IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER) FTC/86/2014
[2014] UKUT 0507 (TCC)

ON APPEAL FROM THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)
LAND REGISTRATION DIVISION

Leeds Combined Court Centre
The Courthouse,
1, Oxford Row
Leeds LS1 3BG

Date: 17th November 2014

Before :

HIS HONOUR JUDGE ROGER KAYE QC
(Sitting as a Judge of the Upper Tribunal)

IN THE MATTER OF LAND ADJACENT TO THE COACH HOUSE, THORP ARCH, WETHERBY

Between :

HILARY KATHRYN KIRKBY	**Respondent / Applicant below**
- and –	
MARCUS ALEXANDER HEANEY	**Appellant/ Respondent below**

Counsel and Solicitors:
Mr John Randall QC and Mr David Warner instructed by Lupton Fawcett Denison Till appeared for the Appellant
Mr Andrew Francis instructed by Shulmans LLP appeared for the Respondent

Hearing dates: 24, 25 September 2014
Hand down Decision: 17 November 2014

- -

APPROVED DECISION

Date: 17 November 2014 Roger Kaye QC

HH Judge Roger Kaye QC:

Introduction

1. This is an appeal brought under s 11 of the Tribunal, Courts and Enforcement Act 2007 and s 111 of the Land Registration Act 2002 from the decision of the First Tier Tribunal ("FTT"), Tribunal Judge Michell ("the FTT Judge"), given on 24 January 2014 ("the Decision") as amended by paragraphs 15-18 of the Reasons for his Order dated 14 April 2014 made pursuant to s 73 Land Registration Act 2002 ("LRA 2002"). By the Decision the FTT Judge found that the Applicant (and Respondent to the Appeal), Mrs Hilary Kirkby had established 12 years' adverse possession of a grass verge ("the Verge") adjacent to and fronting her house at and known as The Coach House, Thorp Arch, Wetherby LS23 7AB ("the Coach House"), that she was in possession of that land on 10 April 2012 (thus satisfying s 9(5)(a) LRA 2002), the day on which her application for first registration was made, and that she was entitled to be registered with possessory title to the Verge.

2. The Verge measures approximately 32 metres in length and is zig-zag shaped. It lies alongside a lane which provides access to *inter alia* the home of the Appellant, Mr Marcus Heaney. It now includes two car-parking spaces. The Appellant owns land opposite to Mrs Kirkby on the other side of a narrow road dividing their properties at and known as The Woodshed, Thorp Arch, Wetherby LS23 7AB ("the Woodshed"). He also claims (or claimed before the FTT Judge) to be the paper title owner of the Verge having acquired it in February 2012.

3. The FTT Judge also, in the further, separate, decision given on 14 April 2014 referred to above, refused permission to appeal and refused the application to adduce fresh evidence in respect of a Consent Order made in the Leeds County Court dated 15 February 2012 in proceedings between the Appellant and Mr and Mrs Kirkby (dealt with below). In the course of giving his reasons he did however make certain corrections to the Decision leading to the amendments referred to above. HHJ Behrens, sitting as a Judge of the Upper Tribunal, gave permission to appeal by Order dated 19 June 2014.

Appeal

4. Mr Heaney appeals against the FTT Judge's Decision (as amended) and order on the grounds that:

    a. First (Ground 1), the conclusion of the FTT Judge that Mrs Kirkby had established the necessary factual possession and intention to possess at any time prior to April 2000 was wrong;
    b. Second (Ground 2), the FTT Judge failed to take any or any proper account of the disavowal by Mrs Kirkby of any intention to possess the subject land set out in her statement of case in proceedings between her and Mr Heaney; and

c. Third (Ground 3), the conclusion of the FTT Judge that Mrs Kirkby was in possession of the subject land for the purposes of section 9(5) of the LRA 2002 on 10 April 2012 was not supported by the findings of fact made by him and was wrong.

The Applications to Adduce Fresh Evidence

5. In support of his appeal Mr Heaney has applied (by three separate applications) to rely on certain fresh evidence, namely:

   a. A Consent Order dated 15 February 2012 made between the Respondent and her husband (as Claimants) and the Appellant (as Defendant) in proceedings in the Leeds County Court under case number 0LS51332 (a repeat of the application refused by the FTT Judge referred to above);[1]
   b. A Witness Statement (with exhibits) dated 15 August 2014 of a Mr Jason Green, an employee of (and former Planning Officer with) Leeds City Council[2]; and
   c. A Report of HM Nautical Almanac Office (Dr Steve Bell) of 5 September 2014 (subsequently incorporated in the form of a formal report complying with CPR Part 35), concerning the date on which the Respondent's photograph produced at the hearing below was likely to have been taken[3].

6. These applications were all directed to be heard at the outset of the appeal. At the outset of the appeal hearing I directed that these applications to adduce fresh evidence should be dealt with first, principally on the basis that the outcome could determine the form and substance of the appeal and potential consequential matters, such as whether Mr Green should be cross-examined and if so whether that necessitated restoring the matter to the FTT Judge or another Judge of the FTT for a complete re-hearing or whether it could be contained and limited to a hearing before the appeal judge.

7. This judgment is accordingly limited to dealing with these applications.

Background

8. In order to make sense of the applications I must briefly outline the background to the appeal.

9. Mrs Kirkby acquired the freehold of the Coach House in June 1999. She and her husband carried out certain redevelopment, refurbishment and conversion works to the property and they moved into the Coach House in during January 2000 following completion of the works.

---

1 For Application Notice and evidence see Appeal Bundle, pp. 8-114, 146-154.

2 Application Notice 21 August 2014 (Appeal Bundle, p. 131). Witness Statement and exhibits at pp. 135-143.

3 See Appeal Bundle, pp. 284-296.

10. The works involved retention of builders from July 1999 to redevelop the property. The FTT Judge found that the builders used the Verge to gain access to the Coach House and to store building materials. He found that this use amounted to dealing with the land in a way to be expected of any occupying owner and a clear indication to the paper owner of an intention to dispossess him (see paragraph 55 of the Decision). Mr Heaney's case is the Judge was wrong to reach that conclusion.

11. By her application for first registration Mrs Kirkby sought to register title by adverse possession to the Verge. The Application relied on the carrying out of a number of different types of works or activities on or to the Verge, including such as follows:

    a. The reinstatement of the existing hard-standing at the northern end of the Verge to create two car parking spaces in 2000;
    b. The erection of a fence and dry stone wall at the southern edge of the Verge;
    c. The alleged importation and levelling of topsoil, the alleged seeding of the land with grass seed and the alleged laying of stepping stones to form a path, all in January 2000.

12. Mr Heaney opposed her application on the grounds (now reflected in Grounds of Appeal 1 and 2) that Mrs Kirkby had not enjoyed the necessary factual possession of the Verge for the requisite 12 years nor had she evinced the necessary intention to possess the land.

13. It was Mr Heaney's case: -

    a. that there had been no exclusive or continuous use of the Verge by Mrs Kirkby for the required period. Such use or occupation as was made of the Verge was in common with others;
    b. that Mrs Kirkby had not held the requisite intention to possess the Verge;
    c. that Mrs Kirkby ceased to be in possession of the Verge (if she had previously been) in February 2012, when Mr Heaney acquired the paper title to it, and immediately required Mr & Mrs Kirkby to make no further use of it (whether for parking or otherwise), a request with which, he maintained, to some extent she complied.

14. This conduct, argued Mr Heaney, both evidenced the absence of the necessary intention to possess on Mrs Kirkby's part, and also negated any entitlement to be registered with a possessory title to the Verge by virtue of section 9(5)(a) of the LRA 2002 (now reflected in Ground of Appeal 3). She was not in actual possession of the Verge on 10 April 2012, when HM Land Registry ("HMLR") entered receipt of her application for first registration in its Day List (nor on the date that the application bore, namely 5 April 2012).

15. The hearing took place in Leeds between 22 and 24 October 2013. The FTT heard from 9 witnesses: Mr and Mrs Kirkby; Mrs Dawn Steel; Mr

and Mrs Moorhouse; Mr Heaney; Mr David Bentley; Mr Tom Kilby; and Mr Martyn Gill.

16. The FTT Judge concluded that Mrs Kirkby had been in factual possession of the Verge since July 1999 (when the Respondent and her husband cleared the Verge and the builders went in (above)) alternatively January 2000; that she had the necessary factual possession and intention to possess that land; and that by February 2012 she had barred the title of the paper owner of the Verge pursuant to section 17 of the Limitation Act 1980. The FTT Judge further concluded that Mrs Kirkby remained in possession of the Verge on 10 April 2012 when her application for first registration was received at HMLR. He therefore directed the Chief Land Registrar to give effect to the application as if the objection of Mr Heaney had not been made.

17. Mr Randall QC for Mr Heaney argues that Grounds 1 and 2 are closely linked (in particular with regard to the intention aspect of Ground 1), and both ultimately go to whether Mrs Kirkby had established the requisite factual possession and intention to possess for a period of at least 12 years between July 1999 and mid-February 2012. Ground 3 addresses the distinct question of whether the Respondent had established that she was in actual possession on 10 April 2012, so as to satisfy s.9(5)(a) LRA 2002.

The Fresh Evidence

18. I must now therefore turn to consider first the nature and potential implications of the new evidence sought to be admitted.

19. First, Mr Green.

20. In securing planning permission for the conversion of the Coach House to domestic use, certain matters, including the landscaping of the Verge, had been reserved for further approval once details had been submitted to the local planning authority. In January 2000 in his evidence at the FTT hearing it appeared that Mr Kirkby had had a long telephone conversation with Mr Green, the then planning officer at Leeds City Council, in advance of submitting his detailed proposals. According to Mr Kirkby Mr Green indicated to him (in substance) that he could carry on with the landscaping[4]. Consequently, according to the gist of Mr Kirkby's evidence, he started works on the Verge before he wrote to Mr Green's department on the 18 February 2000 outlining his proposals.

21. Mrs Kirkby, for her part, was uncertain of the dates and times of these and other certain events and was plainly dependent on, and adopted her husband's evidence though she expressly referred to her husband's conversation with Mr Green. This was, she said in support of her application for first registration, "*to ensure we would be granted*

[4] Transcript of relevant parts of hearing before FTT at Appeal Bundle, pp. 139-140.

permission when we formally submitted the external landscaping layout". This was not done until 18 February when her husband, she said, "*submitted and obtained reserved matters' planning permission for the external landscaping works*." Somewhat ironically Mrs Kirkby's written evidence (dated and apparently served on 16 April 2013) in support of her application was adopted by her husband in his[5].

22. Mr Green was not called and did not give evidence before the FTT.

23. In order to check this after the trial, Mr Heaney's solicitors sought evidence from Mr Green, not hitherto secured. Mr Green's proposed new evidence records that he had indeed had a telephone conversation with Mr Kirkby on the 14 February 2000 in which he outlined to Mr Kirkby what needed to be included within the landscaping plan that was yet to be submitted for approval if it was to be satisfactory. He maintains (supported by his contemporaneous notes retrieved from the City Council relevant file) that he did not give Mr Kirkby prior approval for the landscaping of the Verge nor would he have been able to do so. Approval was not given until 28 February 2000.

24. Setting aside for one moment the building operations on the Verge commencing in July 1999 (which Mr Randall also attacks in his substantive appeal as insufficient to amount to ouster of Mr Heaney), Mr Randall's point is that this casts doubt on the veracity of Mr Kirkby's evidence as to when he started the landscaping works to the Verge, since the letter of 18th February 2000 sending the proposals to the local authority is plainly forward looking and not in any way mentioning either prior approval of the work, or of the work having already commenced.

25. Second, the evidence from Dr Bell of HM Nautical Almanac Office (HMNAO).

26. Amongst the evidence put forward by and on behalf of Mrs Kirkby were some photographs of the Verge which purported to show the topsoil of the Verge levelled but without grass[6]. In evidence obtained after the FTT hearing Dr Bell of HMNAO has, from the position of shadows as shown on one or more of the photographs, the angle of the sun, the geophysical location of the property and other technical indicia indicated that in his opinion the photographs must have been taken on 9 April 2000 (or September 2000) plus or minus 3 days. If so, argues Mr Randall, the photographs showing the physical condition of the Verge in April 2000 served further to undermine Mr Kirkby's evidence that the Verge had been covered with top-soil and then seeded by him in January 2000.

27. Third, the Consent Order of 15 February 2012.

---

5 See Main Bundle, pp. 295-297 (paragraphs 18-19, 21; witness statement of Mrs Kirkby); p. 408 (paragraph 3; witness statement of Mr Kirkby); the letter of 18 February 2000 is at Supplemental Bundle, pp. 66-68.

6 See Core Bundle pp. 7W, 36 (lower rh corner); Main Bundle p. 362.

28. On 10 August 2010 Mr and Mrs Kirkby commenced proceedings against Mr Heaney in Leeds County Court raising the status of the Verge. Their pleaded case was that the Verge was part of the garden of the Coach House. Included in the relief sought was an injunction to prevent Mr Heaney from interfering with the fence erected on the Verge by them and from interfering with their enjoyment of the Coach House. Mr Heaney here too acted initially in person and defended the case on the basis that the claimants did not own the Verge.

29. The action seems to have proceeded at a fairly gentle pace, with a stay throughout most of 2011 to see if the dispute could be resolved by settlement. By mid-February 2012 the action had still not been settled but in the meantime Mr Heaney had acquired the paper title to the Verge and retained solicitors, Pinsent Masons LLP, to act for him.

30. In view of the acquisition, Pinsent Masons sent to the solicitors for Mr and Mrs Kirkby a draft Consent Order (signed by them on behalf of Mr Heaney) suggesting the proceedings be discontinued and a forthcoming Case Management Conference vacated pending registration of Mr Heaney's title[7]. The parties agreed to continue their negotiations and the draft Consent Order was signed by Mr and Mrs Kirkby's solicitors on their behalf on or about 15 February 2011 and a copy e-mailed the same day to Pinsent Masons for lodging at court. They in turn notified Mr Heaney that "*They*" (which can only have been a reference to Milners, the solicitors for Mr and Mrs Kirkby) had signed the Consent Order[8]. On the same day (also on 15 February 2012) Milners wrote to HMLR objecting to the registration by Mr Heaney on the basis that Mr and Mrs Kirkby were in possession[9].

31. The Case Management Conference fixed for 16 February was consequently vacated. The Consent Order recited as follows:

> "*Upon the Defendant* [i.e. Mr Heaney] *having acquired title to the land to which this dispute relates* [i.e. including the Verge]
> *And upon the Defendant having invited the Claimants* [Mr and Mrs Kirkby] *to discontinue their claim*
> *And to allow time for registration of the transfer of the subject land* [the Verge] *in favour of the Defendant and ancillary matters to be disposed of*"

32. The copy Consent Order signed by the solicitors on behalf of Mrs Kirkby (and her husband) was not before the FTT but a copy (unsigned) was.

33. Mr Randall's submission is that the recitals in the Consent Order amounted to an unequivocal acknowledgment of Mr Heaney's title to the Verge. On the basis that Mrs Kirkby had not, as at the date of the Consent Order (15 February 2012), been in possession of the Verge with the necessary intention to possess the same for a period in excess of 12 years, then the signed Consent Order acquired some significance as going to the

---

7 Appeal Bundle, pp. 110-116.

8 Appeal Bundle, pp. 113-114 (copy signed Order), 190-192 (emails).

9 Supplemental Bundle, pp. 226-227.

issue of whether Mrs Kirkby had the necessary intention to possess and whether she was in actual possession of the Verge at that time.

34. Mr Randall must, of course, overcome a number of hurdles to get this far: e.g. the factual finding that Mrs Kirkby had gone into possession in July 1999, had sown grass seed (or her husband had) in January 2000. He must also persuade a court that Mr Heaney's title had not already by that time been extinguished under s 17 Limitation Act 1980. In the absence of such prior extinguishment, the signature on the Order, by an agent of Mrs Kirkby and delivered by email to Mr Heaney and his solicitors, was sufficient acknowledgment, he argues, under ss 29-31 Limitation Act 1980 to start time running afresh (a point not apparently argued at trial and to which Mr Francis on behalf of Mrs Kirkby objects). Thus, on this basis, Mr Heaney's title, it is contended, could not, in such circumstances, have been extinguished by the time Mrs Kirkby's application was made on 10 April 2012.

35. During the hearing before the FTT Mrs Kirkby was not asked whether she, or anyone on her behalf, had signed the Consent Order.

36. Mr Randall further submits that all three applications are closely linked. They are, if the Judge was incorrect in his interpretation of the activities of the builders between July 1999 and January 2000, focussed on the question of factual possession of the Verge with the necessary intention to possess in early 2000 and correspondingly the termination of possession in February 2012 coupled with the acknowledgment of Mr Heaney's title to the Verge by the signed Consent Order.

The Legal Framework

37. The admission of fresh evidence on an appeal to this Chamber of this Tribunal is governed by Rule 15(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008 No 2698) ("the 2008 Rules"). This provides, so far as relevant, that the Upper Tribunal

> "*may-*
>
> *(a) admit evidence whether or not-*
>
> *(i) the evidence would be admissible in a civil trial in the United Kingdom; or*
>
> (ii) *the evidence was available to a previous decision maker ..*"

38. This is to be contrasted with Rule 15(2A) governing the admission of fresh evidence in an asylum case or an immigration case, which this is not. In those cases by Rule 15(2A)(b) the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence.

39. Rules 5 and 6 confer on the Upper Tribunal wide discretionary powers of case management in the giving of directions. Rule 15(1), without prejudice to the general powers in Rule 15(1), (2) and (3) enables the Upper Tribunal to give directions as to evidence including evidence on oath. Under Rule

16 witnesses may be summoned to answer questions or produce documents.

40. In interpreting the above Rules and deciding whether to exercise its power under Rule 15, the Upper Tribunal must give effect to the overriding objective set out in Rule 2. This provides, so far as relevant, as follows:

> **"*2.*** *(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.*
>
> *(2) Dealing with a case fairly and justly includes—*
>
> *(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;*
> *(b) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*
> *(d) using any special expertise of the Upper Tribunal effectively; and*
> *(e) avoiding delay, so far as compatible with proper consideration of the issues.*
>
> *(3) The Upper Tribunal must seek to give effect to the overriding objective when it—*
>
> *(a) exercises any power under these Rules; or*
> *(b) interprets any rule or practice direction….*"

41. Rule 15 is also to be contrasted with the power of the Court of Appeal to admit fresh evidence under CPR 52.11(2) which provides:

> "*Unless it orders otherwise, the appeal court will not receive …. (b) evidence which was not before the lower court*."

42. This gave rise to the well-known dicta of Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489 at p. 1491:

> "*To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible*."

43. In *Terluk v Berezovsky* [2011] EWCA Civ 1534, the Court of Appeal had to consider the modern application of the principles post the introduction of the CPR. Laws LJ said this at paragraph 31:

> "*It is clear that the discretion expressed in CPR 52.11(2)(b) has to be exercised in light of the overriding objective of doing justice …. The Ladd v Marshall criteria remain important ("powerful persuasive authority") but do not place the court in a straitjacket (Hamilton v Al-Fayed (No 4) [2001] EMLR 15 per Lord Phillips MR as he then was at paragraph 11). The learning shows, in my judgment, that the Ladd v Marshall criteria are no longer primary rules, effectively constitutive of the court's*

> *power to admit fresh evidence; the primary rule is given by the discretion expressed in CPR 52.11(2)(b) coupled with the duty to exercise it in accordance with the overriding objective. However, the old criteria effectively occupy the whole field of relevant considerations to which the court must have regard in deciding whether in any given case the discretion should be exercised to admit the proffered evidence. It seems to me with respect that so much was indicated by my Lord the Chancellor (then Vice-Chancellor) in Banks v Cox (17 July 2000, paragraphs 40-41):*
>
> > *"In my view, the principles reflected in the rules in Ladd v Marshall remain relevant to any application for permission to rely on further evidence, not as rules, but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the Court below."* "

44. Thus, the starting point is Rule 15(2) of the 2008 Rules not CPR 52.11(2). Rule 15(2) is, to my mind, intended to be and is considerably more flexible than CPR 52.11(2) which is centred on a negative, not positive approach ("*the appeal court will not receive*"). Moreover, the overriding objective under the 2008 Rules is defined in a marginally different way from the same under the CPR (contrast CPR 1.1(2) and 2008 Rules, Rule 2(2)). For example, dealing with cases "*fairly and justly*" under the 2008 Rules includes "*avoiding unnecessary formality and seeking flexibility in the proceedings*" (Rule 2(2)(b)). This, in my judgment, shows that an open-textured, flexible, approach is the starting point. Ultimately it will be a question of what fairness and justice require.

45. Like FTT Judge Michell I have not been referred to any decision of the Upper Tribunal concerning the admission of new evidence on appeal except in the context of asylum or immigration cases where Rule 15(2A) also applies (above). One such decision was that of the Court of Appeal in *IY (Turkey) v Secretary of State for the Home Department* [2012] EWCA Civ 1560. This was an appeal from the Upper Tribunal (Immigration and Asylum Chamber). The Court of Appeal dismissed an appeal from the Upper Tribunal Judge himself dismissing an appeal from the FTT whereby the FTT had rejected the appellant's appeal from a decision of the respondent Secretary of State refusing to grant asylum and proposing the removal of the appellant to Turkey.

46. The Court of Appeal had to consider whether a further report of an expert should have been admitted before the Upper Tribunal. It had been refused so the question arose as to the Upper Tribunal's powers to admit fresh evidence.

47. Davis LJ giving the lead judgment (with which Tomlinson and Longmore LJJ agreed) was of the "*clear view*" that permission had been properly refused.

48. At paragraphs 35 to 36, Davis LJ said this:

> "*35. It is plain that sub-paragraph (b) is not designed to be exhaustive of the matters to be considered before a decision to admit further evidence is made. Mr Bazini rightly accepted as much. He further accepted that, although not the legal test actually prescribed by the rules, in accordance with previous authorities in this asylum context it is generally appropriate for the tribunal to have regard to the three*

> *criteria identified in the case of Ladd v Marshall [1954] 1 WLR 1489 before deciding whether or not further evidence is to be permitted. But he objected that UTJ Eshun had not engaged with the reasons given for seeking to adduce this further evidence; and, further, that she (and the UTJ, judging by his remarks when subsequently refusing permission to appeal) must have adopted too limited or restrictive an approach in refusing to entertain this further evidence.*
>
> *36. The statutory scheme is in essence for the Upper Tribunal to assess whether or not a decision of the First-tier Tribunal was wrong in law. The statutory scheme generally does not permit an entire rehearing on the facts by the Upper Tribunal on such an appeal, unless a point of law is identified such as to require a decision to be remade and which the Upper Tribunal itself then decides to remake. Moreover in point of practice the efficiency of the whole appeal system would be seriously undermined if parties conceive that they can readily adduce on appeal evidence not placed before the First-tier Tribunal. That, indeed, is the principal rationale in this context for normally applying, by analogy, the criteria laid down in Ladd v Marshall. Exceptionality of course is not the legal test here. But, in my view, exceptionality is properly descriptive of the circumstances in which fresh evidence may – at all events in the absence of consent from all parties – be permitted to be adduced before an Upper Tribunal: albeit of course what ultimately will be decisive is what justice requires in the circumstances relating to the particular application*."

49. It is true that Davis LJ nowhere refers to Rule 15(2) of the 2008 Rules but the fact that he makes the point that exceptionality was not the legal test applicable in that case shows that he must have had it in mind, albeit that exceptionality is descriptive of the circumstances in which fresh evidence may be admitted. Accordingly, although *IY* was an immigration and asylum case the principles above stated apply, in my judgment, to other applications to adduce fresh evidence before the Upper Tribunal on appeal. In short, I come back to what I stated above: an open-textured, flexible, approach is the starting point. Ultimately it will be a question of what fairness and justice require. In considering what fairness and justice require, the Tribunal will always consider the circumstances of the case including, in considering whether to exercise the discretion to admit fresh evidence, the guidance of the *Ladd v Marshall* principles. Mr Francis also rightly, in my judgment, stresses the need to bear in mind proportionality as outlined in Rule 2(2)(a) of the 2008 Rules.

50. I therefore turn to the specific applications in the same order as considered above. In this context in my judgment it is right to bear in mind that the three aspects of the proffered evidence, the evidence of Mr Green, that of HMNAO and the Consent Order are, as Mr Randall submits, closely interlinked for the reasons he gives.

Mr Green

51. In his application to adduce the fresh evidence of Mr Green, Mr Heaney's solicitors suggested in the application notice of 21 August 2014 (supported by Mr Heaney in his witness statement of 22 August 2014) that there had been no prior indication that Mr Kirkby would give evidence to the effect that he had been given informal approval to begin landscaping works before the grant of formal consent.

52. Mr Francis, for the Respondent, submits that this evidence falls at the first hurdle. It does not fulfil the first principle in *Ladd v Marshall* in that the evidence of Mr Kirkby's telephone call with Mr Green was clearly foreshadowed in Mrs Kirkby's evidence (though it has to be said this was to ensure they got permission when the formal application was made). Since this was supported by Mr Kirkby's evidence in his witness statement of 16 April 2013 there was plenty of time to contact Mr Green and to obtain the evidence now to hand.

53. Secondly, he submits it also fails the second test (influence on the outcome) because there was other evidence justifying the Judge coming to the conclusion that possession of the Verge by the Respondent commenced well before February 2000.

54. Accordingly, he further submits, if admitted the evidence of Mr Green can only be tested by cross-examination necessitating the recall also of Mr and possibly Mrs Kirkby for further cross-examination. This, in his argument, would be disproportionate and not in accordance with Rule 2(2)(a) of the 2008 Rules.

55. Mr Randall submits that one should be wary of applying too much hindsight.

56. The Judge dealt with this matter this way in his judgment:

> "*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 planning authority approved the scheme on 28th February 2000.*
>
> *...*
>
> *"28. The evidence of both Mr and Mrs Kirkby was that Mr Kirkby sowed the grass seed in January 2000. ...*
>
> *...*
>
> *"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 M Kirkby would not have sowed the grass seed before getting the approval of the local authority to his landscaping scheme. Mt 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 .... Mr and Mrs Kirkby were the only witnesses who could give direct evidence as to when the grass seed was sown. .... I do not accept that Mr Kirkby would not have sowed the seed before seeking the local authority's approval to the landscaping scheme. .... It is ... not at all improbable that Mr Kirkby would have put down the grass seed before obtaining formal approval to the landscaping scheme.*"

57. This is not, to my mind, a question of applying hindsight at all. It seems to me that Mr Francis is right. Whilst I entirely accept that Mr Green's evidence is credible, nevertheless, two of the *Ladd v Marshall* guidelines are not fulfilled. First, I am not persuaded that the evidence of Mr Green could not have been obtained in time for the hearing. The fact that there had been a conversation with him had been foreshadowed in Mrs Kirkby's

evidence as noted above. Second, moreover, these (and no doubt other) excerpts from the FTT Judge's Decision (especially at paragraph 31 quoted above) show to my mind that the evidence of Mr Green is unlikely to have any influential (important or otherwise) effect, still less decisive, on the outcome of the case. The FTT Judge was almost prepared to assume that Mr Kirkby would have sown grass seed before the grant of formal permission. Mr Green's evidence is likely to make little if any difference to the conclusions of the Judge in this respect.

58. In this context Mr Francis's submission that to allow further examination and cross-examination on this point would be disproportionate is highly relevant.

59. Accordingly, in isolation even adopting a flexible, informal approach, having regard to the ultimate test of what does fairness and justice require I am not persuaded this is an appropriate case to admit the fresh evidence of Mr Green and I would decline to do so for the reasons indicated.

HMNAO

60. This proposed new evidence in the form of the report of Dr Bell of HMNAO, summarised above, it is said serves also to undermine the suggestion that the Verge was seeded in January 2000.

61. The evidence (especially that of Mr Bentley) tends to establish that the relevant photographs relied upon by Mr Heaney at the FTT hearing were taken in April 2000, that they show the state of the ground as not consistent with the sowing of grass seed three months earlier (no grass was growing even if some daffodils were), and as consistent with an unchallenged photograph taken by Mr Bentley on 4 April 2000 together with his evidence that the works did not commence before about April 2000. In short the grass sowing was not done in January but April 2000.

62. The evidence of Mr and Mrs Kirkby on the photographs she produced (above) was unclear and varied. Mrs Kirkby's photographs had, in some cases, approximate dates where known marked on them but she was in her testimony to the FTT unable to give any clear or coherent explanation as to the dates, deferring to her husband's evidence. Mrs Kirkby's fourth witness statement, first received by Mr Heaney's team on or about 14 October shortly before the hearing began on 22 October 2013, asserted that the photograph sent for analysis to HMNAO[10] had been taken in approximately January 2000.

63. The FTT Judge plainly preferred the evidence at trial of Mr and Mrs Kirkby as to when they sowed the grass seed (above) over the evidence of Mr Bentley and his April photograph (though he did not reject the latter evidence indicating that the photograph was insufficiently clear to indicate some fine initial growth might not have been visible in the photograph). In

[10] That at Core Bundle p. 7W seems the clearest but still not, at least to my eyes, definitive.

dealing with permission to appeal (refused) in paragraph 2(f)[11] he seemed to think that the burden was on Mr Heaney to produce expert evidence to support his argument that grass could not have been sown in January if it was not visible in the photograph taken in April by Mr Bentley.

64. In my judgment the evidence of Dr Bell (although plainly credible) does not fulfil the first and second guidelines of *Ladd v Marshall*. The photographs only seemed to assume a degree of importance at, or even after the hearing when taking stock. Mr Bentley's photograph was, as I say, unchallenged. The earlier photographs were not identified by a specific date until Mrs Kirkby's fourth witness statement produced shortly before the hearing which realistically gave little time to follow up a potential piece of evidence from the HMNAO (even if, before the trial it was or was not likely to be relevant). Nevertheless January was clearly a vital month and all of Mrs Kirkby's photographs (or such of them as were possible) could have when first produced have been subjected to forensic analysis to establish their date.

65. Nor am I convinced the evidence (whilst credible) would have an important influence on the trial. Whilst I agree it must be remembered that the burden of proof was on Mrs Kirkby to establish her case, not on Mr Heaney to disprove it, nevertheless it was Mr Heaney who was saying that the April photograph supported his proposition that grass could not have been sown in January if it was not visible in the April photograph. Whilst generally I accept that the burden of proof was on Mrs Kirkby to establish her claim to adverse possession, as so often in proceedings the burden shifts backwards and forwards depending on the proposition. The FTT Judge did not find the photograph of Mr Bentley so clear as to persuade him that there might not be some initial growth. So too, in my judgment, with the photograph now said to be taken in April 2000[12]. If there had been some expert evidence (and given Mr Bentley's photograph Mr Heaney might have deployed it) that might have supported the point Mr Heaney sought to make.

66. I do not think that flexibility, fairness and justice do require this fresh evidence to be admitted either. It is simply potentially determinative of the date the photograph was taken. It does not directly or vitally support Mr Bentley's photograph even though it might be thought consistent with it. Equally it might not. There is no application to adduce expert evidence as to seed growing rates for the area in question (for perhaps understandable reasons). Additionally, if admitted there would have to be a round of further evidence from additional experts on the side of Mrs Kirkby and possibly, as with Mr Green, the recall of Mr and Mrs Kirkby and Mr Heaney. There is considerable force in Mr Francis's submission here too that this would be disproportionate.

---

[11] See Judgment at paragraphs 29, 31 and Decision of 14 April 2014 (Appeal Bundle, pp. 12-13, 65. This latter was based on paragraph 18(f) of the Grounds of Appeal at Appeal Bundle, pp. 51-52 (the Bentley photograph).

[12] That is the one at Core Bundle, p. 7W.

67. Accordingly for these reasons I would decline to allow this evidence, too.

The Consent Order

68. I have again dealt above with the provenance and purported significance of the Consent Order.

69. The issue of the Consent Order was first raised after the hearing before the FTT when Mr Heaney applied to the FTT Judge for permission to adduce it by way of fresh evidence.

70. It appears that at the outset of the proceedings again Mr Heaney was not represented and prepared his initial witness statement himself. By the hearing (October 2013) he was represented by solicitors and counsel. On 8 October 2013 (shortly before the hearing) the solicitors for Mrs Kirkby sent to Mr Heaney's solicitors a Supplemental Bundle containing exhibits to Mr Heaney's first witness statement which had been omitted. The index to the Bundle only went to tab 33 and page 176. At the hearing (during the first day apparently) further documents consisting of tabs 34-35 were handed to Mr Heaney's solicitors and a copy of the bundle provided to Mr Heaney including the (unindexed) documents at tab 34 (photographs) and 35 (which included details of the county court proceedings including the letter of 13 February 2012 from Pinsent Masons, and a copy of the Consent Order signed by one side). Unfortunately given this had arrived late no one looked to or looked close enough to see what the documents contained. Had they done so they would at least have seen the copy Consent Order signed by Pinsent Masons[13].

71. As a result the significance of the Consent Order did not arise until after the FTT hearing and decision.

72. Mr Heaney applied to the FTT Judge both for permission to appeal (refused) and to adduce fresh evidence in the form of the Consent Order as signed by solicitors for both parties. (It was in fact a copy since the original has not been located.) The FTT Judge refused to allow the fresh evidence[14].

73. The FTT Judge found that the first guideline in *Ladd v Marshall* had not been met. The document (whilst plainly credible) could have been obtained with reasonable diligence. One can well understand the difficulties with which Mr Heaney in initially representing himself was faced, especially when it came to deciding which documents to produce. One can also have sympathy with the late delivery of documents. It would be unreasonable to expect him and his advisers to grasp the significance of everything they were handed on the first day of the hearing or even in the late delivered Supplemental Bundle. But there had already been an allusion to the existence of the County Court proceedings in Mrs Kirkby's

13 Supplemental Bundle, pp. 224-225.

14 See Decision 14 April 2014 paragraphs 4-14, Appeal Bundle, pp. 66-70.

first witness statement of 16 April 2013 and in Mr Heaney's first witness statement of the same date[15]. As previously noted a copy of the signed copy of the Consent Order had already been sent to and was in the possession of Mr Heaney well before the hearing. Given it is apparent both sides were aware and had mentioned the Leeds County Court Case in their respective FTT evidence it is surprising no one dug to find a copy of the Order or at least asked questions about it at trial. Even if in the excitement of the first day the Consent Order in the Supplemental Bundle is overlooked, it ought to have been found before the end of the trial in time to ask questions (if necessary by recalling witnesses) about it or to form the basis of submissions.

74. The FTT Judge found the second criteria (important influence) also unfulfilled on the basis that by the time of the Consent Order Mr Heaney's title had already been barred or extinguished under s 17 Limitation Act 1980 on the basis of his finding of fact that adverse possession commenced in July 1999. I consider this criteria neutral to arguable (in Mr Heaney's favour) in that if Mr Randall succeeds in displacing the findings as to possession in July 1999 and January 2000, then the Consent Order could be deployed as further evidence of absence of intention to possess in February 2012. (Even then Mr Heaney has all sorts of other obstacles to overcome, not least the conflicting evidence of the letter addressed to HMLR the same day as the Consent Order previously mentioned.)

75. I consider therefore that the obstacles to admission of the signed Consent Order are formidable. Nevertheless, to ignore its obvious existence seems to me would be to provide a sense of unreality to the proceedings on appeal. The existence of the document would be known about but not touched on. No one needs to be examined or cross-examined about it; the document speaks for itself. Whether it has the impact Mr Randall suggests is not the issue. I merely consider that in applying the ultimate test, that of fairness and justice this evidence ought to be allowed. The reality cannot be ignored. None of this however prevents Mr Francis raising objections to the provenance of the document actually relied on or to Mr Randall's raising of a point not argued at trial. I have simply not dealt with those aspects of the case.

Conclusion

76. Does that therefore mean I ought to revisit the other alleged new evidence of Mr Green and HMNAO (Dr Bell) on the same basis looking at matters in the round? In my judgment I do not consider that I should or ought to. The evidence of Mr Green and HMNAO is on a different footing, would lead to greater delay and expense by necessitating further examination and further expert evidence for potentially little reward. The Consent Order stands alone if, and only if, Mr Randall succeeds in overcoming the hurdles I have mentioned so that Mr Heaney's title is not barred by the

[15] Paragraphs 47 and 30 respectively (Main Bundle, pp. 302, 451).

time the Consent Order was signed. Accordingly I reach the conclusion for the reasons given that the Consent Order may be adduced, but that is all.