REF/2012/0608

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

HILARY KATHRYN KIRKBY

APPLICANT

and

MARCUS HEANEY

RESPONDENT

Property Address: Land on the east side of The Coach House, Thorp Arch, Wetherby
Title Number:YY2869

Before: Judge Michell

Sitting at: Leeds Employment Tribunal
On: 22nd to 25th October 2013

Applicant Representation: Mr Andrew Frances, counsel, instructed by Shulmans LLP
Respondent Representation: Mr David Warner, counsel, instructed by Lupton, Fawcett Lee & Priestley.

DECISION

ADVERSE POSSESSION OF UNREGISTERED LAND- APPLICATION FOR FIRST REGISTRATION WITH POSSESSORY TITLE- WHETHER APPLICANT IN POSSESSION- WHETHER APPLICANT ABANDONED POSSESSION

Cases referred to

Powell v McFarlane (1977) 38 P and CR 452
Mount Carmel Ltd. v. Peter Thurlow Ltd & Elizabeth Smee [1988] 1 WLR 1078
Prudential Assurance Co Ltd v. Waterloo Real Estate Inc [1999] 2 EGLR 85 at 87
J A Pye (Oxford Ltd) v Graham [2003] AC 419

1. The Applicant, Mrs Kirkby has applied to HM Land Registry for first registration with possessory title of a strip of land ("the disputed land") adjoining the eastern side of her home, The Coach House, Thorp Arch, near Leeds. Her application was made on 10th April 2012. The Respondent, Mr Heaney lives at a property called The Woodshed. In February 2012 Mr Heaney took a transfer of the disputed land from The Trustees of the Hatfield Estate, though there has been some doubt as to whether, irrespective of the claim by Mrs Kirkby, the Trustees can show a good paper title to the disputed land. HM Land Registry raised requisitions of Mr Healey before his application was accepted. The consequence of that was that Mr Heaney's application had not been dealt with at the date of Mrs Kirkby's application. Mr Heaney objected to Mrs Kirkby's application and the matter was referred to the Adjudicator to HM Land Registry for determination.

2. The office of the Adjudicator to HM Land Registry was abolished on 1st July 2013. The functions of the Adjudicator under the Land Registration Act 2002 were transferred to the First-tier Tribunal and have been allocated to the Property Chamber, where they are performed by the Land Registration Division. The determination of this matter is one of the functions transferred to the First-tier Tribunal.

3. I inspected the site accompanied by the parties and their representatives on the afternoon before the start of the hearing. The Coach House forms part of an attractive group of stone houses near the village green at Thorp Arch. The area is approached from the south along a public highway called Bridge Foot. This road runs along the western side of the garden of a house called Manor House. Another road runs to the east off Bridge Foot to pass between the front of Manor House to the south and the village green to the north. This road then continues past a driveway between Manor House and The Coach House and then curves to run towards the south along the north-eastern side of the disputed land. The disputed land

is an area of open land between the roadway and the north eastern side of The Coach House. For ease of reference, the north east side of The Coach House was referred to in the Case Summary and at the hearing as the east side and I shall refer to it as the east side here. I shall adjust all compass points accordingly, for the sake of ease of description. The east side of The Coach House is stepped back in three steps from the north to the south end. There is a door giving access into The Coach House situated in the central one of the three steps. The northern end of the disputed land comprises a paved parking area, sufficiently large to accommodate two cars. The remainder of the disputed land is laid to grass with some small flower beds against the wall of The Coach House. There is a large granite trough on the grass between the area outside the door and the parking area. The disputed land narrows to a point at the southern end. There is no substantial difference in level between the disputed land and the roadway running beside it. The roadway passes alongside the disputed land and to a point approximately level with the south-eastern corner of The Coach House where it ends at a gateway giving access to Paddock House. This is a more modern house owned by Mr and Mrs Bentley. There is a shrub growing beside the southern wall of The Coach House. To the north of Paddock House and on the east side of the roadway is the home of Mr Heaney, a house called The Woodshed, which stands in a walled garden. The walled garden was formerly known as Slaughterhouse Yard. The western wall of the house is set a little way to the east of the roadway and Mr Heaney owns a strip between the roadway and his house. From the north-western corner of the house there is a wall with double wooden gates giving access into the walled garden of The Woodshed. To the north of the grounds of The Woodshed and opposite the door into The Coach House there is a house now known as Hemmingway's Cottage.

The Facts

4. Manor House, The Coach House, Hemmingway's Cottage, The Woodshed and other nearby properties were once part of the Hatfield Estate. Mrs Kirkby's house was formerly two buildings; a coach house and an adjoining two-bedroom cottage. The cottage was the southernmost of the two buildings. Old photographs show that there was an entrance door in the eastern wall of the cottage. The coach house was accessed from the west by means of a driveway between the Manor House and the coach house. Mr John Patrick Carpenter purchased the Manor House, the coach house and the adjoining cottage from the Hatfield Estate. In the transfer of these properties, he covenanted to obtain the consent of the Hatfield

Estate to plans and specifications for alterations to the buildings. Subsequently, Mr Carpenter sold the Manor House before going on to sell the coach house and cottage.

5. The trustees of the Hatfield Estate transferred The Woodshed to Mr Heaney by a transfer of part dated 22nd March 1995. The Woodshed was formerly part of title number WYK460808. The roadway did not form part of the land registered under that title. The Woodshed was then registered under title number WYK568385. The transfer of The Woodshed to Mr Heaney included the grant to him of a right of way, so far as the trustees had power to grant the same, over the roadway. The roadway was shown coloured purple on the transfer plan. The land shown coloured purple did not include the disputed land. The transfer of The Woodshed did not grant or purport to grant any rights over the disputed land. The trustees had written to the owner of Paddock House, Mr Bentley on 31st March 1994 to say that they did not intend to sell the roadway or land to the west of The Woodshed.

6. Mrs Kirkby purchased the coach house and adjoining cottage from Mr Carpenter who transferred it to her by a transfer dated 18th June 1999. The transfer was of the land comprised in title number WYK305064. It is common ground that that title did not include the disputed land. However, in his evidence Mr Kirkby said that the edge of the disputed land by the track was the "natural line for the boundary". He said that he and his wife were advised by their solicitors that there was no-one else who was likely to own the disputed land. He said Mrs Kirkby would not have bought The Coach House had the Kirkbys known that the disputed land belonged to someone else.

7. On 10th May 1999 Mr Carpenter made a statutory declaration in which he said

(1) he had bought the Coach House and the adjoining Manor House on 1st December 1983;
(2) the Manor House had since been sold off;
(3) he had gardened the disputed land and had cultivated the grassed area;
(4) he had exercised pedestrian access to The Coach House over the disputed land; and
(5) had enjoyed use of and access to, through and over the disputed land uninterrupted, unimpeded and without claim by any other person.

8. Mrs Kirkby purchased the buildings in order to convert them into a home for herself

and her husband. Planning permission for the conversion works and change of use had been granted in December 1997 on an application made by Mr Carpenter. Condition 10 of that planning permission required consent to be obtained for a landscaping scheme to the property, including the disputed land. Mr Kirkby sought and obtained on 15th April 1999 the approval of the Hatfield Estate to the plans and specifications. At the time of the application for consent from the Estate, Mr Kirkby did not know that the Hatfield Estate claimed to be the owner of the disputed land. The plans show that the principal entrance into the new house was to be over the disputed land. The exterior door leading into the house in the east elevation, that is, from the disputed land, gives access to the hall from which the staircase to the upper floor and all the other ground floor rooms are accessed. Although there are 3 sets of doors in the western elevation giving access respectively to and from the snug, the dining room and the lounge, there can be no doubt that the door which in common parlance would be referred to as the front door, is the door in the east elevation accessed from the disputed land.

9. At the time Mrs Kirkby purchased The Coach House, there were a number of overgrown bushes and shrubs towards the northern half and in particular outside the part of The Coach House to the north of where the front door is now. The south end, outside that part of The Coach House which was once a cottage, was covered with grass and low-growing weeds. Old photographs produced in evidence show a patch of grass outside the door into the cottage and patches of weeds on either side. In the area just to the north of the door into the cottage, a rose bush can be seen in one of the photographs. There were at this time some rough stones, perhaps averaging about 8 to 10 inches across set into the disputed land by the edge of the roadway. Mr and Mrs Kirkby say that the stones had been placed along the whole of the edge of the disputed land where it adjoins the roadway but a witness, Mr Bentley said that they were only along the edge towards the north of the disputed land and there were none to the south. In one of the old photographs taken before work started stones can be seen alongside the northern area of the disputed land that is now a parking space but not further south. In other old photographs taken before the conversion works were done, no stones can be seen on the disputed land outside the part of The Coach House that was formerly a cottage.

10. Building work to convert the buildings into a house started in June 1999. Mr Kirkby cleared the disputed land of bushes using a mechanical digger. Fencing was erected between

The Coach House and land of the adjoining Manor House and at the south end but no fencing was erected to fence off the disputed land from the track. Photographs were produced showing the buildings from the north while works were in progress. One photograph shows two large full bags of the type used to deliver sand or gravel and a roll of orange plastic net fencing lying on the disputed land. Another photograph shows scaffolding erected against the northern end of the east elevation. The scaffolding stands on the disputed land and is braced by two scaffold poles, the bases of both poles being on the disputed land. There is a skip visible on the disputed land to the south of the scaffolding and a wooden pallet can be seen leaning against the wall of the building at the south end. Mr Kirkby's evidence was that the builders did not fence the disputed land because they were offloading materials onto the disputed land all the time. These included steel lintels, joists and rafters, plaster board, chipboard, and roofing materials. During the course of the building works, the foul and surface water drainage pipes were connected to existing drains running under the disputed land

11. The works reached practical completion in December 1999. Mr Kirkby sent a snagging list to the builders on 19th December 1999. Mrs Kirkby and her husband moved into The Coach House on 20th January 2000. There is then no real dispute about what they did on the disputed land. Prior to moving in they placed hardcore at the northern end of the disputed land to create an area of hard standing for parking two cars. Shortly before or at the time of moving in, they placed a number of stones on the disputed land near to the edge between the disputed land and the roadway. Later photographs show grass growing between the row of stones and the edge of the metalled roadway. In early January 2000 12 tons of top soil were delivered and spread over the disputed land by the builders. A photograph taken before the disputed land had been levelled and covered with top soil, shows a row of stones along the edge of at least most of the disputed land. Mr Kirkby levelled and raked the soil and sowed grass seed on it. There is a dispute about when he sowed the seed and I shall return to this issue later. Mr and Mrs Kirkby then laid gravel on top of the hardcore at the northern end of the disputed land. They created a flower bed between the parking area and the wall of the house. They laid paving slabs leading from the track to the front door of the house. They placed a large granite trough on the disputed land and planted flowers in it. They hung a hanging basket on a bracket fixed to the east wall of the house.

12. On 18th February 2000 Mr Kirkby applied to the planning authority for approval of the landscaping scheme for The Coach House and the disputed land. The landscaping scheme for which approval was sought, included stone strips between strips of grass at the parking area at the northern end of the disputed land, a lawn to the south, a stone path to the front door and planted beds against the wall of the house. The row of stones along the edge of the disputed land was not shown as part of the landscaping scheme. The planning authority approved the scheme on 28th February 2000.

13. Over following years Mr and Mrs Kirkby cut the grass on the disputed land, maintained the grass by scarifying it, created further flower beds alongside the wall of the house and tended to plants in the flower beds and in the granite trough and planted bulbs beside the path. They also cleared away leaves that were blown onto the disputed land from nearby trees. They did not lay stone strips between strips of grass in the parking area, as shown on the landscaping scheme.

14. In 2003 Mr and Mrs Kirkby placed some larger or, rather, taller stones near to the edge between the disputed land and the roadway. Mrs Kirkby said they put the stones down so to prevent the occupier of a neighbouring property from driving over the edge of the disputed land, which had started to happen. Mr Heaney objected to the higher stones in 2004. The effect of the taller stones was to prevent cars leaving The Woodshed from overhanging the disputed land. Following receipt of an objection from Mr Heaney, Mr Kirkby lowered the stones. Mr and Mrs Kirkby said in oral evidence that this was not done so as to allow vehicles to drive onto the disputed land but to allow Mr Heaney's car to oversail part of the disputed land.

15. In 2007, the Hatfield Estate decided to sell the cottage which stands on the opposite side of the track from the disputed land, being a cottage formerly occupied by a Miss Hemmingway and known as "Hemmingway's Cottage". On 22nd February 2007 Mr Hare of the Estate's agents, Carter Jones wrote to Mr Kirkby (wrongly addressed in the letter as "Mr Kirby"), referring to the disputed land, stating that he had always understood this area was

owned by the Estate, noting the presence of the hardstanding and the stones along the edge, stating that he understood neighbours were concerned about the width of their access, and asking Mr Kirkby to contact him to discuss. Mr Kirkby did not reply to this letter and so Mr Hare wrote again on 14th March 2007, asking for a reply. Mrs Kirkby instructed Shulmans' solicitors to reply. They wrote on 26th March 2007 stating that the disputed land belonged to Mrs Kirkby and asking for any documentary evidence to support Mr Hare's belief that the land belonged to the trustees.

16. On 28th April 2008 the Hatfield Estate sold Hemmingway's Cottage, subject to contract, to Mr Heaney. However, Mr Heaney did not go ahead with the purchase. Hemmingway's Cottage was then purchased by Mr and Mrs Moorhouse.

17. In June or July 2008 Mr and Mrs Kirkby erected a fence along the edge of the disputed land. The fence consisted of a single wooden bar supported on wooden posts and was about 2 feet high. There was a gap in the fence allowing access to the paving slabs leading to the front door of the Coach House. The fence did not prevent access onto the parking area and from there onto the remainder of the disputed land. Mr and Mrs Kirkby said the reason they erected the fence was because they feared when Mrs Hemingway's cottage was sold, building works would be done to it and lorries might come onto the disputed land. Mr Heaney and Mr Bentley both protested to the Kirkbys about the erection of the fence. Mr Bentley wrote to Mr and Mrs Kirkby complaining that the fence denied him and his neighbours the use of the disputed land. On the night of 3rd July 2008 there was an attempt to knock down the fence with a garden roller. There is a dispute as to the role Mr Heaney played in this. Mr Kirkby said Mr Heaney took part and then hammered on the door of The Coach House while Mr Kirkby was calling the police. Mr Heaney said he was not involved; it was done by two friends of his, Jonathan Smith and Geoffrey Simpson who had been in the local public house with him. Mr Smith and Mr Simpson lived about one and two miles away respectively. In response to a question whether he had asked them to knock down the fence, Mr Heaney said that he had not stopped them. I do not need to resolve for present purposes the dispute as to what exact role Mr Heaney played in the attempt to knock down the fence in July 2008. It is clear that Mr Heaney took strong exception to the erection of the fence.

18. On 24th February 2009 Hartlaw LLP wrote to Mr and Mrs Kirkby. They were solicitors instructed by Mr and Mrs Bentley, the owners of Paddock House. They stated in the letter that Mr and Mrs Kirkby did not own or have rights over the disputed land and asked them to remove the fencing immediately because it was causing an obstruction to the users of the track (referred to as "The Green"), including Mr and Mrs Bentley. Shulmans replied on 30th March 2009 on the instructions of Mr and Mrs Kirkby, stating that Mr and Mrs Kirkby and their predecessor, Mr Carpenter, had occupied the disputed land exclusively since at least 1 December 1983 and were therefore entitled to be registered as proprietor with possessory title. They asked what right or interest Mr and Mrs Bentley had over the disputed land. In the correspondence that followed, Mr and Mrs Bentley's solicitors asserted that Mr and Mrs Bentley had a right of way over the disputed land and said that Mr and Mrs Bentley had

> "until recently, frequently maintained the land in question by mowing the grass and pruning the roses".

In a letter in response dated 7 May 2009, Shulmans wrote that "for the record", Mr and Mrs Kirkby disputed Mr and Mrs Bentley's claims that they had frequently maintained the land by mowing the grass and pruning the roses".

19. Mr Heaney, Mr and Mrs Bentley, Mr and Mrs Gill (the owners of the Manor House) and Mr and Mrs Brook had discussions and email correspondence about the fence. Mr Bentley spoke to someone at Land Registry Nottingham West office about whether Mr and Mrs Kirkby could claim possessory title to the disputed land. In an email sent to Mr Heaney and Mr and Mrs Gill on 11 May 2009 Mr Bentley reported on his conversation with a lady at Land Registry and wrote as follows

> "Kirkby will have to prove he has had 12 years <u>exclusive use</u> and that nobody else has had <u>any form of access</u> , including occasional access – examples of occasional access include (i) Marcus and ourselves using the land to offload materials for marquees and building work, (ii) pedestrian access around vehicles parked on the tarmac etc.
>
> According to the lady at the LR, any form of access also means "could have had access" – we don't actually have had to use it – and so the small stones along the edge of the track from 2000 onwards are of no consequence, as anyone could easily step over them and therefore they do not constitute a "barrier".

The "exclusive use" requirement is also relevant in respect of Carpenter's false statutory declaration – as the land has been in common use by many people throughout the period from 1964 to the time the fence was erected in 2008, so Carpenter's declaration is of no use to Kirkby.

Kirkby will have to prove that nobody else could have had access to the land which, in a situation like ours, means that LR will be looking for fencing and gates with padlocks.

Kirkby may try to claim that he is entitled to ownership through possessory title because he has been the only person who has cut the grass or clipped the hedges – that argument will not be accepted by the LR, as the land still fails the test of "exclusive use".

20. On 6th April 2010 Mr Heaney's mother, Mrs Wendy Heaney drove her Audi saloon car into the fence while reversing out of the driveway of The Woodshed. Mr Heaney then on the same day took down the fence and placed the pieces on the parking space by the east wall of The Coach House. He also removed the stones around the edge of the disputed land and placed these also on the parking space. Mr and Mrs Kirkby brought proceedings in the Leeds County Court against Mr Heaney seeking an injunction preventing him from interfering with the re-erection of the fence, damages in the amount of the cost of replacing the fence and generally and an injunction "prohibiting the defendant from interfering with the enjoyment by the claimants of [the disputed land]". Mr Heaney served a Defence. In their Reply, Mr and Mrs Kirkby pleaded as follows

(1) in paragraph 4 that "the Claimants do not need to assert ownership of this land in order to bring the present proceedings or that it "belongs" to their property and they do not do so"; and

(2) in paragraph 9 as follows

> "It is denied that the claimants in this action are "endeavouring to claim this land by possessory title" as alleged in paragraph 14 of the Defence. This action is concerned only with the defendant's interference with chattels which belong to the claimants and which were located on land which was at all material times in the possession of the claimants and with his interference with the claimants' enjoyment of the said land over which the defendant has no title or other rights which could entitle him to dispossess the claimants".

21. On 13th February 2012 the Hatfield Estate executed a transfer to Mr Heaney of the roadway and the disputed land. Mr Heaney put a copy of the transfer through the letter box of The Coach House and instructed his solicitors, Pinsent Mason to write to Mr and Mrs Kirkby's solicitors. Pinsent Mason wrote on 13th February 2013 stating that their client had purchased the disputed land and enclosing a copy of the transfer. The letter also included a warning that if Mr and Mrs Kirkby used the disputed land for any purposes then Mr Heaney would apply for injunctive relief and that accordingly, Mr and Mrs Kirkby should refrain from parking their car on part of the disputed land. Mr Kirkby said that he and Mrs Kirkby took advice from their solicitors, Milners immediately. Mrs Kirkby said that the solicitors advised them that since the transfer appeared to be valid, they should remove their car and other items from the disputed land. They removed their car and a house-name stone and some flower pots from the disputed land on or about 18th February 2012. Mrs Kirkby said that she did not want to move the items but her husband insisted because he thought Mr Heaney would damage them if they did not do so. Milners solicitors wrote on behalf of Mr and Mrs Kirkby to Land Registry on 15th February 2012 stating that their clients opposed the application of Mr Heaney for first registration on the grounds that they were in occupation of the disputed land, having been in occupation since 2000 and had used and maintained it. In fact Land Registry had not received an application for first registration at that date. Mr Kirkby said that about a week after the initial advice from the solicitors, their solicitor changed his advice; he told Mr and Mrs Kirkby not to put their car back on the disputed land but otherwise to carry on as normal.

22. Mrs Kirkby wrote on 16th February 2012 to the solicitors who acted for the Hatfield Estate on the sale of the roadway to Mr Heaney. Mrs Kirkby's concern as expressed in the letter is as to access to her front door. She wrote that she was "distraught" having received "threatening letters from Pinsents telling me that I cannot now access my front door or even walk down the lane" and that although clause 11.2.1 of the transfer to Mr Heaney suggested that she did have access, Pinsents "have said that they are going to remove it". Mrs Kirkby also wrote

> "I deeply regret not having approached the Estate to purchase the land but we were told there were no deeds. I would have willingly paid substantially more than Mr

Heaney".

23. Thereafter, Mr and Mrs Kirkby did not park their car on the disputed land but their evidence is that they continued to mow the grass, to pick up leaves and tend the plants on the ground but only while Mr Heaney was out so as to avoid a confrontation. They also walked over the disputed land. Mr Heaney himself cut the grass, although how often he did so is in dispute. According to Mr Kirkby, on one occasion Mr Heaney ran the lawn mower over the grass just an hour after Mr Kirkby had cut it.

24. On 5th April 2012 Mrs Kirkby signed an application in form FR1 for first registration of the disputed land on the grounds that she had acquired title to it by adverse possession. The application was received by Land Registry and entered in the day list on 10th April 2012. At that date, Mr Heaney's application for first registration had not been accepted by Land Registry. Land Registry had raised requisitions on the application, which were still outstanding. Mr Heaney and Mr and Mrs Bentley objected to Mrs Kirkby's application and Land Registry gave notice of the objections to Mrs Kirkby's solicitors on 23rd April 2012.

25. After Mrs Kirkby had made her application to Land Registry, Mr Heaney began to park cars on the disputed land. In a letter to Land Registry dated 27 April 2012 Shulmans wrote that Mr Heaney had started on 12th April 20012 (and not before) parking his cars on the disputed land, parking one diagonally across the Kirkby's parking spaces and parking his second car "right up to the house under a window". Photographs of Mr Heaney's cars parked on the disputed land were produced in evidence.

26. On 30th April 2012 Mr and Mrs Kirkby put their car back on the parking space on the disputed land. Mr Heaney saw the car and put a note through Mr and Mrs Kirkby's door, telling them to remove the car from the land immediately and adding "otherwise I will exercise my rights accordingly". After an exchange with Mr Heaney, Mr Kirkby then removed the car. Mr Heaney continued to park a number of cars on the disputed land. He parked a Land Rover very close to the front door of The Coach House in an attempt to prevent Mr and Mrs Kirkby from using that door. He then left a sports car in front of the door. He has parked

other cars on the disputed land since then. His solicitors have written to the Kirkbys to say that when Mr Heaney has proved his title to the disputed land, "the land will be fenced at the boundary where it meets your client's property". As appears from that letter, it is Mr Heaney's intention that Mrs Kirkby should not have access to the front door of The Coach House over the disputed land.

27. On 2nd May 2012 Mr Heaney removed the paving slabs forming a path on the disputed land to the front door of The Coach House. Mr and Mrs Kirkby called the police and instructed their solicitor to write to Mr Heaney in protest.

Factual Issues

When was the grass seed sown?

28. The evidence of both Mr and Mrs Kirkby was that Mr Kirkby sowed the grass seed in January 2000. They said that 12 tons of top soil were delivered to the site in December 1999 and spread by the builders. Mr Kirkby subsequently graded the soil and sowed grass seed in it. They pointed to a photograph taken in June 2000 when there was a Victorian-themed celebration in the village. The photograph shows the Coach House adorned with Union flag bunting and the disputed land covered in what appears to be well-established grass.

29. Mr Bentley said the grass was not sown until later. He produced a photograph of the disputed land said to have been taken in April 2000 and in which the surface of the disputed land is brown in colour, the colour of the soil and grass cannot be seen.

30. Counsel for Mr Heaney pointed to the fact that Mr Kirkby wrote to the planning authority with three plans indicating proposals for landscaping external areas, including the disputed land and that the planning authority did not give its approval to the landscaping until 28th February 2000. He submitted that Mr Kirkby would not have sowed the grass seed before getting the approval of the local authority to his landscaping scheme. Mr Kirkby said that he had already done the work before he submitted the landscaping proposals for approval. He had been talking to the planning officer and knew that approval would be granted.

31. I accept Mr and Mrs Kirkby's evidence that Mr Kirkby sowed the grass seed in

January. There was no expert evidence as to whether seed sown in January could lie dormant and germinate when the temperature rose some months later or whether it would rot or been eaten by birds. In the absence of such evidence, I am left only with the evidence from Mr and Mrs Kirkby about what Mr Kirkby did and when, the evidence of Mr Bentley about what he observed and the photographs. Mr and Mrs Kirkby were the only witnesses who could give direct evidence as to when the grass seed was sown. No other witnesses saw them do it. They are more likely to recall when the grass seed was put down than Mr Bentley is to recall when he first saw it. There is no good reason for Mr and Mrs Kirkby to give a date for sowing the seed earlier than they in fact recall. The photograph taken in April is not sufficiently clear to indicate that the seed had not germinated at all by then. It may have germinated but the fine initial growth may not be visible in the photograph. I do not accept that Mr Kirkby would not have sowed the seed before seeking the local authority's approval to the landscaping scheme. Sowing grass seed is not a very expensive exercise and it was not suggested to me that the local authority was at all likely to object to a lawn being created on the disputed land. It is therefore not at all improbable that Mr Kirkby would have put down the grass seed before obtaining formal approval to the landscaping scheme.

Driving over the disputed land

32. Mr and Mrs Kirkby both said that vehicles did not generally drive over the disputed land while they were living at The Coach House (until after the transfer to Mr Heaney in 2012). Mrs Kirkby accepted that workmen unloading scaffolding from a lorry walked on the disputed land. There had been no vehicles on the disputed land when Mr Heaney had his fortieth birthday party at his house in 2005. Mr Kilby had delivered chairs for the party using a trailer. Mr and Mrs Kirkby accepted that when a marquee was delivered for the wedding of Mr and Mrs Bentley's daughters in 2007 and 2010 the lorry parked partly on the edge of the disputed land.

33. Mr Tom Kilby gave evidence. He said on regular occasions between 1996 and 2008 he delivered and collected materials for building and landscaping works at The Woodshed and that over the same period, he delivered and removed garden furniture on at least three occasions. In order to make these deliveries, it was necessary for him to drive his vehicle and trailer over the disputed land and that on at least one occasion he removed stones running along the edge of the disputed land to get his tractor and trailer in and out of The Woodshed.

He said that it was difficult or impossible to get a vehicle and trailer into Mr Heaney's property without driving onto the disputed land. In cross-examination, he said that he had delivered materials to Mr Heaney's house about 8 to 10 times in total. He had been parked for up to an hour on occasions when delivering chairs and for up to 15 minutes on other occasions. Mr Kirkby said Mr Kilby did not do so. It was not all impossible to get a vehicle and trailer into The Woodshed without going onto the disputed land.

34. Mr Martyn Gill gave evidence. He has lived at the Manor House for some years. He said that he had parked on the parking place on the disputed land on 3 or 4 occasions between 2008 and February 2012. The first time was in the summer of 2008. He produced a photograph which he dated 15th November 2009 showing a Range Rover belonging to him parked at the western end of the disputed land. He said this was the third time he had parked on the disputed land.

35. Mr Heaney gave evidence that he had had works carried out to his house on three occasions while Mrs Kirkby owned The Coach House. In 2000, the footings had been put in for a conservatory. This took about 2 months. He was unable to say when in 2000 these works had been done. In 2005, the kitchen was demolished and a 30' by 2' extension was built. This work took a year. In 2007, a further extension was built. This took about 3 to 4 months.

36. I find that cars have on occasions driven over the edge of the disputed land. Lorries and trucks making deliveries to Paddock House on the occasions of the weddings of Mr Bentley's daughters did so. Mr Kilby did so occasionally and on one occasion temporarily moved some of the stones along the edge of the disputed land to enable him to do so. Having had the benefit of the site inspection, I accept that it would have been at least very difficult to manoeuvre a tractor and trailer into The Woodshed without crossing the edge of the disputed land. Photographs produced in evidence show a trailer being manoeuvred through the gateway of Paddock House and show how narrow the roadway beside the disputed land is. However, the cars drove only over the edge of the disputed land nearest the roadway and not over the greater part of the disputed land. Further, they did not drive over the disputed land at all regularly. I also find that Mr Gill on 2 or 3 occasions only from 2008 onwards parked his

car on the parking space at the north end of the disputed land.

Gardening work on the disputed land

37. Mr Bentley gave evidence that he had maintained the hedge on the disputed land nearest to Paddock House. He accepted that Mr Kirkby had cut it but said that Mr Kirkby had left it a mess and he had cut it every year, usually after Mr Kirkby had cut it. Mr Bentley said that prior to Mrs Kirkby acquiring The Coach House, he had mown the grass on the disputed land in the area from where the front door of The Coach House now is, down to the Paddock House end. He had done this every other week and had picked up leaves. Mr Heaney said that he had seen Mr Bentley on a fairly regular basis at weekends doing maintenance work on the disputed land. The maintenance work he had seen Mr Bentley do was pruning a hedge on the south side of the track by the entrance to Paddock House.

38. Mrs Barbara Moorhouse gave evidence. From 1978 her parents lived at Causeway Cottage, which is about 50 metres away from the disputed land. Mrs Moorhouse visited Causeway Cottage 3 or 4 times a week and then after her father died, she visited her mother daily until her mother's death. Following her mother's death Mr and Mrs Moorhouse did renovation work to Causeway Cottage during 2007 and following that, in 2008 their son moved into the cottage. In 2009, Mr and Mrs Moorhouse bought Hemingway's Cottage. Mrs Moorhouse gave evidence that Miss Hemingway had done a little work on the disputed land before Mr Carpenter bought the coach house. The land had been tidied up during Mr Carpenter's ownership. Mrs Moorhouse said that she had never seen Mr Bentley do anything on the disputed land. The western end was totally overgrown when Mrs Kirkby bought The Coach House but not the eastern end near Paddock House.

39. Mr Kirkby gave evidence that he had seen Mrs Bentley pruning a bush at the east end of the disputed land when he and Mrs Kirkby moved in. He had asked her not to do it again. Mrs Bentley told him that she had always cut that bush. Mr Kirkby said Mrs Bentley did not do so again after the conversation.

40. Mrs Steel has lived at Lime Tree Cottage, Thorp Arch since 1998. Her house is about 150 metres away from the disputed land. She had seen Mr and Mrs Kirkby gardening on the disputed land but had never seen anyone else working on it

41. I find that from the time Mrs Kirkby acquired The Coach House until after 13th February 2012, Mr and Mrs Kirkby were the only people to carry out any gardening work on the disputed land. I do not consider that from 2000 onwards Mr Bentley maintained the hedge on the disputed land nearest to Paddock House. It is outside his gate and plainly not part of his property. Mr Bentley may from time to time have trimmed off an unruly branch, especially if he thought there was a danger of it scratching his car but there was no need for him to trim it regularly because Mr Kirkby did so. There can be no doubt that Mr and Mrs Kirkby gardened and maintained the disputed land. The hedge is growing on what is part of the disputed land. Mr Kirkby had demonstrated that he thought it was part of his wife's property by asking Mrs Bentley not to trim it. Mr Kirkby would have trimmed this hedge as part of his regular garden maintenance activities.

Use of the disputed land since February 2012

42. Mr Heaney said that since February 2012 he had regularly mown the grass on the disputed land, sometimes as often as twice a week. He also said in cross-examination that he had maintained shrubs and climbing plants on the disputed land since February 2012. He said he had done so every 2 months or so. Mr Heaney accepted that Mr Kirkby had mowed the grass until 2012 but he said he had not seen Mr Heaney feed it. Mr Heaney also accepted that Mr Kirkby had mowed the grass since April 2012 but said that the Kirkby's did nothing on the land between February and April 2012.

43. Mr Gill said that from February 2012 he had seen Mr Heaney tending the disputed land but had not seen anyone else do so. He had not seen Mr Kirkby doing anything on the disputed land at this period.

44. I find that Mr Kirkby did not do any gardening work, beyond perhaps the most minor work, between February and April 2012. Mr Heaney may have passed the lawn mower over the disputed land to make a point but the grass is unlikely to have required much mowing during this period. He did not do any other gardening work on the disputed land.

Law

45. Section 15 of the Limitation Act 1980 provides as follows:

"15(1) No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

(6) Part I of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned."

46. Section 17 of that Act provides

"Subject to—

(a) section 18 of this Act; .

at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished".

Section 18 deals with settled land and land held on trust and is not relevant.

47. Schedule 1, paragraph 1, provides as follows:

"Where the person bringing an action to recover land, or some person through whom he claims, has been in possession in the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action, shall be treated as having accrued on the date of the dispossession or discontinuance."

48. Schedule 1, paragraph 8, provides:

"(1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as 'adverse possession') and where under the proceeding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

(2) ……..

(3) ……

(4) For the purpose of determining whether a person occupying any land is in adverse possession of land it shall be not assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.

This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case."

49. Thus, the right of action to recover the land is barred whenever 12 years have elapsed from the time when any right of action accrued. It does not have to be a period immediately before an action is brought. When the right of action to recover the land is barred, the title of the person formerly having the right to bring the action is extinguished.

50. The question to be answered when considering whether a person occupying land is "in adverse possession" for the purpose of Schedule 1 paragraph 8 to the Limitation Act 1980 is

> "…whether the Defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner…Beyond that…the words possess and dispossess are to be given their ordinary meaning."

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

51. Legal possession is comprised of two elements:

(1) A sufficient degree of physical custody and control ("factual possession"); and

(2) An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). "What is crucial is to understand that, without the requisite intention in law there can be no possession. Such intention may be, and frequently is, deduced from the physical acts themselves." (*ibid* paragraph 40).

52. Factual possession has been described as follows:

> "It signifies an appropriate degree of physical control. It must be a single and [exclusive] possession…Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed …Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."

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

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

> "It would plainly be unjust for the paper owner to be deprived of his land where the claimant had not by his conduct made clear to the worlds including the paper owner, if present at the land, for the requisite period that he was intending to possess the land" –

per Peter Gibson LJ in *Prudential Assurance Co Ltd v. Waterloo Real Estate Inc* [1999] 2 EGLR 85 at 87

Possession

54. It is not clear from Mrs Kirkby's Statement of Case that she was then alleging that Mr

Carpenter had been in possession of the disputed land prior to his selling the coach house and adjoining cottage to Mrs Kirkby. However the question of whether Mr Carpenter was in possession was explored to some degree in the evidence. I am not satisfied that Mr Carpenter was in possession. The only evidence from Mr Carpenter was his statutory declaration dated 10th May 1999. The contents of that statutory declaration do not establish clearly that Mr Carpenter was in possession of the strip. There is no other evidence to establish that Mr Carpenter was in possession.

55. I find that Mrs Kirkby was in factual possession of the disputed land from when building works commenced in July 1999. Having regard to the nature and location of the disputed land, Mrs Kirkby exercised a sufficient degree of exclusive control of the disputed land from then on and no-one else did. The land was cleared of bushes with a mechanical digger. During the building works, the land was used as part of the building site; as a base for scaffolding, as a place for unloading materials used in the build and for temporary storage of materials. This use of the disputed land amounted to a dealing with it in the way that an occupying owner could be expected to deal with it. No-one else made any use of the disputed land at this time. Given the presence of the scaffolding and building materials, they could not have done so. Further, I find that Mrs Kirkby manifested an intention to possess the disputed land. I have no doubt that if the owner of the disputed land had seen the land while the building works were being carried out, he would have seen clearly that Mrs Kirkby was intending to possess the disputed land. No-one other than Mrs Kirkby and her contractors could realistically have used the disputed land while the building works were being carried on and it would have been apparent that Mrs Kirkby was intending to deal with the disputed land in a way which excluded the world at large. I do not consider in those circumstances that it was necessary for Mrs Kirkby to fence off the land in order to make manifest her intention to possess.

56. Counsel for Mr Heaney submitted that during the building works, Mrs Kirkby was using the disputed land with the consent of the trustees of the Hatfield Estate as the paper title owner. He submitted that permission was given implicitly when the trustees approved the plans for the coach house and cottage. I reject this submission for two reasons. Firstly, it was not proven before me that the paper title was vested in the trustees of the Hatfield Estate.

Secondly, I do not consider that it is to be implied from the fact that the trustees approved the plans that they consented to the use of the disputed land for building works or at all. There is no evidence that they were informed how the works would be carried out. It would have been reasonable for them to have been so informed if consent was sought for the use of the disputed land. If they had been asked for permission to use the disputed land, they could have objected to use unless terms were agreed, for example, to ensure the safety of contractors and the public and as to reinstatement.

57. Mrs Kirkby remained in possession after the building works were completed. The disputed land was then landscaped by the spreading of soil, the sowing of grass seed, the creation of a parking space and a path, the creation and planting of flower beds and the placing of stones around the edge of the land. What had been a piece of largely unkempt verge was turned into what was recognisably a garden and parking area. The landscaping was substantially complete by the end of January 2000. That garden area was then maintained by Mr and Mrs Kirkby over the years. The area to the north was used as a parking space. By setting out and using the disputed land as a parking area, as a means of entrance to The Coach House and as a garden, Mrs Kirkby dealt with the disputed land in a way in which an owner might have been expected to have dealt with it.

58. I find that Mrs Kirkby was in possession of the disputed land notwithstanding that the disputed land was not fenced off from the roadway except between July 2008 and April 2010. Fencing is only one way in which physical control may be exercised over land. The acts of Mrs Kirkby and her husband, short of fencing, were sufficient in this case to amount to an assumption of an appropriate degree of physical control. Their acts of landscaping, setting out a lawn a flower beds, laying a path, creating and surfacing a parking area, and marking the edge with stones and then maintaining the land all amounted together to a sufficient assumption of physical control. I do not consider that the fact that the wheels of vehicles occasionally strayed onto the edge of the disputed land means that Mrs Kirkby did not have an appropriate degree of physical control. Only a few vehicles very occasionally drove onto the edge of the disputed land. The evidence does not show that any significant part of the disputed land was used by people other than Mrs Kirkby and her husband, whether as a part of the adjoining road or for any other purpose It is important to note that the test of possession is whether the person claiming to be in possession has a sufficient degree of

physical custody and control and what is sufficient depends on the circumstances. There is no absolute requirement to exclude everyone from entering onto any part of the land, even the smallest area. It is not the law, contrary to what Mr Bentley seems to have thought when he wrote his email on 11th May 2009 that Mrs Kirkby could not have been in possession if anyone else had any form of access to the disputed land. The degree of control exercised by Mrs Kirkby was appropriate in all the circumstances.

59. Counsel for the Respondent submitted that Mrs Kirkby had demonstrated in the Reply to the Defence in the proceedings in the Leeds County Court that she did not have the intention to possess the disputed land. This appeared from paragraph 9 in which Mr and Mrs Kirkby pleaded that they denied they were "in this action" "endeavouring to claim this land by adverse possession". I do not accept this submission. What Mr and Mrs Kirkby were stating in paragraph 9 of the Reply was that they were not in that action asserting that they had barred the title of the paper title owner to the disputed land by adverse possession. This is not surprising because Mr Heaney did not at the time these proceedings were issued have or claim to have a paper title to the disputed land. Mr and Mrs Kirkby did not plead that they were not in possession of the disputed land or did not intend to possess it.

60. I further find that Mrs Kirkby, after the building works had been completed, continued to demonstrate an intention to possess the disputed land. The landscaping and then maintenance of that land unequivocally made that intention apparent I consider that an owner would have been aware if on site that Mrs Kirkby was intending to possess the disputed land. The disputed land appears to an onlooker to be part and parcel of the curtillage of the Coach House and would have done so from the moment the landscaping work was done.

61. By February 2012 Mrs Kirkby had been in adverse possession of the disputed land for in excess of 12 years. Mrs Kirkby had been in possession from June 1999. Even if Mrs Kirkby was not in possession while the building works were being carried out, she was in possession by the end of January 2000. The paper title to the disputed land had been extinguished under section 17 of the Limitation Act 1980. Such estate as the trustees of the Hatfield Estate had at the date of the transfer to Mr Heaney had been extinguished.

Abandonment of Possession

62. Counsel for Mr Heaney submitted that Mrs Kirkby abandoned possession on 18th February 2012 by removing her car, plant pots, and the house name sign from the disputed land. I do not accept that submission. The consequence of a trespasser abandoning possession (albeit in that case at a time when the squatter had been in possession for less than 12 years) was considered by the Court of Appeal in *Mount Carmel Ltd. v. Peter Thurlow Ltd & Elizabeth Smee* [1988] 1 WLR 1078. In that case, the plaintiff sought possession, alleging that, though its title had been extinguished by adverse possession, it was entitled to sue for possession as the assignee of the interest of a squatter, Mr Renwick who had entered into possession prior to the second defendant, Ms Smee. The Court of Appeal held that Mr Renwick had in effect given up the property to Ms Smee and so he did not have a right of possession against Ms Smee which he could have assigned to the plaintiff. Lord Justice Nicholls (as he then was) giving the judgment of the Court of Appeal, drew a distinction between a squatter being dispossessed by another squatter and a squatter abandoning any rights to possession. In the former case, the first squatter can sue to recover possession from the second squatter, provided that he brings his action within the 12 year limitation period (see at p.1086E-F). In the second case, the first squatter has no claim to possession against the second squatter because he, in effect, gives up the property to the second squatter. His Lordship equated abandoning the property with "relinquish[ing] all claims to or interest in the property" – see at p.1987A-G. In this case, I do not consider that Mrs Kirkby abandoned possession in the sense of relinquishing all claims to it. That she did not do so is shown by the letter her solicitors wrote on her behalf to Land Registry on 15th February 2012, stating that Mrs Kirkby opposed an application by Mr Heaney to register title to the disputed land. Mrs Kirkby removed a number of objects, on the advice of solicitors but she did not intend to abandon her possession of the disputed land.

Land Registration Act 2002 Section 9(5)

63. Counsel for the Respondent submitted that if Mrs Kirkby was in possession of the disputed land, her possession ceased on 18th February 2012 and did not subsequently resume.

He submitted that Mrs Kirkby was not in possession of the disputed land for the purposes of section 9(5) of the Land Registration Act 2002. Section 9(5) provides as follows

> "A person may be registered with possessory title if the registrar is of the opinion—
>
> (a) that the person is in actual possession of the land, or in receipt of the rents and profits of the land, by virtue of the estate, and
>
> (b) that there is no other class of title with which he may be registered".

Mrs Kirkby made her present application by form FR1 dated 5th April 2012. The application was received by Land Registry and entered on the day list on 10th April 2012. The 10th April 2012 is the date on which the application was made and that is the date on which it is necessary to consider whether Mrs Kirkby was in actual possession. When considering whether Mrs Kirkby was in actual possession of the disputed land at that date, I consider the facts against the background that by that date, as I have found, Mrs Kirkby had barred the title of the paper title owner. On the date of the application, the following was the situation on the ground. As Mr Healey accepts, Mr Kirkby was mowing the grass. I accept Mr and Mrs Kirkby's evidence that at that time they were continuing to maintain the disputed land as by mowing the grass, picking up leaves and tending plants. Mrs Kirkby's property, in the form of the paving slabs remained on the disputed land forming a path to the front door. Mrs Kirkby and Mr Kirkby continued to walk on the disputed land. Mr Heaney had not at that date started to park his car on the disputed land. In those circumstances, I am satisfied that Mrs Kirkby was in possession on the 10th April 2012 and was in actual possession of the disputed land as at the date she made her application to be registered with a possessory title.

64. I would just add that if I had found Mrs Kirkby was not in possession of the disputed land on 10th April 2012 this would not have prevented Mrs Kirkby from obtaining possessory title to the disputed land on a further application. I have found that Mrs Kirkby was in adverse possession of the disputed land from the commencement of the building works in 1999. The paper title was therefore barred under the Limitation Act 1980 prior to Mr Heaney taking a transfer of such title as the Hatfield Estate Trustees had at the date of the transfer. If Mrs Kirkby is not in possession of the disputed land, she could recover possession by proceedings and then make a fresh application to be registered with a possessory title.

Conclusion

65. I am satisfied that Mrs Kirkby is entitled to be registered with possessory title to the disputed land. Accordingly, I shall direct the Chief Land Registrar to give effect to the application as if the objection of Mr Heaney thereto had not been made.

Costs

66. My preliminary view is that Mr Heaney must pay Mrs Kirkby's costs of the proceedings, to be assessed on the standard basis. Mrs Kirkby has succeeded and it is just that costs should follow the event. I do not consider that the circumstances are such as to make it just to award costs to be assessed on the indemnity basis. Any party who wishes to submit that some different order should be made as to the costs of the proceedings should serve written submissions on the other party and on the Tribunal by 5pm on 7th February 2014.

BY ORDER OF THE TRIBUNAL

Dated this 24th January 2014