankings on either side of footpath 32 over much of its course. As noted above, I observed that this was the case on the site inspection. However, in my view the same point applies. Given the striking topography of the land, the presence of a fence or hedge at the top of a steep slope is equally, if not more explicable, as having been erected to prevent anyone falling down the steep slope than as having been erected in reference to the highway.

54.4. The Respondent has also sought to rely its contention that footpath 32 is an ancient drovers' way. In my view the admissible evidence before me does not establish that this was the case. The 1820s map and the 1876 map show the existence of the way but do not indicate how it was used. Even if the way was in fact used as a drovers' way that in itself would not assist the Respondent's case on the width of the footpath. While it may be right that the current pedestrian pathway would be quite narrow for effective use as a drovers' way that does not establish that the way was originally wider. That part of the Respondent's contention relies on the assertion that over time the bankings were created by long user of the way by cattle or otherwise.

54.5. I have no admissible evidence before me to establish how the bankings were created. Even if I had admitted Ms Taylor's opinion evidence in this respect I would have expected it to be accompanied by cogent evidence that considered the various means in which such a strikingly steep set of bankings on either side of a pathway may have been created and then provided an opinion as to which was most likely and why. Without such evidence it would, in my view, be quite unsafe to proceed on the assumption that the bankings were created in the way the Respondent speculates.

54.6. The Respondent also relies on the verbal description of footpath 32 contained in the official record sheet. It states that footpath 32 *"runs in a North Easterly direction between high banks"*. I do not think this description assists on the question of the width of footpath 32. The reference to the footpath being between high banks does not assist as to whether the high banks are themselves part of the footpath or whether they are referred to because they are outside of the footpath and serve to delineate its extent.

54.7. Similarly, the lack of references to the width of footpath 32 in the official record sheet seems to me to be an entirely neutral factor. The lack of reference to width may have been the result of the varying width of the path but it may also have been the case that no width was stated because the correct width of the footpath was not known at the time the official record was prepared.

55. In light of my conclusions on this issue I do not need to go on to consider the Applicants' alternative argument that even if the area of the bankings had once been part of the public right of way, the way should be regarded as being "destroyed" within the meaning of paragraph 15 of *Smith* once it had become permanently unusable because of the steepness of the slope. Had it been necessary to consider this argument I would have been assisted by further citation of authority on what constituted destruction of a highway for these purposes.

The relevant law in relation to the third issue

56. The legal principles relevant to the acquisition of land by adverse possession are well-established and there was no dispute between the parties them. The physical and mental components of adverse possession are set out in the House of Lords decision in *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30. In summary a party claiming adverse possession must show that during the relevant period:

56.1. That he had factual possession of the land claimed;

56.2. That he had the necessary intention to possess the land; and

56.3. That he did not possess the land with the owner's consent

57. The description of factual possession of land set out by Slade J in *Powell v McFarlane* (1979) 38 P&CR 452 was approved in *J A Pye (Oxford) Ltd v Graham.* Slade J stated:

> *"Factual possession 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 of 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."*

58. The essence of factual possession is exclusive physical control of the relevant land. The possession must be sufficiently indefinite and permanent to amount in law to possession rather than to a temporary user. For possession to be exclusive it does not require that the relevant land is used continually. In *Bligh v Martin* [1968] 1 WLR 804 Pennycuick J held that:

> *"possession may continue to subsist notwithstanding that there are intervals, and sometimes long intervals, between the acts of user ... In the case of farmland, this must habitually be the position; for example, as regards arable farm land during the winter months."*

59. In relation to the necessary intention required on the part of the party claiming adverse possession, it is important to note that the intention required relates to possession of the land. In *Buckinghamshire County Council v Moran* (1988) 86 LGR 472 Hoffman J stated that the intention required was *"not an intention to own or even an intention to acquire title but an intention to possess".* This formulation was approved in *J A Pye (Oxford) Ltd v Graham.* The intention required is, in one's own name and on one's own behalf, to exclude the world at large, including the owner with paper title, so far as reasonably practicable and so far as the processes of law will allow.

60. In many cases the establishment that there has been the required factual possession of the land will be sufficient to prove that the possessor had the relevant intention. In *J A Pye (Oxford) Ltd v Graham* Lord Browne-Wilkinson stated:

> *"if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land"*

61. In *J Alston & Sons Ltd v BOCM Pauls Ltd* [2008] EWHC 3310 (Ch) it was held that there was no requirement that the adverse possessor had to have an intention to infringe the true owner's rights. Thus the relevant mental element of adverse possession could be established even where the possessor accepted that he would have vacated the land if asked to do so by the documentary title owner.

62. Possession cannot be said to be adverse if it is with the owner's consent. In *Buckinghamshire County Council v Moran* [1990] Ch 628 Slade LJ stated:

> *"Possession is never "adverse" within the meaning of the 1980 Act if it is enjoyed under a lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper title and his licence has not been duly determined, he cannot be treated as having been in "adverse possession" as against the owner of the paper title".*

The contentions of parties and evidence on the third issue

63. The Applicants' position on the third issue is, put simply, that they can demonstrate by their own and supporting evidence that they have had both the relevant factual possession and intention to possess the Land since 1995.

64. The Respondents' position is:

64.1. The Applicants cannot establish factual possession because the Respondent has itself carried out maintenance work on the Land since 1995 including clearing fallen trees and/or maintaining/reducing trees;

64.2. The Applicants' evidence as to adverse possession should not be accepted or, if accepted, is not sufficient to establish the elements of adverse possession summarised above;

64.3. The Applicants' actions in cutting back trees on the Land were illegal acts in breach of Tree Preservation Orders.

65. The most important part of Mr Iqbal's oral and written evidence in relation to the third issue was as follows:

65.1. Since 1995 Mr Iqbal stated that he and his wife have treated the Land as their own. Although the Land is too steep to use for any recreational purpose, he stated that they had from time to time cut back and maintained the vegetation and trees growing on it. In cross-examination it was suggested that the only significant work of maintenance he had carried out on the Land was that shown in photographs from 2015. Mr Iqbal denied this and explained various times when he had carried out works since 1995, particularly in relation to works for the development of a new house at 29A Hamilton Road.

65.2. When Mr Iqbal purchased the land now included in titles BM212288 and BM277707 there a barbed wire fence in the vicinity of what Mr Iqbal considers to be the boundary between the Land and footpath 32 was already in place. He and his wife have maintained this barbed wire fence throughout their ownership, replacing sections of it most recently in 2015. Pictures of the barbed wire fence are exhibited to Mr Iqbal's statutory declaration.

65.3. Mr Iqbal was referred to an email received by the Respondent shortly before the hearing in which a member of the Chiltern Society is reported to have stated that the barbed wire fence *"was erected 2015/2016"*. Mr Iqbal strongly denied this and

reiterated that the account given in his witness statement was correct, although he accepted that the barbed wire fence had been replaced in 2015. Mr Iqbal went on to add that he thought that he had even seen the barbed wire fence in place as long ago as the 1970s when he used to go for cross country runs along footpath 32.

65.4. Mr Iqbal states that for a section of what he considers to be the boundary between the Land and footpath 32 there is a low retaining wall which was "erected many years ago".

65.5. Mr Iqbal produced photographs of the recent work carried out on the Land. These show some items of major work such as the stumps of recently cut saplings/small trees and the clearance of sections of the Land.

65.6. Mr Iqbal said that no one has objected to his and his wife's use of the Land since 1995.

65.7. Mr Iqbal denies that anyone else has maintained the Land since 1995 although he accepted in his oral evidence that on one occasion in 2013 the Respondent's workmen threw cuttings onto the Land but removed them when requested to do so.

65.8. Mr Iqbal states that he has only ever seen maintenance work to footpath 32 carried out outside of the Land. He was cross-examined on the basis that work may have occurred while he was out of while he was unaware of it. He stated that either he or his wife were there for the majority of the time when works were likely to have been carried out.

65.9. Mr Iqbal was asked various questions about maintenance job sheets produced by the Respondent for works carried out on footpath 32. I deal with these below in relation to the evidence of Ms Taylor but Mr Iqbal's evidence was that maintenance work was usually only done where a fallen tree had blocked the footpath and then, as far as the Land is concerned, access to the Land was not required.

65.10. Mr Iqbal also states that parts of the bankings leading down from adjoining properties to the level of the pathway have been fenced off along the course of footpath 32.

65.11. Mr Iqbal said that he had conversations with the District Council's tree officer and understood that he was entitled to trim and cut back most of the trees on his land with the exception of two particular trees.

65.12. In re-examination Mr Iqbal was asked about the height of the trees in his garden adjoining the Land when he purchased his property in 1995. He estimated that they were probably half the size that they grew to before he recently cut some of them back. He stated that the had cut them back because he was concerned that they grew quickly and unless he cut them back he would become unable to do anything about them.

66. Mrs Iqbal provided a short witness statement agreeing with the content of her husband's statement. She also gave oral evidence which, in all material respects, was consistent with her husband's evidence. She was mainly cross-examined about how frequently she left her house at 29A Hamilton Road. She explained that generally either she or her husband were in the house. They had been burgled and tried hard to ensure that someone was in the house almost all of the time as a result.

67. Mrs Iqbal stated that when she and her husband left the house together they arranged for their daughter to come to stay at the house to keep an eye on it. She was confident that while she was at the house she would have been well placed to observe anyone entering upon the Land to carry out maintenance work as the rooms she mainly occupied looked down towards footpath 32. Her evidence was that it was from this vantage point that she saw the Respondent's workmen placing cuttings on the Land in 2013 and that she reported this to her husband causing him to speak to the workmen involved.

68. I also heard evidence from Mr Carl Stratford, a chartered surveyor, who was called by the Applicants. He verified that the content of his 25th August 2016 statement was true. He confirmed in his evidence that he was engaged to act for the Applicants in 2000 in connection with an application for planning permission to build what is now 29A

Hamilton Road. The Land was included in the landscaping proposals submitted with the planning application. The landscaping proposals included felling three trees on the Land. The planning consent was granted and he was aware that the Applicants proceeded to fell the three identified trees on the Land.

69. Mr Stratford stated that he had noticed the barbed wire fence which ran along the boundary between the Land and the pathway in 2000 and that the fence remained in place whenever he visited the Applicants' property subsequently. He also gave evidence that in their dealings with him the Applicants had always regarded the Land as being theirs and had always treated it as such.

70. Mr Stratford was cross-examined about how frequently he visited the Applicants' property and his evidence was that he attended frequently in the period 2000-2003 during the planning application, subsequent works and snagging period. Thereafter he visited on an occasional basis to deal with problems such as drainage issues that arose from time to time. He answered variously that after 2003 he probably had occasion to visit 2 or 4 times a year.

71. As already noted, Ms Taylor produced a series of job sheets detailing works carried out to footpath 32. These cover a period from 2003 to 2013. Each job sheet contains a description of the location of the relevant works. Significantly, on cross-examination Ms Taylor, with admirable honesty, was unable to state that any of the job sheets related to work that had taken place on the Land. The most she could suggest was that the job sheets related to work that had been carried out very close to the Land.

Conclusions on the third issue

72. I can deal with the third issue concisely. I find on the evidence that the Applicants have had factual possession of the Land since 1995 and that they also had the necessary intention to possess the Land from 1995 onwards. There is no evidence that they enjoyed possession with the consent of any potential owner and it was clear from Ms Taylor's evidence that the Respondent did not provide any consent.

73. I summarise my reasons for this finding below:

73.1. Having heard their oral evidence, I accept the written and oral evidence of Mr and Mrs Iqbal with the very limited caveats set out below. Although they were both cross-examined, on some issues at length, their accounts remained consistent with their statements and they were both able to provide detailed answers to most of the questions addressed to them. When they were not aware of the answer to a question they were clear in saying so and they did not speculate in their answers. Overall, I gained the impression that both Mr and Mrs Iqbal were honest witnesses who were seeking to assist the Tribunal in giving their evidence.

73.2. I accept Mr and Mrs Iqbals' accounts that they had exclusive possession of the Land since 1995. It is important to take into account the unusual topography of the Land. Given the steep slope of the Land the most that any owner would be able to do with the land in practical terms would be to maintain it and to manage the trees and vegetation upon it. I accept Mr and Mrs Iqbal's evidence that they did so.

73.3. In relation to Mrs Iqbal's evidence, I consider that she may have somewhat underestimated the amount of time when she was away from the house. While I accept that Mrs Iqbal spends a lot of time at home at 29A Hamilton Road her evidence at times gave the impression that she was hardly ever away from the house. I find that her recollection of the extent to which she was away from the house was an underestimation. However I accept the thrust of her evidence, which was that she, her husband or a relative were very frequently at home and were generally well placed to see if anyone was carrying out work on the Land.

73.4. In relation to Mr Iqbal's evidence, I was not convinced that at this remove of time he did have an accurate recollection of having seen the barbed wire fence adjoining the pathway as long ago as the 1970s. It is sometimes difficult to recollect when one first noticed a particular matter and I find that it is unlikely that his first recollection of seeing the barbed wire fence was as early as the 1970s, particularly as he said that he observed the fence while running. The barbed wire fence, at least as it appeared on the site inspection, is a low-level structure that is not particularly conspicuous.

73.5. Neither of these findings are of relevance to my conclusions on the adverse possession issue. As far as Mrs Iqbal's presence in the house is concerned, in light of Mrs Taylor's honest acceptance that she could not state that any of the job sheets related to the Land, there is simply no evidence before me that the Respondent carried out any maintenance work to the Land. There is therefore no evidence that the Applicants' possession was ever disturbed, other than the single incident in which cuttings were placed on their land without permission.

73.6. In relation to Mr Iqbal's account, I accept both his and his wife's evidence that the barbed wire fence was in place in 1995 and that the Land was accordingly fenced off to a degree from 1995 onwards. Although the fence is inconspicuous it is consistent with Mr and Mrs Iqbal's intention to exclude others from the Land.

73.7. In addition, the Applicants' accounts were supported by that of Mr Stratford. There was no effective challenge to his evidence and he was able to confirm that Mr and Mrs Iqbal were treating the Land as their own and that they were carrying out acts of ownership such as cutting down trees in the early 2000s.

73.8. I note that it is alleged that the Applicants have cut down trees contrary to a tree protection order. In light of my findings about their use of the Land since 1995 it is not necessary for me to make any findings in this respect as the Applicants do not need to rely on their recent cutting down of trees in order to establish their claim to adverse possession.

Costs

74. I have set out my conclusions on the three principal issues that arise on this Reference Above. Accordingly the Applicants have succeeded in obtaining the relief they sought. At the hearing I informed the parties that following the determination of the issues raised by the reference the Tribunal would consider the question of costs based on written representations subject to consideration of any objection made by any party.

75. The parties were informed in writing at the start of the proceedings that the general rule in this Tribunal is that the losing party will pay the successful party's costs as well as his

own. I have found that the Applicants have succeeded on their Application and the application of the general rule in this case would result in an order that the Respondent pay the Applicants costs.

76. I direct that the parties are to make written submissions on costs supported, where the party seeks an order for costs in its favour, by a Statement of Costs in form N260 (which can be easily obtained on the internet) or in substantially similar form. Copies of all submissions and Statements of costs are to be filed with the Tribunal office and served on the other parties. The submissions should address the incidence of costs including whether there are any reasons for departing from the general rule described above, the basis of the assessment (whether standard or indemnity) and the quantum of costs that should be awarded.

77. I direct that the Applicants shall file their written submissions as to costs and any Statement of Costs by 5pm on 7 September 2017.

78. The Respondent is directed to file its written submissions as to costs and any Statement of Costs by 5pm on 7 September 2017.

79. The Applicants are to file any additional written submissions as to costs limited to commenting on the Respondent's submissions and any Respondent's Statement of Costs by 5pm on 7 September 2017.

80. The Tribunal will consider the materials received pursuant to these directions and issue a written determination on costs.

81. In the event that there is non-compliance with the directions given for the determination of costs the Tribunal gives notice that it may give a direction debarring the defaulting party from taking any further part in the determination of costs and proceed to determine the costs issues without further reference to the defaulting party.

BY ORDER OF THE TRIBUNAL
DATED THE 17TH DAY OF AUGUST 2017

Malcolm Sheehan

JUDGE MALCOLM SHEEHAN