**[2015] UKUT 294 (TCC)**

**UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**

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| **Appellant: GARY STUART SMITH** | **Tribunal Ref: FTC/107/2014** |
| **Respondents: MICHAEL FRANKLAND AND JAYNE FRANKLAND** | |

**Property address: Land adjoining 19 Bridge End, Billington, Clitheroe,**

**DECISION NOTICE**

**HIS HONOUR JUDGE HODGE QC**
Sitting at Manchester Civil Justice Centre
28 May 2015

**Representation:**

**Mr Wayne Goldstein** (of counsel) instructed by **Steele & Son**, Clitheroe, appeared for **the Appellant**

**Mr Ian Foster** (of counsel) instructed by **Maddocks Clarke**, Altrincham, appeared for **the Respondents**

**UPON APPEAL** from the Order and Decision of Judge Ann McAllister, Judge of the Property Chamber of the First-tier Tribunal (Land Registration Division), dated 4th April 2014 pursuant to the Order of Judge Edward Cousins dated 7 August 2014 granting permission to appeal

**AND UPON READING** the Appeal Bundle

**AND UPON HEARING** Counsel for the Appellant and for the Respondents

**IT IS ORDERED THAT**

1. The Appellant is refused permission to rely upon the witness statements of (1) James Anthony Wright dated 10 October 2014 and (2) the Appellant dated 14 May 2015.

2. The appeal is dismissed.

3. The Appellant is to pay the Respondents' costs of the appeal in the agreed sum of £6,240 (£5,200 and VAT of £1,040)

**REASONS**

(Full reasons are set out in the Tribunal's extemporary judgment)

1. This appeal raises no novel or contentious issue of law or of practice. By her substantive Order dated 4th April 2014, Judge McAllister found that the Appellant had acquired title to a garage but not to any other part of the disputed land. The Appellant now seeks to challenge that decision insofar as it relates to an area of hard standing and vegetation to the west of the garage (referred to as "the Western Land"), which formed part of the disputed land. By a later Order dated 30th May 2014 Judge McAllister refused to review her decision in relation to the Western Land; and she refused permission to appeal her substantive decision. The Appellant asserts that he has acquired title to the Western Land by adverse possession. It is now clear that his appeal is limited to the Western Land. There is a further area of hard standing to the front of the garage, but this was not within the reference to the First-tier Tribunal (nor does it fall within the scope of this appeal), although it did feature in the evidence. For the Appellant, Mr Goldstein (of counsel) rightly conceded in his written skeleton argument that there had not been a great deal of evidence at the hearing before the First-tier Tribunal about the dimensions of the Western Land because the focus had not been upon individual parts of the disputed land outside the garage (including the Western Land) but upon the whole of that land. He also acknowledged that parking a motor vehicle on the hard standing to the west of the garage also required one to park on the land to the front of that hard standing (and outside the scope of the reference)

due to the depth of the hard standing to the west of the garage being insufficient to accommodate the full length of a motor vehicle; as Mr Goldstein put it in his oral submissions, any car parked on the hard standing had to straddle the land in front of a line projected westwards from the front wall of the garage because of the limited depth of the hard standing to the west of the garage.

2. Judge McAllister gave her reasons for refusing permission to appeal at paragraphs 3-6 of a later Order and Decision dated 30th May 2014 (which are to be treated as incorporated in these Reasons). In giving permission to appeal the substantive decision of Judge McAllister, Judge Cousins said this (at paragraphs 1-4 of his decision dated 7th August 2014):

> (i) In paragraph 12 of the reasons for appealing the Appellant contends that the Judge failed to consider and/or give proper weight to the following issues, as to whether there was sufficiency of evidence of:
>
> > (a) actual possession of "the Western Land" by reference to the grant of a licence to Mr Wright to park his car there, and the clearing and management of foliage from it; and
> >
> > (b) an existing 'common character of locality' between the garage and the Western Land, giving rise to the reasonable inference of possession (as referred to by the Judge in paragraphs 34 and 35 of the decision).
>
> (ii) A number of points are raised by counsel for the Appellant in his reasons for appealing. In paragraph 37 of the decision the Judge found that the garage and "the land" were separate and distinct but, it is said, that the Judge then only makes reference to the land to the rear of the garage. The Judge (in paragraph 1 of her later Order) states that the land now referred to as the "Western Land" was never identified as such during the course of the evidence at the hearing of the original applications. It is said that the Judge conflated the Appellant's claim over the Rear Land (as defined) with his claim over the Western Land. Further, after making reference to the evidence in the case as to the parking of Mr Wright's car (at paragraph 5 of the Order), it is said that the

Judge then appears to have ignored the Appellant's evidence that Mr Wright had parked his car with the permission of the Appellant for many years on the Western Land, such evidence being confirmed by Mr Malcolm Fletcher and Mr McMellon in their evidence. Indeed, in so far as the evidence of Mr McMellon is concerned, it is said that the Judge made a mistake as to his evidence when identifying the position where Mr Wright parked his car: see paragraph 28 of the decision.

(iii) In paragraph 6 of her later Order it is stated by the Judge that to the extent that the "hard standing [i.e. the Western Land] formed part of the Disputed Land…the use made of it, consistent with the use made of the remainder of the front of the garage, might at best have given rise to an easement to park, but did not have the character of exclusive occupation needed for adverse possession".

(iv) I find force in these and other points raised by counsel for the Appellant in the reasons for permission, and that the Appellant has an arguable case, with reasonable prospects of success on the appeal. In my judgment there are three issues which need to be addressed: First, did the Judge, as a matter of law and fact, fail to consider and/or fail to identify that there is an existing 'common character of locality' between the garage and the Western Land; secondly, did the Judge fail to address/give proper weight to the evidence in the case as to the parking by Mr Wright of his car on the Western Land; and, thirdly, if there was evidence in the case which supported such an interpretation, whether this evidence was sufficient to give rise to a claim for adverse possession, or instead an easement of parking.

3. At the opening of the appeal, I refused an informal application by Mr Goldstein for permission to rely upon the witness statements of (1) James Anthony Wright dated 10 October 2014 and (2) the Appellant dated 14 May 2015. In relation to both witness statements, I considered that the first of the criteria for receiving further evidence established by *Ladd v Marshall* was not satisfied: The evidence could have been obtained with reasonable diligence for use at the hearing before Judge McAllister. Further: (a) in relation to Mr Wright's witness statement, I

considered that the evidence would add little to that which had already been presented to Judge McAllister, so the second of the criteria in *Ladd v Marshall* was not satisfied; and (b) in relation to the Appellant's witness statement, I considered that its admission would be contrary to the overriding objective of enabling the Upper Tribunal to deal with cases fairly and justly: the Appellant's evidence would not be the subject of the cross-examination to which the Appellant had been subjected at the hearing before the First-tier Tribunal; and some of the evidence appeared to contradict the photographic evidence that had been before Judge McAllister: Had the Appellant's witness statement been produced in advance of the hearing before the First-tier Tribunal, it could have been addressed at the site view on 3 February 2014.

4. I had had the benefit of pre-reading the skeleton arguments of counsel as well as the Appeal Bundle. Mr Goldstein addressed me on the appeal for about 1 ½ hours. Having had the benefit of Mr Foster's written skeleton argument, I did not find it necessary to call upon him in response. At the conclusion of Mr Goldstein's address, I indicated that I would deliver an extemporary judgment at 2.00 pm, with shorter written reasons to follow. This would enable counsel to proceed to address me on the issue of costs, which (I suspect) features largely in the motivation for this appeal. My extemporary judgment was delivered between about 2.00 pm and 2.35 pm.

5. There was no dispute as to the relevant law. On the nature and the requirements of adverse possession, Mr Goldstein took me to the well-known guidance provided by Slade J in the leading case of *Powell v McFarland* (1979) 38 P & CR 452 at 470-1. He also referred me to two passages from *Jourdan: Adverse Possession* (2nd edn) as authority for the propositions that: (1) the grant of a licence to make some specified use of land is an indication that the licensor considers himself to be in control of the land, and thus is an indication that he has animus possidendi: see para 13-08; and (2) parking in a confined space can amount to an act of possession if it manifests an intention to control the space: see para 13-74. It was also common ground that acts of possession done on parts of the land to which possessory title is sought may be evidence of possession of the whole. The question is whether there is such a 'common character of locality' between the different parts as to raise a reasonable inference that the particular land in dispute belonged to the possessor in the same way as the other parts did. It is against that background that I turned to the

issues identified by Judge Cousins when granting permission to appeal. Before doing so, however, I wished to emphasise that (as Mr Goldstein conceded) the focus of the hearing before Judge McAllister was not on individual parts of the disputed land outside the garage, but upon the whole of that land. In particular, she did not appear to have considered it to be necessary to distinguish between the area immediately in front of the garage, and the area of hard standing at its western side: see paragraph 5 of her decision dated 4th April 2014. The terms of her decisions had, in my judgment, to be viewed with that consideration in mind.

6. The first question was whether, as a matter of law and fact, Judge McAllister had failed to consider, and/or had failed to identify, that there was an existing 'common character of locality' between the garage and the Western Land. This was addressed at paragraphs 17 to 18 of Mr Goldstein's skeleton argument, and at paragraphs 14-21 of Mr Foster's skeleton. The Respondents accepted that Judge McAllister had not considered specifically whether there existed a 'common character of locality' between the garage and the western land. Instead, she had focussed upon the land to the rear of the garage. The Respondents also accepted that a distinction could be drawn between the Western Land and the land to the rear of the garage. But they said that that did not address the question of whether there existed a 'common character of locality' between the garage and the western land. The thrust of Mr Goldstein's submission was that the hard standing to the west of the garage was so inherently linked to the garage itself as to raise the reasonable inference that the Appellant (through the act of parking thereon by his licensee, Mr Wright) was also in possession of the hard standing: the hard standing was the parking space for the garage, and it was irrelevant who was actually parking there, provided he was there with the licence of the person in possession of the garage.

7. I rejected that submission, for the reasons given by Mr Foster at paragraphs 20 and 21 of his written skeleton. I accepted that a clear distinction between the garage and the Western Land could be drawn in the following respects:

(1) By its very nature, the garage was enclosed whereas the Western Land was open land; and

(2) By its very nature, the boundaries of the garage (its walls) were clear, whereas the boundaries of the Western Land were not obviously delineated.

I also accepted that the Appellant's possession of the garage for storage purposes raised no reasonable inference that the Appellant was also in possession of the hard standing, still less of the whole of the Western Land. Such an inference was precluded by reason of the boundaries of the western land not being obviously defined. Furthermore, and in any event (and even if one focussed upon the hard standing):

(a) The Western Land was not used by the Appellant for the purposes of storage by the Appellant but (on his best case) by a third party licensee, Mr Wright, for the purpose of parking a motor vehicle in connection with Mr Wright's occupation of his own neighbouring house;

(b) On the Appellant's own case, that use for parking was not in any way related to the use of the garage, but rather to the use of Mr Wright's own house, which was situated some distance away from the garage; and

(c) No reasonable inference could be drawn that the Appellant's possession of the garage for the purposes of storage raised, without more, a reasonable inference of possession of the Western Land, which was used for a different purpose entirely.

For these reasons, I rejected Mr Goldstein's submission that the hard standing to the west of the garage was so inherently linked to the garage itself as to raise the reasonable inference that the Appellant (through the act of parking thereon by his licensee, Mr Wright) was also in possession of the hard standing.

8. It was convenient to deal with issues 2 and 3 together (as both counsel had done). Issue 2 was whether the Judge had failed to address or give proper weight to the evidence in the case as to the parking by Mr Wright of his car on the Western Land. The third issue was whether, if there was evidence in the case which supported such an interpretation, that evidence was sufficient to give rise to a claim for adverse possession, or instead an easement of parking. Those two issues were addressed at paragraphs 19 to 25 of Mr Goldstein's skeleton, and paragraphs 10 -13 of Mr Foster's

skeleton. During the course of his oral submissions Mr Goldstein had undertaken a thorough review of the evidence relating to car parking. However, he had failed to satisfy me that the Judge had fallen into error in her analysis of that evidence or in the conclusion at which she had arrived.

9. At paragraph 5 of her substantive decision Judge McAllister had said that it was "possible to park a number of cars in front of and at the western side of the Garage, but it is clear from the evidence that this area is used by a number of people for parking". Mr Goldstein submitted that this was correct in relation to the land at the front of the garage, but not in relation to the hard standing to the west of the garage. For the reasons set out below, I rejected this criticism. Mr Goldstein also criticised the end of paragraph 28 of the Judge's substantive decision where, referring to the evidence of Mr McMellon (a witness for the Respondents), she said that "he also stated that a number of people parked in front of the Garage, including a Mr Wright, who acted as though the space was his". In her later decision dated 30th May 2014, Judge McAllister sought to set out (at paragraph 5) the evidence as to parking on the land to the front and on the western side of the garage, concluding "as I have stated in my decision, Mr McMellon stated that Mr Wright believed he had a right to park in 'his space'". Mr Goldstein submitted that this conflated the issues of parking at the front, and at the side, of the garage. He said that the Judge had failed properly to address, and to consider, the evidence relating to Mr Wright's licence to park on the hard standing to the west of the garage. He accepted that I had to be satisfied that the Judge had got it wrong. He acknowledged that cases such as the present case are fact-sensitive. Mr Goldstein accepted that, in the ordinary course, parking on open land was unlikely rise to a finding of adverse possession. But this case was said to be different: the key element was physical control; and the Appellant had allowed Mr Wright to park on the hard standing to the west of the garage for a substantial, and significant, period of time, dating back to the purchase of his house in 1983. Mr Goldstein further submitted as follows: The area of hard standing had an obvious use for parking, and no-one other than Mr Wright had parked there (as the Appellant's licensee). One should consider how a paper title owner of the hard standing would have used the land. The licence to Mr Wright had continued unabated for many years. The Judge had failed to consider not only whether the Appellant and Mr Wright had parked on the western land for the requisite period, but, and more significantly, that

the Appellant had clearly controlled who used the Western land, as evidenced by the longstanding permission he had given to Mr Wright to park to the west of the garage. The Judge had therefore failed properly to consider the quality of the Appellant's acts of possession of the Western Land.

10. I accepted Mr Foster's submission that Judge McAllister had clearly regarded the hard standing on the Western Land as being included as part of the land to the front of the garage. In my judgment, on the evidence before her, she had been right to treat the hard standing to the west of the garage as having a common character with the land to the front of the garage. The hard standing itself was (as Mr Goldstein had conceded) insufficient, of itself, to accommodate the full length of a motor vehicle (as illustrated by the photograph at page 27 of section 2 of the Appeal Bundle, which the Judge had attached to her decision dated 30th May 2014 for ease of reference). Mr Frankland's evidence in cross-examination was that Mr Wright had used his "space" for 90% of the time (rather than all of the time), as one would expect with a car (at least unless it is "off the road", of which there was no suggestion in the evidence). The Appellant's evidence in cross-examination was that if one drove away from the land, some one else would be "straight in there". Mr Goldstein submitted that this evidence should be confined to the land directly in front of the garage, and that it did not extend to the hard standing to the west; but I could not see why, as matter of common sense, the hard standing to the west of the garage should not be subject to occasional, opportunistic parking by third parties in just the same way as the land to the front of the garage. I had to acknowledge that, because no express emphasis was placed in submissions upon the distinction between what had now become the Western Land and the remainder of the disputed land, and between the hard standing to the west of the garage and the land to the front and west of the garage, the substantive decision of the Judge had not focussed upon these separate areas. But Judge's McAllister's substantive decision had included (at paragraph 5) the statement that it was "clear from the evidence" that the area to the front, and at the western side, of the garage was "used by a number of vehicles for parking". And, in my judgment, her substantive decision had to be read in conjunction with her later decision dated 30th May 2014, which included her conclusion (at paragraph 6) that "it is clear that to the extent that the hard standing formed part of … the western land … the use made of it, consistent with the use made of the remainder of the front of the garage, might at

best have given rise to an easement to park, but did not have the character of exclusive occupation needed for adverse possession". In my judgement, that was a conclusion which was open to Judge McAllister on the evidence. The Appellant had not demonstrated that she had thereby fall eninto error.

11. I should add that had I accepted Mr Goldstein's submissions as to the parking of cars, I would have limited the Appellant's claim to have acquired title by adverse possession to the area of hard standing to the west of the garage. I did not consider that the Appellant had even begun to demonstrate that Judge McAllister had fallen into error in failing to identify any sufficient acts of adverse possession in relation to the land extending beyond the area of hard standing on which Mr Wright has been parking his motor car. On the evidence, the amount of hard core deposited to the north of the hard standing was not great; and no steps were ever taken to level the land, or to apply the hard core to it so as to extend the area of hard standing. Tree-felling was limited to one occasion in 2009. Mr Goldstein accepted that he had had difficulty in finding any reference in the transcript of the proceedings to the cutting back of grass and foliage near the hard standing. But that had, in any event, been considered by the Judge and rejected as sufficient evidence of the exclusive possession needed for adverse possession: see paragraph 6 of her decision dated 30th May 2014.

12. For these reasons, I dismissed the appeal.

*Costs*

13. At the conclusion of my extemporary judgment, Mr Goldstein realistically accepted that costs should follow the event. I therefore ordered the Appellant to pay the Respondents' costs of the appeal. Agreement was reached as to the amount of costs in the (reasonable and proportionate) sum of £5,200 (plus VAT of £1,040) making £6, 240 in total.

14. I should add that had I allowed the appeal in relation to the area of hard standing, I would, nonetheless, not have interfered with Judge McAllister's exercise of her discretion as to the award of the costs of the hearing in the First-tier Tribunal in

the absence of any counter-offer of settlement from the present Appellant, limiting his claim to the garage and to the area of hard standing.

**BY ORDER OF THE UPPER TRIBUNAL**

His Honour Judge Hodge QC

**Dated this 28th day of May 2015**

**Released on 29th May 2015**