IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER) FTC/86/2014

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: 10 April 2015

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 :

MARCUS ALEXANDER HEANEY **Appellant**

- and –

HILARY KATHRYN KIRKBY **Respondent**

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

Hearing dates: 2, 3 February 2015
Hand down Decision: 10th April 2015

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APPROVED DECISION

Date: 10 April 2015 Roger Kaye QC

HH Judge Roger Kaye QC:

Introduction

1. This appeal is round two of 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 under title number YY2869.

2. The Verge measures approximately 32 metres in length and is zig-zag shaped. It is situate between The Coach House and a narrow lane, road or track way, which provides access to a number of properties including The Coach House and the home of a neighbour, the Appellant, Mr Marcus Heaney. The Verge also now includes two car-parking spaces. The Appellant also owns land opposite to Mrs Kirkby on the other side of this narrow lane, road or track way dividing their properties at and known as The Woodshed, Thorp Arch, Wetherby LS23 7AB ("the Woodshed"). He is also the paper title owner of the Verge having acquired it on 13 February 2012.

3. It emerged fairly late in this second stage that a small strip apparently otherwise included in the Verge (and included within the decision of the FTT Judge) was, by an admitted error of the Land Registry, not included in the referral made to the FTT Judge. Both sides anticipate however that there should be no insuperable difficulty over this small error which it is anticipated by all, including HMLR, will be dealt with consequential on the outcome of this appeal.

4. 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.

5. HHJ Behrens, sitting as a judge of the Upper Tribunal, gave permission to appeal by a Decision dated 19 June 2014.

6. At the first stage I heard and determined the appeal against the refusal to admit fresh evidence by, in a decision dated 10 December 2014, allowing one of the pieces of fresh evidence namely the Consent Order dated 15 February 2012 referred to above made between the Respondent and her husband (as Claimants) and the Appellant (as Defendant) in proceedings in the Leeds County Court commenced in August 2010 under case number 0LS51332[1]. The circumstances in which this came about are set out in my first Decision to which reference should be made[2].

7. The Consent Order, a copy of which signed by the solicitors on behalf of Mrs Kirkby (and her husband) was not before the FTT but a copy (unsigned) was but was not seemingly relied on for reasons stated in my first Decision.

8. The 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*"

9. I also extended time for appealing that decision to the handing down of this decision so that if convenient all matters could be dealt with together.

The Appeal

10. As foreshadowed in that earlier decision, 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 the Verge 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 Verge set out in her statement of case in the County Court proceedings between her and Mr Heaney referred to above; and
    c. Third (Ground 3), the conclusion of the FTT Judge that Mrs Kirkby was in possession of the Verge 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.

Background

11. The background to the appeal was also set out in my first Decision, but to spare too much cross referral I largely repeat it here.

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1 See Appeal Bundle ("AB"), pp. 113-114.
2 See paragraphs 27-36, 68-75.

12. The Coach House, The Woodshed and other neighbouring properties were once part of the Hatfeild Estate. Mr Heaney acquired The Woodshed from the trustees of the Estate in March 1995 together with a right of way over the road or track way but not over the Verge.

13. Mrs Kirkby acquired the freehold of the Coach House in June 1999 from a Mr Carpenter in order to convert it into a home for herself and her husband with the benefit of planning permission one condition of which (condition 10) required consent to be obtained for a landscaping scheme to the property including the Verge. The title did not, however, include the Verge. At least at that time there appeared to be no paper title to the Verge. She had also obtained consent from the Hatfield Estate to the plans and specifications for the conversion in April 1999. The approach to the principal entrance or front door to the new house from the track way was and is over the Verge.

14. She and her husband cleared the Verge of bushes and carried out considerable redevelopment, refurbishment and conversion works to the property including the connection of foul and surface water drainage to existing drains under the Verge. They moved into The Coach House in January 2000 following practical completion of the works in December 1999. Thereafter they sought and obtained (on 18 February 2000) approval from the local planning authority for landscaping The Coach House and Verge in accordance with their planning permission. They did other works to the Verge as outlined below.

15. 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.

The Application and Hearing

16. By her application for first registration on 10 April 2012 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:

    - The creation or reinstatement of the existing hard-standing at the northern end of the Verge to create two car parking spaces in 2000;
    - The erection of a fence and dry stone wall at the southern edge of the Verge;
    - 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;
    - The placing of a coping stone with the name of The Coach House carved on it;

- The planting of a flower border and various plants adjacent to The Coach House;
- Various works of maintenance such as cutting back plants on the Verge, cutting, feeding and maintaining the lawn on the Verge and clearing leaves on the land and cutting and pruning bushes;
- Planting and maintaining flowers in a stone or granite trough on the Verge (not placed there by the Appellant or her husband);
- The placement of boundary stones on the Verge in 2003 (if not earlier) and a post and rail fence in 2008 (subsequently removed after about 21 months in place – below).

17. 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. He had acquired the paper title to the Verge from the Hatfeild Estate in February 2012. The issue ultimately came before the FTT.

18. It was Mr Heaney's case:-

- 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. Such common use included use of the Verge for parking, manoeuvring vehicles when entering and exiting nearby properties or loading and unloading vehicles, use by pedestrians for the avoidance of passing vehicles, and acts of maintenance by Mr Heaney including the cutting of bushes, removing of paving and other stones, and occasional mowing of the lawn;
- That Mrs Kirkby had not held the requisite intention to possess the Verge as demonstrated by a number of factors such as their Reply in the above-mentioned County Court proceedings in November 2010 that they were not attempting to claim a possessory title, a letter from Mrs Kirkby of 16 February 2012 indicating her willingness to purchase the Verge (thereby implying she did not already own it), and (by virtue of the fresh evidence) the Consent Order of 15 February 2012 (above) containing a recital said to be an acknowledgment of Mr Heaney's title;
- 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 by removing her car, the stone house sign, various plant pots, and the boundary stones.

19. 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).

20. 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. The Judge also had a view of the site[3] and the benefit of a large number of documents, plans and photographs included in the trial bundles.

The Decision

21. 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 1980 Act"). The FTT Judge further concluded that Mrs Kirkby remained in actual possession of the Verge on 10 April 2012 (for the purposes of s 9(5)(a) LRA 2002) 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.

The Law

22. There is no dispute between the parties as to the law applicable to cases of adverse possession. Nor is it disputed that the FTT Judge correctly reminded himself and set out the relevant applicable legal framework[4]. The central thrust of the argument of Mr John Randall QC, counsel for the Appellant, is that the FTT Judge applied it to the facts found (or which he ought to have found) incorrectly.

23. It is also common ground that an appeal court must pay due deference to the findings of the trial judge (one who was, as Mr Andrew Francis, counsel for Mrs Kirkby submits, a specialist judge sitting in a specialist tribunal). He saw the witnesses, saw and heard a great deal of evidence, documentary and photographic and also had a view of the site. That said a distinction has to be drawn between primary findings of fact and appropriate inferences based on those findings. Whilst an appeal court may be very slow to interfere with the former, so far as an evaluation of the appropriate inferences is concerned an appeal court may be just as able to draw these from the primary findings: see, for example, *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 CA.

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3 See his decision paras 3-4 for a description of the site and environs.

4 See paragraphs 45-53 of his Decision.

24. Mr Randall's main submissions were to the effect that the FTT Judge made errors in his evaluation of the primary evidence. In one respect he does challenge the primary findings: in connection with the sowing of grass seed in January 2000.

25. Mr Francis submits, in summary, there is no basis for interference with the Judge's findings or evaluations. There was evidence to support both.

26. Having regard to the foregoing I can therefore summarise the legal position shortly. The paper title owner may be regarded for these purposes as the person owning the relevant land according to the registered title or conveyancing history whilst the adverse possessor or squatter refers to the person claiming adverse possession of the same land as against the paper title owner. In this case Mr Heaney had the paper title from February 2012 and it appears that the Hatfeild Trustees may have had it before then (though the FTT Judge was not completely satisfied on that point[5] seemingly due to the absence of paper title). The person claiming to be adverse possessor was and is Mrs Kirkby.

27. The relevant limitation period for the recovery of land by action is 12 years from the date on which the right of action accrued: s 15(1) of the 1980 Act. It is common ground that so far as applicable to this case (not being settled land or land held on trust for sale to which the provisions in s 18 of the 1980 Act apply) after the expiration of the 12 year period the title of the paper owner is extinguished: s 17.

28. Schedule 1 of the 1980 Act contains provisions for determining the date of accrual of the right of action (s 15(6)). Schedule 1, paragraph 8(1), requires the adverse possessor to be in possession of the relevant land. Paragraph 8(4) provides that it is not be assumed that the adverse possessor is in possession by permission of the paper title owner merely because his occupation is not inconsistent with the latter's present or future enjoyment of the land but this is not to be taken as prejudicing a finding on the actual facts of the case that such occupation was by implied permission. As the FTT Judge noted, the relevant question is whether the person in adverse possession has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner: see *JA Pye (Oxford Ltd) v Graham* [2003] AC 419 at paragraphs 36-37 per Lord Browne-Wilkinson.

29. Legal possession comprises two elements, first factual possession manifested by a sufficient degree of physical custody and control and second, an intention to possess by exercising such custody and control on one's own behalf and for one's own benefit though such intention may be deduced from the physical acts (*JA Pye (Oxford Ltd) v Graham* [2003] AC 419 at paragraph 40 per Lord Browne-Wilkinson). It must be such that the adverse possessor or squatter demonstrates by his conduct to the world including the paper owner that he has an actual intention to possess the

[5] See paragraph 56 of the FTT Judge's Decision.

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

30. Factual possession involves a sufficient degree of exclusive possession exercised by a sufficient degree of excusive physical control which depends on the overall circumstances of the case; broadly speaking dealing with the land as an occupying owner might have been expected to deal with it and no one else has done so (see *Powell v McFarlane* (1977) 38 P & CR 452, at 470-471 per Slade J cited in *JA Pye (Oxford Ltd) v Graham* [2003] AC 419 at paragraph 41). What must be looked at – objectively – is factual possession which is to be assessed by reference to the squatter's acts relied on to constitute possession and the absence of any acts of possession by the paper owner: see *Wretham v Ross* [2005] EWHC 125 (Ch) at [24] per David Richards J. Fencing or enclosing the land in question is clearly a classic way of establishing exclusive possession but it does not follow that the absence of such fencing is fatal to a claim to adverse possession: see *Simpson v Fergus (*2000) 79 P&CR 398, 402 per Robert Walker J.

The Grounds of Appeal - Preliminary

31. I have already drawn attention to the nature of the task on this appeal. The law is not in dispute, the essential issue is whether the decision is to be upheld in light of the primary facts as found (or, per Mr Randall, ought to have been found) and of the Judge's application of the law. This involves an examination of three issues:

    - First, did Mrs Kirkby have factual possession of the Verge for the relevant period of 12 years? (Grounds 1-2 of the Appeal.)
    - Second, did she have the intention to possess the Verge for that period? (Grounds 1-2.)
    - Third, was she in actual possession for the purposes of s 9(5) LRA 2002 on 10 April 2012? (Ground 3.)

32. Mr Randall 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 the Respondent, 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 Mrs Kirkby had established that she was in actual possession on 10 April 2012, so as to satisfy s.9(5)(a) LRA 2002.

33. Mr Andrew Francis for Mrs Kirkby argues that the decision was not wrong and should be upheld.

Grounds of Appeal 1-2 – Factual Possession July 1999 to mid-February 2012

34. Mr Randall submitted that the FTT Judge erred in concluding that Mrs Kirkby went into factual possession in July 1999 and remained in possession thereafter for a number of reasons concerning the following:

- The building works and the use of the Verge by the builders;
- The absence of fencing;
- The consent of the Hatfeild Estate to the redevelopment of The Coach House;
- Mrs Kirkby's own assertion that she had been in possession of the Verge since 2000 when she moved into the property) and not July 1999;
- The reinstatement and landscaping of the Verge in January 2000;
- The use of the Verge by others;
- The abandonment of the Verge in mid-February 2012.

The Building Works and Absence of Fencing

35. The FTT Judge found that the building works had started in July 1999 and practical completion reached in December 1999. Fencing was erected between The Coach House and land adjoining at the south end but not where the Verge adjoined the track running alongside it. He noted bags of sand and gravel, scaffolding (subsequently erected on the Verge), a skip, a wooden pallet, steel lintels, joists, rafters, plaster and chipboard, roofing materials and a roll of orange plastic net fencing all lying on the Verge or unloaded on to the Verge. He also noted hardcore placed at the northern boundary or side of the Verge to form a hard standing for cars. He also found the Verge was cleared of bushes with a mechanical digger and used as part of the building, as a base for scaffolding, a place for unloading and storing materials. No one else used the Verge in this time, nor could they have done so given the presence of the scaffolding and building materials[6].

36. In these circumstances the Judge found that Mrs Kirkby had exercised a sufficient degree of exclusive control of the disputed land from the commencement of those works and no-one else did. He also found that Mrs Kirkby had manifested an intention to possess the Verge and it would have been apparent to the world she was intending to deal with the land in a way that excluded the world at large. Accordingly he did not consider it necessary for Mrs Kirkby to have fenced the Verge to make her intention to possess it plain.[7]

37. Mr Randall subjected these findings and conclusions to heavy criticism. He ingeniously and if I may say so very attractively isolated a large number of incidents and subjected them to a detailed analysis, each of which did not constitute factual possession or were overlooked by the Judge as the case may be.

38. In my judgment what matters is an objective assessment of the circumstances and all the circumstances taken as a whole. It is not just a question of taking isolated items. In my judgment there was plainly

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6 See Decision, paras. 10-11, 55.

7 Decision, para. 55.

evidence, all of which entitled the FTT Judge to reach the findings and the conclusions, he did. Moreover I agree with those conclusions.

39. Mr Randall's detailed analysis submitted that the mere use of the Verge for temporary purposes by the builders was not evidence of Mrs Kirkby taking possession. I disagree. The builders were there plainly on Mrs Kirkby's instructions and as her agents. He submitted that the erection of scaffolding did not constitute taking possession. It was merely there as an expedient to enable the building works to be carried out. So viewed Mr Randall may be right but it cannot be viewed in isolation. The scaffolding was part of the activities on the Verge instructed by and authorised by Mrs Kirkby.

40. More specifically with regard to the absence of fencing, the Judge found that the Verge was not fenced off except for some 21 months between July 2008 and April 2010. The absence of fencing was, in my judgment correctly justified by the Judge as not necessary in all the circumstances. The builders needed to unload and store materials on the Verge. As he also pointed out fencing is only one way, but need not be the only way physical control is exercised[8].

The Consent of the Hatfield Trustees to Plans

41. On acquiring The Coach House Mrs Kirkby was required to obtain consent of the Hatfeild Trustees to the plans and specifications of the proposed redevelopment. It was submitted before the FTT Judge (and before me) that this amounted to implied consent for the purposes of Schedule 1, paragraph 8(4) of the 1980 Act (see above). The FTT Judge rejected this[9] on the grounds first, it had not been proven that the paper title was vested in the Hatfeild Trustees; second, it was not to be implied from the approval of the plans that they consented to the use of the Verge. There was no evidence that they were informed how the works would be carried out. Had they been asked for consent for use of the land, they could have granted permission on terms as to appropriate safeguards and reinstatement.

42. In any event, as Mr Francis rightly pointed out, the covenant or obligation as to plans had nothing to do with the Verge and only extended to The Coach House. In these circumstances in my judgment the conclusion of the FTT Judge was amply justified.

Mrs Kirkby's Assertion she had been in possession since 2000, not July 1999

43. This assertion was made in a letter to HMLR dated 15 February 2012 by Mrs Kirkby's solicitors. Mr Randall submitted the FTT Judge had failed to take any or any proper account of it. It was raised as an attempt to defer the start of the 12-year period as late as possible.

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8 See para. 58.

9 Para. 56.

44. Whatever Mrs Kirkby may have asserted through her solicitors, it was the evidence at the hearing that mattered. The Judge plainly preferred and accepted the evidence of Mrs Kirkby and her husband[10] in relation to the building operations and accepted, as already mentioned, that her possession had commenced in July 1999.

The Reinstatement and Landscaping of the Verge

45. The FTT Judge in his Decision found that following practical completion of the building works in December 1999, Mr and Mrs Kirkby moved into the property on 20 January 2000. Prior to moving in they had accomplished a number of steps to reinstate and improve the Verge, they placed hardcore at the northern end for a parking area, received a delivery of 12 tons of topsoil and spread over the Verge by the builders. Mr Kirkby levelled and raked the soil, created flowerbeds, laid paving slabs to the front door, and sowed grass seed[11]. This latter action was very much disputed and challenged to the point that it was submitted the Judge was wrong to have found this as a primary fact, again in an attempt to defer time running. Reliance was placed by Mr Randall on the evidence of Mr Bentley, on photographs (an attempt at an earlier stage was to rely on fresh evidence in the form of the evidence of HMNAO and from photographs), on the poor witness statement evidence of the Kirkbys, on the unlikelihood of the Kirkbys jumping the gun by sewing seed before they had local planning authority approval to the scheme. All of this (with the exception of the attempted fresh evidence) was before the FTT Judge. Mr Randall alleged that the FTT Judge had failed to take account of this or that, in particular had placed undue reliance on the absence of expert evidence as to the rate of growth of grass seed.

46. In my judgment with respect to Mr Randall the matter has been subjected to a painstaking and painful degree of over-analysis. He even attacked the credibility of the Kirkbys which was plainly a matter for the FTT Judge. It is not necessary for me to go through each and every item of criticism made on Mr Heaney's behalf on this point. The Judge, as it seems to me, looked at the matter carefully and in the light of submissions made to him, weighed the matter up and ultimately preferred and accepted the evidence of the Kirkby's, particularly that tested in the witness-box by cross-examination, as he was entitled to. In my judgment there was material before the Judge justifying and supporting his findings and conclusions.

47. As Mr Francis submitted, the levelling and laying of topsoil (12 tons of it, it has to be said) in January 2000 was evidence of factual possession of the highest degree, so was the creation of the hard standing for cars.

The Use of the Verge By Others

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10 See witness statement at Main Bundle 2, tab 1, p. 295 and cross-examination at AB p.15.

11 Decision, paras. 11, 28-31, 57.

48. There was, as Mr Randall pointed out, a great deal of evidence of occasional use of the Verge by others accepted by the FTT Judge[12]: for occasional parking, and for manoeuvring of cars and other vehicles or as a public amenity to allow others to pass. Mr Randall even submitted that the FTT Judge had made no finding that any part of the Verge, let alone all of it, was used as a private garden.

49. On the contrary, the FTT Judge found that Mr and Mrs Kirkby were the only people to carry out any gardening work on the Verge from the time of their acquisition until after 13 February 2012 and that they had used the Verge, amongst other things, as a garden[13]. As for use by others, as the Judge again pointed out, what matters is that the person claiming possession has a sufficient degree of physical custody and what is sufficient depends on the circumstances. The Judge felt the degree of control exercised by Mrs Kirkby was appropriate in all the circumstances. There was evidence before him justifying his findings and this conclusion.

Abandonment in Mid-February 2012

50. Following Mr Heaney's acquisition of the paper title on 13 February 2012, as noted above, through his solicitors he 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 on 18 February 2012 on advice of her solicitors by removing her car, the stone house sign, various plant pots, and the boundary stones thereby, it was maintained on his behalf both before the FTT Judge and before me, deliberately and intentionally abandoning or vacating the Verge[14]. The flag or paving stones remained. A few days previously, Mrs Kirkby's solicitors wrote to HMLR objecting to Mr Heaney's own application for first registration (his application was not immediately dealt with owing to a degree of uncertainty about the title of the Hatfeild Estate to the Verge). About a week later, the solicitors changed their advice. Whilst the Kirkbys did not replace the car, they did continue to gain access to their house over the Verge and carried out other minor acts of maintenance and gardening[15]. The FTT Judge found (relying on *Mount Carmel Ltd v Peter Thurlow Ltd & Elizabeth Smee* [1988] 1 WLR 1078 CA) that to amount to abandonment of the Verge, Mrs Kirkby must be taken to have relinquished all claims to it. On the facts, she had not by maintaining her opposition to Mr Heaney's title.

51. In my judgment there was evidence to justify this conclusion and I would not dissent from it. In any event, if adverse possession started as the Judge found in July 1999 the paper owner's title would have been extinguished under s 17 of the 1980 Act and Mr Heaney cannot have obtained any good title to the Verge.

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12 Decision, para. 36.
13 Decision, paras, 41, 57.
14 Decision, paras. 21, 63.
15 See Decision, paras. 21-23, 44 as amended, 63 (as amended), 64.

52. I conclude therefore that in my judgment the FTT Judge was entitled to reach the conclusion that he did, namely that Mrs Kirkby had factual possession of the Verge for the relevant period of 12 years from July 1999.

53. I therefore now turn to the second issue whether Mrs Kirkby had the relevant intention to possess the Verge for the same period.

Grounds of Appeal 1-2 – Intention to Possess July 1999 to mid-February 2012

54. Again as noted above the FTT Judge found that Mrs Kirkby had manifested an intention to posses the Verge from July 1999[16] and that she continued to demonstrate this intention after the building works had been completed by the landscaping and continued maintenance of the Verge in excess of the next 12 years[17] at the expiration of which the paper owner's title was extinguished under s 17.

55. Mr Randall makes five points on this aspect of the case:

- First, that the evidence of intention insofar as derived from the factual possession was equivocal;
- Second, her Reply in the County Court proceedings referred to above expressly disavowed an intention to claim possessory title;
- Third, he relies on the terms of the Consent Order;
- Fourth, he relies on Mrs Kirkby having abandoned the Verge following Mr Heaney's demand to do so in February 2012;
- Fifth, he relies on a letter written by Mrs Kirkby to the Hatfeild estate trustees also in February 2012.

56. As to the first, the FTT repeatedly emphasised that Mrs Kirkby's acts must have demonstrated to the whole world her intentions as regards the Verge: to incorporate it as part of The Coach House. In my judgment there was more than enough evidence to support this conclusion.

57. As to her Reply in the County Court proceedings, the argument as to this ran briefly as follows: in the County Court proceedings commenced in August 2010 Mr and Mrs Kirkby sought an injunction to prevent Mr Heaney (who had removed their fence and stones from the edge of the Verge) from interfering with the fence erected on the Verge and their enjoyment of The Coach House. Mr Randall argued that the claim did not seek an injunction preventing trespass on the Verge. In his original Defence (when acting in person) Mr Heaney alleged (in paragraph 14) that Mr and Mrs Kirkby were "*endeavouring to claim this land by possessory title*". In paragraph 9 of her Reply (settled by counsel), Mrs Kirkby stated "*It is denied that the claimants are "endeavouring to claim this land by possessory title*" as alleged in paragraph 14 "*or at all"*.

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16 See above and Decision, para. 55.

17 Decision, para. 60.

58. The FTT Judge quoted the passages from the pleadings save for the words "*or at all*" and concluded that Mrs Kirkby's pleading was to be construed as being confined to a statement that she was not seeking to assert that she had barred the paper owner by adverse possession. He also pointed out that in paragraph 4 of the Reply, Mr and Mrs Kirkby had pleaded that they "*did not need to assert ownership of* [the Verge] *in order to bring the present proceedings*". He also quoted the further words in paragraph 9 of the Reply that "*This action is concerned only with* [Mr Heaney's] *interference with chattels which belong to the claimants and which were located on the* [Verge] *which was at all material times in the possession* [of Mr and Mrs Kirkby] *and with his interference with* [their] *enjoyment of the said* [Verge] *over which* [Mr Heaney] *has no title or other rights which could entitle him to dispossess* [them]." He decided that the effect of the pleading was that the issue of possessory title simply did not arise in that action. Mr and Mrs Kirkby were in possession; Mr Heaney was not and had no title at all to the Verge.[18]

59. It is true that the Judge omitted the words "*or at all*" but as Mr Francis submits, the pleading must be read in context. At that time Mr Heaney had not asserted title to the Verge. He had even less rights than a squatter. As between him and the Kirkbys the latter had a better claim to the Verge, they were at least in possession and it was obviously part of the curtilage of their property. In my judgment the FTT Judge was right to reject the argument. The words "*or at all*" viewed in this context added nothing. To amount to a complete disavowal of their claim to be acquiring possessory title clearer language would be needed. They were in possession and claimed possession. Mr Heaney was not and could not.

60. As to the Consent Order, again the context was a claim about Mr Heaney's interference with chattels on the land. In any event Mrs Kirkby's letter to HMLR objecting to Mr Heaney's title on the same day as the Consent Order can have left no one in any doubt where the Kirkby's stood on the matter.

61. As to abandonment, I have dealt with this under the previous heading.

62. Finally as to Mrs Kirkby's letter of protest to the Hatfeild Trustees written just after discovering Mr Heaney's acquisition of the paper title is merely an expression of her concern. She wrote she regrets not having approached the Trustees earlier but did not because she had been led to believe there were no deeds, She also indicated that she would have paid more than Mr Heaney (who paid £10,000). Mr Randall submits that she would not have so written if she believed she already owned or intended to possess the Verge. Although referred to by the Judge[19] he appears, argues Mr Randall, not to have appreciated its significance. In my judgment the letter does not assist Mr Randall at all. At best it is an expression of regret for not having acquired the Verge at the outset or earlier, which might have saved her

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18 Decision, paras. 20, 59.

19 Decision, para. 22.

much trouble with Mr Heaney. It does not, in my judgment, indicate a lack of intention to possession the Verge.

63. Accordingly I conclude that on the second issue, was there intention to possess, that the FTT Judge was entitled to reach the conclusion that he did.

64. It follows that in my judgment there was evidence supporting and justifying the FTT Judge's conclusions that Mrs Kirkby had factual possession and the necessary intention to possess from July 1999 through to mid-February 2012. In those circumstances the paper owner's title would have been and was extinguished under s 17 of the 1980 Act by August 2011. It was not and is not therefore strictly necessary to consider the impact of the letters or Consent Order of February 2012 beyond the foregoing to demonstrate had it been so I would have concluded against Mr Randall on these aspects.

Ground 3 – Actual Possession on 10 April 2012

65. Mr Randall submitted the FTT Judge was wrong to conclude that Mrs Kirkby was in actual possession on 10 April 2012 in accordance with the requirement of s 9(5)(a) LRA 2002. Most of his criticism is to the effect that the Judge ignored the fact that Mrs Kirkby had to a large extent complied with Mr Heaney's demands on acquiring the paper title.

66. But the Judge did not ignore the context, which was by April 2012 Mrs Kirkby had barred the title of the paper owner having already been in adverse possession for over 12 years. True she and her husband were only doing minor maters of maintenance at the time, but the Verge still afforded access to their home across the paving slabs which gave a route to their front door. Moreover even if not in possession she could have succeeded in obtaining possession from Mr Heaney and then made a fresh application to be registered[20].

67. Mr Francis argues, rightly in my judgment, that the Judge had also concluded that Mrs Kirkby had not abandoned possession and was in possession "*by virtue of the estate*" (see s 9(5)(a)), i.e. by virtue of her own estate due to having extinguished the title of the prior paper title owner.

68. In my judgment the FTT Judge reached a conclusion that the Respondent was in actual possession on the relevant date, the 10 Aril 2012 and there was evidence before him to support such a conclusion on the evidence and his findings.

Conclusion

69. Mr Randall also raised further points relating to the small strip of the Verge which had not been registered and the effect of extinguishment of

[20] See Decision, paras. 63-64 as amended.

the paper title as regards the Hatfeild Estate Trustees. Neither of these points was raised below nor in the Notice of Appeal.

70. It follows in my judgment the FTT Judge's conclusions were supported by and justified on the evidence before him and the findings he made.

71. In the result I dismiss the appeal.