[2018] UKFTT 209 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO. 2016/0221

BETWEEN

(1) DAVID FREDERICK CLEWER
(2) JEAN CAROL CLEWER

Applicants

and

PATRICIA ANN SCAMMELL

Respondent

**Property address: Garden Ground at 1 Birchglade, Calmore, Southampton**
**Title number: HP782690**

**Before: Judge Daniel Gatty**

**Sitting at: 10 Alfred Place, London WC1**
**On: 31 January 2018**

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| Applicant Representation: | Martin Strutt of counsel, instructed by Lyons Davidson, Solicitors |
| Respondent Representation: | Ian Wheaton of counsel instructed by Underwood, Solicitors |

## DECISION

**Cases referred to:**
*Buckinghamshire County Council v Moran* [1990] Ch 623
*Marshall v Taylor* [1895] 1 Ch 641
*Wallis's Clayton Bay Holiday Camp v Shell Mex* [1975] 1 QB 94
*Williams v Usherwood* (1983) 45 P & CR 235

1. This matter was referred to the First-tier Tribunal in April 2016. It concerns an application to HM Land Registry by the Applicants, Mr and Mrs Clewer, to alter the register so as to show a triangular section of garden ("the Disputed Land") as belonging to them, rather than to the Respondent, Mrs Scammell.

2. At present, the land register shows the Disputed Land as part of the front garden of 1 Birchglade, Calmore, Southampton ("No. 1"). It is Mr and Mrs Clewer's case that they have been in adverse possession of the Disputed Land since their purchase of the adjoining property to the north, 2 Birchglade, Calmore, Southampton ("No. 2") on 1 May 1980. They therefore contend that by the time that the Land Registration Act 2002 came into force on 13 October 2013, Mrs Scammell's title had been extinguished by adverse possession and she held the Land on statutory trust for them pursuant to s. 75 of the Land Registration Act 1925. If I accept their case in that regard, it will follow that they are entitled to be registered as proprietors of the Disputed Land pursuant to the transitional provisions contained in para. 18 of Sch. 12 to the Land Registration Act 2002. Mrs Scammell disputes that Mr and Mrs Clewer had been in adverse possession of the Disputed Land for at least 12 years before 13 October 2013.

3. The hearing of this reference took place before me, sitting at 10 Alfred Place, London, on 31 January 2018. The Clewers were represented by Martin Strutt of counsel and Mrs Scammell was represented by Ian Wheaton of counsel. I am grateful to them both for their assistance.

4. At the beginning of the hearing an issue arose whether I should admit some evidence regarding produced on behalf of the Mrs Scammell regarding a man hole cover and drainage runs. I admitted the evidence for the reasons that I gave orally at the hearing.

**The factual background and the evidence**

5. No. 1 and No. 2 were built as part of an estate in which the front gardens were all laid to lawn with no boundary features separating one from another. Mrs Scammell and her late husband (who died in March 1999) bought No. 1 from the developers in 1972. The first owners of No. 2 were Mr Robert Barber and his wife Mrs Janet Sharp Barber, both of whom made witness statements for the proceedings before me but neither of whom attended to give oral evidence. Mr and Mrs Barber owned No. 2 from March 1972 until they sold it to the Clewers in 1980.

6. It is common ground that Mr and Mrs Scammell created the first boundary feature separating the front gardens of No. 1 from that of No. 2 in the 1970s. According to Mr and Mrs Barber, in 1973 Mr and Mrs Scammell dug a border about 2 feet wide leading from the party wall between the houses to the street in a line perpendicular to the front walls of the houses and laid a single line of bricks down the middle.

7. Mrs Scammell does not recall the line of bricks. She says that the first boundary feature was an 18 inch high fence ("the Low Fence") which she and her husband erected in about 1977, along the line perpendicular to the front walls of the houses. It is not in dispute that the Low Fence was present when Mr and Mrs Clewer purchased No. 2 in 1980 and it does not matter for the purposes of these proceedings whether there was a line of bricks there first.

8. In fact, the original transfer plans and the registered title plans for Nos. 1 and 2 do not show the boundary between the front gardens as perpendicular to the front walls of the respective houses (which are semi-detached). They show the boundary as off-set at an angle of about 110 degrees or so to the north from the line of the front walls of the houses. The effect of erecting a fence perpendicular to the front walls of the houses was to create a triangular piece of land which on paper belonged to No. 1 but which to someone who had not seen any title plans would appear to be within the front garden of No. 2. It is that triangle which is the Disputed Land with which I am concerned.

9. Mrs Scammell replaced the Low Fence with a taller, chain-link fence in about 2001 or 2002. In 2003 Mr and Mrs Clewer erected a green-coloured wooden fence up against

the chain-link fence. Following the erection of the Clewers' wooden fence, Mrs Scammell replaced the chain-link fence with a wooden fence of her own.

10. In 2014 Mr and Mrs Clewer erected a brick wall along the front boundary of No. 2's garden, including the front of the Disputed Land.

11. Later in 2014 Mr and Mrs Clewer replaced their wooden fence with a metal 'colourfence'. This triggered a dispute with Mrs Scammell culminating in Mrs Scammell instructing contractors to go on to the Disputed Land and remove the colourfence, which they did on 10 April 2015. As a result, Mr and Mrs Clewer made the application to the Land Registry which gives rise to this hearing.

12. Mr and Mrs Clewer gave evidence before me. The substance of their evidence was that from the date of their purchase of No. 2 they treated the Disputed Land as part of their front garden. Initially they assumed that they had paper title to everything on their side of the Low Fence. In 1989 Mr Clewer had cause to look at his title deeds because of a dispute with the local authority about one of the other boundaries to No. 2 and discovered that the Disputed Land was not shown as within his and Mrs Clewer's title. The Clewers did not take any action or change how they were dealing with the Disputed Land in response to that discovery.

13. Mrs Scammell gave evidence that in 1992 she and her late husband offered to sell the Disputed Land to Mr and Mrs Clewer for £10 plus their costs of dealing with the transfer. Mr and Mrs Clewer did not take up the offer. Mr and Mrs Clewer agreed that this had taken place.

14. I considered that Mr and Mrs Clewer and Mrs Scammell were all giving evidence truthfully, recalling as best they could events stretching back many years. Mr Clewer was plainly well aware of the legal consequences of his evidence. Perhaps that awareness had affected his recollection somewhat when he looked backed at events from long ago, but not so as consciously to distort his evidence in my judgment.

**Adverse possession - the law**

15. As to what constitutes adverse possession, it is well established that there must be (1) factual possession of the land without the paper owner's consent and (2) an intention to possess the land for the relevant period – 12 years in this case.

16. With regard to the requirements of factual possession, I cannot improve upon the definition of Slade J (as he then was) in *Powell v McFarlane* (1977) 38 P & CR 452 at 470-71, in a passage expressly approved by the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 436:

> "Factual possession signifies an appropriate degree of physical control. It must be single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several person jointly. Thus, an owner of land and a person intruding on that land without his consent cannot both be in possession of that land at the same time. The question whether 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 and 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."

17. It is important to note that the intention required is an intention to possess; it need not be an intention to own. See *Pye* at [42] to [46]. Generally speaking, the question whether there was an intention to possess is best answered by drawing inferences from what was done to and with the land in question. Evidence of intention given at trial cannot help but be self-serving.

**The Issues**

18. The issues before me were relatively narrow. Mr Wheaton for Mrs Scammell accepted that in all respects but one Mr and Mrs Clewer were in factual possession of the Disputed Land from 1980 to 2015. He contended, however, that they were not to be treated as in

factual possession at any time because there was a manhole cover within the Disputed Land providing access to drains to No. 1 to which the owners of No. 1 had or might have required access.

19. Mr Wheaton further contended that Mr and Mrs Clewer's occupation and use of the Disputed Land was with the consent of the owners of No. 1 – Mr and Mrs Scammell until March 1999 and Mrs Scammell since then. It was common ground that if the Clewers' occupation and use was pursuant to a permission given by the owners of No. 1, their possession would not qualify as adverse (see *Buckinghamshire County Council v Moran* [1990] Ch 623 at 636).

20. It was not suggested that there were any other grounds for resisting the application if I were to find that Mr and Mrs Clewer had been in factual possession of the Disputed Land for 12 years before 13 October 2003 and not by permission of Mr and Mrs Scammell.

**Factual Possession**

21. I am prepared to assume in the Respondent's favour that sewer pipes for No. 1 pass under the Disputed Land and lead to the manhole cover within it. I do not consider, however, that the mere existence of the pipes and the manhole cover prevent Mr and Mrs Clewer having been in factual possession of the Disputed Land.

22. Where the facts would otherwise lead to the conclusion that X had factual possession of land belonging to Y, the fact that Y's drains pass under the land and that Y might need access to the drains to clean them does not prevent X obtaining title by adverse possession. X obtains title but subject to an implied easement in favour of Y. See *Marshall v Taylor* [1895] 1 Ch 641 at 648 and 651, CA as cited approvingly by the Court of Appeal in *Williams v Usherwood* (1983) 45 P & CR 235 at 254 where Cumming-Bruce LJ, giving the judgment of the Court, concluded:

> "These cases establish that, where a squatter establishes exclusive possession of the surface, he may acquire a possessory title subject to the rights of the paper owner, which have the practical characteristics of easements although they do

not logically satisfy the conditions necessary to prove a legal or equitable easement or a *quasi*-easement. They are, in our opinion, consistent with the undoubted existence of the exceptions to the second rule propounded by Thesiger L.J. in *Wheeldon v. Burrows*. These exceptions are founded on necessity. If it is necessary, the law will imply in favour of a grantor such rights as are necessary to the enjoyment of the grantor's own house, even if he makes no reservation in his grant."

23. There was no evidence before me of Mr or Mrs Scammell actually entering onto the Disputed Land to access the manhole cover at any time after Mr and Mrs Clewer's purchase in 1980. So, even if such an entry would have negated factual possession, which I doubt, there was no such entry on the evidence I heard.

24. As Mr Wheaton correctly accepted, manhole cover aside the Clewers were in factual possession of the Disputed Land at all times after their purchase of No. 1 until April 2015. In the words of Slade J in *Powell*, they dealt with the Disputed Land as an occupying owner might have been expected to deal with it and no-one did so.

25. I therefore conclude that Mr and Mrs Scammell had factual possession of the Disputed Land from May 1980 to April 2015 – a period of over 23 years by the date that the Land Registration Act 2002 came into force.

**Occupation with Permission?**

26. It was Mrs Scammell's written evidence that following the refusal of the offer to sell in 1992 she and/or her husband reminded Mr and Mrs Clewer that the Disputed Land was part of No. 1, albeit they had no objection to Mr and Mrs Clewer continuing to use it.

27. In cross-examination, however, it was apparent that Mrs Scammell (understandably) could not actually recall the conversation that must have taken place when the offer to sell was declined. Nor could Mr or Mrs Clewer. Mrs Scammell was unable to recall any particular conversation in 1992 or later when she or her husband had said in terms that Mr and Mrs Clewer had permission to use the Disputed Land, let alone in which Mr and Mrs Clewer had asked for permission. Mr and Mrs Clewer denied that they ever asked for or were given permission to occupy the Disputed Land.

28. A mere reminder that Mrs Scammell owned the Disputed Land is not in itself a grant of permission to use it. Often there might be a request for and/or grant of permission following a reminder by the owner of land to the person occupying it that it belongs to the former. However, in the absence of evidence of a such a request for or grant of permission, it cannot be inferred just from the fact of a reminder of ownership that there necessarily was one.

29. There was an occasion in 2003, following the erection by the Clewers of their wooden fence in which Mrs Scammell took a copy of her deeds around to No. 2 and showed them to Mrs Clewer. I did not understand the evidence to amount to the giving of permission to use on that occasion but even if permission had been given then, that would have been too late for it to be legally significant. In the light of my finding that the Clewers had been in factual possession since May 1980, permission would have had to be given before the end of April 1992 in order to prevent Mr and Mrs Clewer extinguishing Mr and Mrs Scammell's title to the Disputed Land.

30. Nor do I consider that permission to use the Disputed Land can be inferred from the declined offer to sell the Disputed Land in 1992. It must be recalled that what is required to establish adverse possession is an intention to possess, not to own. Knowledge that one does not own land does not prevent one having an intention to possess it. There are a variety of possible developments that might take place after X offers to sell to Y land that Y is occupying without X's permission and Y declines the offer. X might take steps to eject Y. X and Y might agree a lease of the land to Y. X and Y might agree that Y would continue to occupy by X's licence. Y might simply continue in occupation until and unless X take steps to eject him. The last of those possibilities cannot be treated as occupation by Y with X's permission. To hold otherwise would be to resurrect the implied consent doctrine from *Wallis's Clayton Bay Holiday Camp v Shell Mex* [1975] 1 QB 94 that was rejected in subsequent cases, including authoritatively in *Pye*.

31. In my judgment, it is the last of those possibilities that most accurately describes the basis on which Mr and Mrs Clewer continued to occupy the Disputed Land after 2002. I therefore conclude that Mr and Mrs Clewer were not in possession of the Disputed Land with Mr and Mrs Scammell's consent.

32. Consequently, I find that from mid-1992 the Disputed Land was held on trust for Mr and Mrs Scammell pursuant to s. 75 of the Land Registration Act 1925, entitling them to be registered as its proprietor pursuant to para. 18 of Sch. 12 to the Land Registration Act 2002.

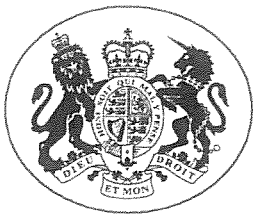
**Decision**

33. For the reasons that I have sought to explain above, I will direct that the Chief Land Registrar gives effect to Mr and Mrs Clewer's application to alter the register as if Mrs Scammell's objection had not been made.

34. The usual rule in this jurisdiction is that costs follow the event: the loser pays the winner's costs since referral to the Tribunal. However, that is not the invariable rule. By para. 9.1 (b) of the Practice Directions, Property Chamber, First-Tier Tribunal, Land Registration I can make a different or no order as to costs. The Respondent has been the loser in these proceedings but I have not yet heard any submissions on costs, which I propose to decide with reference to written submissions. So, if either party wishes to apply for costs they should make a reasoned application in writing, including a schedule of costs and evidence of the costs incurred, within 28 days. Such an application should be served on the other party who will then have 21 days to respond to the application by way of written submissions sent to the Tribunal, copying any submissions to the applying party or parties. Any response to such submissions should be provided to the Tribunal and the other party or parties within 14 days of receipt of the submissions.

**JUDGE DANIEL GATTY**

**Dated this 25th day of March 2018**



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| Respondent Representation: | Ian Wheaton of counsel instructed by Underwood, Solicitors |

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**ORDER**

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IT IS ORDERED THAT:

1. The Chief Land Registrar is directed to give effect to the Applicants' application in Form AP1 dated 28 May 2015 as if the Respondent had not objected thereto.

2. If any party wishes to apply for costs they should serve on the Tribunal and the other party a reasoned application in writing, including a schedule of costs and evidence of the costs incurred, by 5.00 pm on 24 April 2018.

3. Any submissions in response to an application for costs are to be served on the Tribunal and the other party by 5.00 pm on 15 May 2018.

4. Any reply to submissions made pursuant to paragraph 3 above should be served on the Tribunal and the other party by 5.00 pm on 29 May 2018.

**JUDGE DANIEL GATTY**

**Dated this 27th day of March 2018**