[2017] UKUT 0427 (TCC)

Appeal number UT/2017/0042

Adverse possession – paving stones – control – exclusion of others

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

HAROLD NORBERT FRANK and LESLEY FRANK Appellants

- and -

SHIRLEY ANN THORPE Respondent

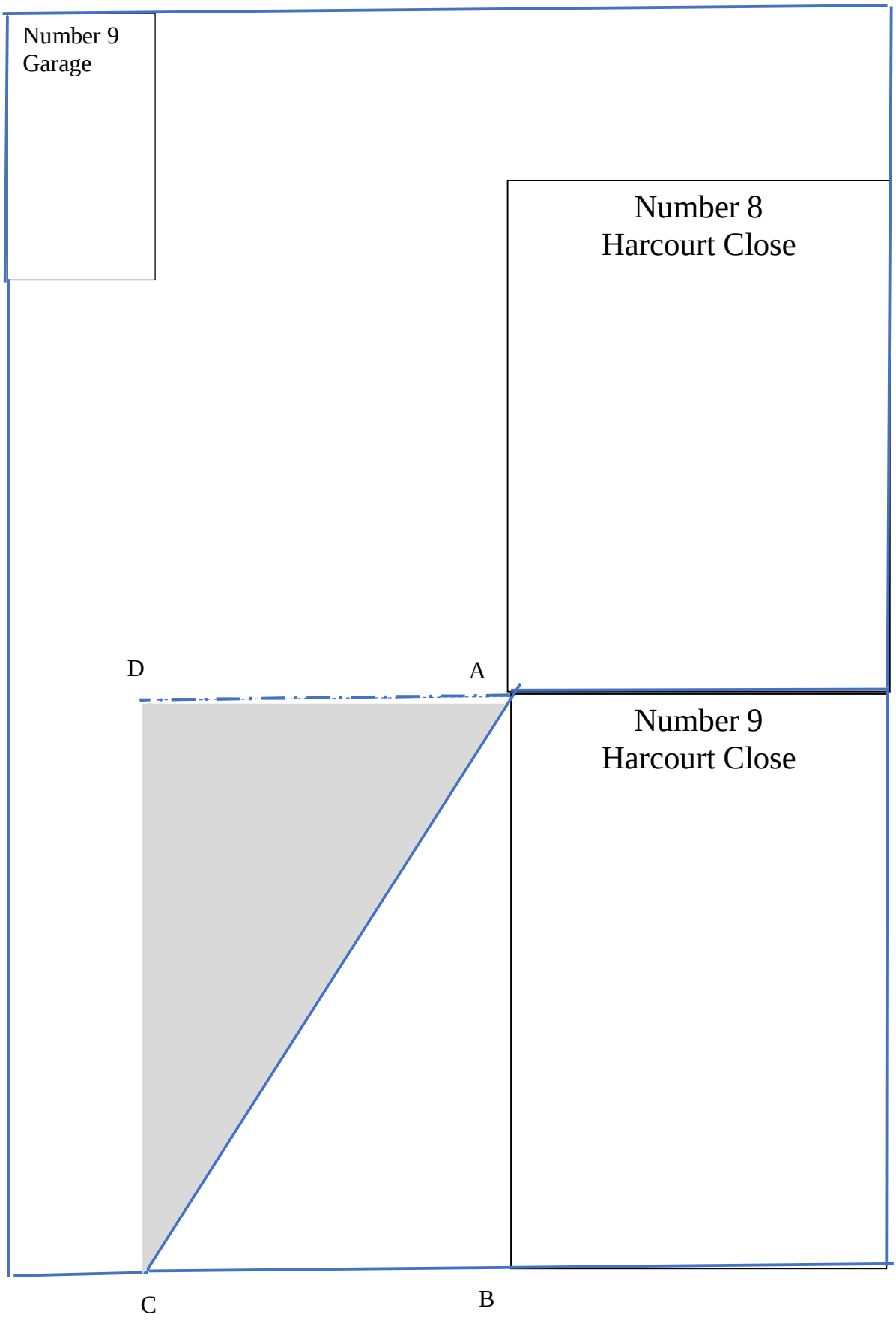
Sitting in public in the Rolls Building on 3 October 2017

Mr Edward Denehan, instructed by Gregsons Solicitors, for the Appellants

Mr Mark Halliwell, instructed by Harland & Co Solicitors, for the Respondent

DECISION

1. The Appellants, Mr and Mrs Frank, are the registered proprietors of Number 8 Harcourt Close, Bishopthorpe, York, and the Respondent Mrs Thorpe is the registered proprietor of Number 9 next door. Mrs Thorpe has applied to HM Land Registry to be registered as proprietor of a triangular piece of land, which I will call "the disputed triangle", in front of her house; she says she has acquired title to it by adverse possession. Mr and Mrs Frank objected and the dispute was referred to the Land Registration Division of the First-tier Tribunal ("the FTT"). On 7 December 2016, after a site visit and a hearing, the FTT ordered the registrar to respond to Mrs Thorpe's application as if the objection had not been made. Accordingly Mrs Thorpe is now the registered proprietor of the disputed triangle, which is registered under its own title number NYK421739.
2. Mr and Mrs Frank appeal the FTT's decision. Their application for permission to appeal stated that they did not challenge the findings of fact made by the FTT, but sought to challenge the conclusions drawn by the FTT from those facts both as to factual possession by Mrs Thorpe and as to her intention to possess the disputed triangle. I gave permission to appeal on 10 April 2017. I directed a re-hearing of part of the evidence for reasons that I explain at paragraph 11 below.
3. I heard the appeal in the Rolls Building on 3 October 2017. Mr Edward Denehan of counsel represented the Appellants, who both attended; the Respondent attended with her son, Mr Steven Thorpe, and was represented by Mr Mark Halliwell of counsel. I am grateful to both advocates for their very helpful arguments.
4. In the paragraphs that follow I set out the factual background insofar as it is not in dispute, followed by my findings of fact on the evidence that was re-heard before me. I then summarise the law, and explain why the appeal succeeds.


Number 9
Garage
Number 8
Harcourt Close
D
A
Number 9
Harcourt Close
C
B

The factual background

5. The layout of Numbers 8 and 9 Harcourt Close is easy to understand from a diagram. The bold lines on the rough sketch plan (not to scale) on the preceding page show the boundaries of the paper title to the two houses, which became the boundaries on the title plans when title to Number 8 was registered in 2012 and title to Number 9 was registered in 2014. The shaded area is the disputed triangle. Lettered points are explained further below. The dotted line is the low wooden fence put up by Mrs Thorpe in 2013.

6. Mrs Thorpe bought Number 9 on 17 January 1984, having previously lived there as a tenant. When she bought it the rectangle A-B-C-D was raised very slightly, so that to drive on to it you had to drive over a concrete lip. There was a flowerbed in the middle of the rectangle. In 1986 Mrs Thorpe had the rectangle paved. The work was done by her son, who is a builder; she chose the flags and brickwork with him, and then he excavated the rectangle, laid hardcore, and mortared in flagstones and bricks to create a checkerboard pattern. The surface of the rectangle was now level with Number 9's drive and with the gravel front of Number 8.

7. At the hearing before the FTT the date of the paving work was in dispute. Mrs Sutherland, who bought Number 8 in 1995, and a number of neighbours gave evidence that it was done in 2009. The judge in the FTT came to the conclusion that they were honestly mistaken about the date and found that the work was done in 1986. I note that the paving is clearly visible in an aerial photograph taken some years before 2009.

8. After the paving work was done the rectangle at the front of Number 9 was open and accessible to all. The judge in the FTT found that Mrs Thorpe parked on the disputed triangle "on occasions". He also found that Mrs and Mrs Frank "may well" have had access to Number 8 across the disputed triangle "on occasions" when they visited Mrs Frank's mother, Mrs Sutherland, who lived there and was the registered proprietor of Number 8 until 2012 when she transferred it to Mr and Mrs Frank by way of gift. The FTT found that Mrs Thorpe washed the rectangle with a power washer, and weeded it.

9. In 2012 Mrs Sutherland had some work done on her house. One of the contractors drove over the rectangle and broke a paving stone. In 2013 Mrs Thorpe had a fence put up along the line A – D on the plan above. The judge recorded her evidence "that the purpose of putting up the fence was to stop persons crossing over the land; she did not have control before the fence was erected."

10. After the fence was put up Mrs Sutherland's solicitors wrote to Mrs Thorpe to ask her to remove it; she did not do so; she applied for registration of title both to Number 9 itself – on the basis of her paper title – and to the disputed triangle on the basis of adverse possession. Hence the current proceedings.

11. It will be apparent from my summary of the facts above that my concern about the FTT's decision, and the reason why I gave permission to appeal, was that the level of Mrs Thorpe's activity on the disputed triangle after 1986, and her own evidence that she did not have control of the rectangle, raised some doubt as to whether the facts found could justify the conclusion of law that the FTT reached. I was also concerned that both the evidence given by Mr and Mrs Frank that they drove over the disputed triangle "regularly" and the evidence given by Mrs Thorpe's son Mr Steven Thorpe that she parked there every day were apparently rejected by the FTT without explanation for that rejection and without any adverse finding as to the credibility of any witness. In order to save the parties the cost and stress of having the matter remitted to the FTT if the appeal was successful, I directed that the appeal should be by way of re-hearing so that the Upper Tribunal could dispose of the matter; however, the re-hearing was limited to the evidence of what happened after the paving was laid in 1986 because there was no challenge to the finding about the date of the re-paving.

The evidence on the re-hearing

12. The re-hearing concerned what happened after the paving work was done. Neither party asked permission to adduce additional evidence and so the witness statements submitted to the FTT were the evidence-in-chief in the Upper Tribunal.

13. Mrs Thorpe and Mr Steven Thorpe gave evidence, as did Mr Frank. Mrs Frank had simply confirmed in her statement that she agreed with everything her husband said and so she was not called to give evidence before me. And whereas the witnesses before the FTT added to their witness statements by giving further evidence-in-chief at the hearing, none of the witnesses sought to do that before me. Accordingly I have to ignore the evidence given to the FTT by Mr and Mrs Frank about their having driven over the disputed triangle when they visited Mrs Sutherland as their witness statements do not mention that.

14. I make it clear that I had no sense or suspicion that any of these four witnesses was doing anything other than telling the truth as they recalled it. The three I saw in the witness box gave evidence calmly and helpfully. I find that no one is lying and all are honest and straightforward witnesses.

15. In her statement Mrs Thorpe said that she cared for the paved rectangle by weeding it and picking up litter; she said in cross-examination that it needed weeding once a month or six weeks though not in winter, and I accept that. She also power-washed it, and I accept her evidence that she did so once a year.

16. Mrs Thorpe's evidence was that Mrs Sutherland did not use the rectangle in any way as her own, except to cross it "to see me and with express or implied licence", and that in any event she did not do so until considerably after Mrs Thorpe had already acquired the land by adverse possession. I accept Mrs Thorpe's evidence of fact that Mrs Sutherland would cross the rectangle on foot to visit her neighbour. I do not accept that Mrs Sutherland did not do so until considerably after 1998; – given the layout, the flat access, and that fact that as Mrs Thorpe said in cross-examination there was a path across the front of the bungalows it would have been very odd indeed if she had not done so and I think that Mrs Thorpe is probably mistaken about the dates. But the "express or implied licence" is lawyer-speak. The "implied licence" assumes what it sets out to prove, that the whole of the rectangle belonged to Mrs Thorpe; and in the absence of any detail about the "express licence" it is difficult to imagine that the term describes anything of legal significance. The

absence of objection to Mrs Sutherland crossing the rectangle is not an implied licence, and it does not say to the neighbour "the land is mine but on this occasion you have permission to cross".

17. Mrs Thorpe was asked if anyone else drove over the rectangle or crossed it on foot. The postman did, she said, because there is a path, but no-one else ever did so. She would have seen them if they had done. I am able to accept that Mrs Thorpe either never saw anyone else cross the rectangle, or does not remember that they did; but I do not believe that no-one ever did. The space is open and there is the path to which Mrs Thorpe referred, and I have no doubt that other pedestrian callers as well as the postman crossed the rectangle to get to the door of Number 8. The paving is attractive and tidy but in no sense forbidding and it would actually be quite odd for pedestrian visitors to go round the front of the rectangle and walk down Number 9's drive to the garage rather than walking straight across the front.

18. Mrs Thorpe's evidence was that she always parked on the rectangle. In cross-examination before me she was asked a number of questions in order to explore that statement. The hearing bundle contained a copy of a photograph of Mrs Thorpe's sister's car parked in the drive before the rectangle was paved[1]; the raised lip is clearly visible in that picture. Mrs Thorpe was asked if she also parked in the drive, as her sister did in the picture, and she explained that it is a shared drive, leading to the garages for Numbers 9 and 10 at the rear of the bungalows, and that she did not park on the drive so as not to block in the neighbour's van or car. Instead, she said, she parked "on the rectangle". I accept her evidence.

19. Mr Steven Thorpe's evidence was that his mother parked on "the buff flags" every day. In cross-examination before me he was asked how he knew that. He explained that he visited his mother twice a week, over the years, because they were very close and for most of the time he was about half an hour's

[11] The decision of the FTT records this as a photograph of Mrs Thorpe, taken by her sister; at the hearing of the appeal she considered the picture carefully, referred to a colour copy, and corrected herself. It is a picture of her sister; she and her sister look very much alike, and the picture is not very clear. The error is understandable and makes no difference to the evidential value of the picture.

drive away at home or at the office. “She was parked there every time I went there”, he said, and I accept that evidence.

20. Having heard Mr Thorpe’s evidence and seen photographs that indicate the dimension of the rectangle, it is clear to me that the difficulty with his evidence, as with Mrs Thorpe’s own evidence (and the reason why the FTT concluded that Mrs Thorpe parked on the disputed land only occasionally), is that it does not go far enough. Evidence of parking on the rectangle is not evidence of parking on the triangle, because of the size of the rectangle. Photographs indicate that the length of the front of the bungalow – between points A and B – is well over one car length and well over two car widths. Indeed, Mrs Thorpe referred at the appeal hearing to having 5 or 6 cars parked on the rectangle when she had visitors. There are two big windows at the front, with a little porthole window between them; Mrs Thorpe said that she parked “in front of the window”, but it is implausible to suppose that that would usually be the bay window of the living room, further away from the drive. Instead anyone drawing up to park on the rectangle would do so in front of the window nearest the drive – for convenience in getting to the door, which was at the side of the house, and quite simply so as not to park in front of the lounge window. Most people do not want a parked car blocking their view of the world. Mrs Thorpe’s car (and I include in that expression cars belonging to her partner Mr Briggs and subsequently her partner Mr Welby, which she drove) may have overlapped the diagonal line; one wheel may have straddled it. But she did not park on the disputed triangle every day, and I believe that the judge in the FTT was right to find that she parked on the disputed triangle only occasionally, on the balance of probabilities.

21. I do not suggest that either Mrs Thorpe or Mr Steven Thorpe was trying to obfuscate or mislead. I do not think that either appreciated the importance of the distinction between the triangle ABC to which Mrs Thorpe had a paper title and the triangle BCD to which she did not. I bear in mind Mrs Thorpe’s own evidence about her awareness of the lie of the land: in her witness statement she said that when she bought the land:

> "I took little interest in the conveyancing documents which were signed at that time; *they mean nothing when they are presented to me even now.*"

22. The emphasis there is mine.

23. So far I have looked only at the evidence given by and for Mrs Thorpe at the re-hearing, along with the FTT's findings about the date of the paving operation. She has the burden of proof of adverse possession at the re-hearing as she had in the FTT and the Appellants, as the objectors to her application to HM Land Registry, do not have to prove anything. Mrs Sutherland bought Number 9 in 1995, and transferred it to Mr and Mrs Frank by way of gift in 2012. Neither of them has lived at the property and since the 1990s they have lived successively in London and in Germany and so although they visited Mrs Sutherland they have not suggested that they did so frequently. Mr Frank's witness statement does not say that he ever passed over the rectangle; Mrs Frank's simply endorses what her husband says. So they are not in a position to assist me in deciding whether or not Mrs Thorpe has adverse possession of the disputed triangle.

24. Mrs Sutherland gave evidence to the FTT but has since sadly passed away. Her witness statement is admissible as evidence, but I treat it with caution since she has not been cross-examined before me. In it she says, of herself and Mrs Thorpe, "we both used the open area on foot and in vehicles to get to our respective properties." She said that when Mrs Thorpe put the fence up in 2013 it became impossible to use the frontage of Number 8 for visitors to park cars, and I take it that this was because previously visitors could get to the front of Number 8 by passing over the rectangle (as the contractor did in 2012) even if there was a car in Number 8's drive. I do treat this evidence with caution, but I have found on the basis of Mrs Thorpe's own witness statement that Mrs Sutherland walked over the disputed land now and then. The FTT also found that Mr and Mrs Frank she parked on the disputed land "occasionally". I heard no evidence from Mr and Mrs Frank about their parking on the disputed triangle; like Mrs Thorpe they chose not to ask to put in further evidence on the appeal.

25. Mrs Thorpe also gave evidence as to her intention to possess the disputed triangle. Her evidence was that when she bought the land she did not look at the plans. She said "It has always been my understanding and belief that this front rectangular area belonged with the house and therefore to me".

The law

26. The law relating to adverse possession is not in dispute and I can summarise it briefly. The current statutory provisions are those of the Limitation Act 1980 ("the 1980 Act"), of which section 15 (1) reads 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.

27. Schedule 1 to the 1980 Act, paragraph 1, provides

> Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of 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.

28. Section 17 of the 1980 Act goes on to say that on the expiry of the limitation period, which is 12 years for claims to recover land, "the title of that person to the land shall be extinguished".

29. Mr and Mrs Frank have a registered title and therefore, by virtue of section 58 of the Land Registration Act 2002 ("the 2002 Act"), they hold the legal estate in the disputed land. Their title was first registered in 2012; but section 11 of the 2002 Act provides that their registered title is subject to those rights, set out in Schedule 1 to the 2002 Act, that override first registration. If Mrs Thorpe had acquired title to the disputed land by adverse possession by the date of first registration, and had remained in occupation of it, then Mr and Mrs Frank would have taken their registered title subject to her rights by virtue of paragraph 2 of Schedule 1; she would have been a person in actual occupation whose rights overrode first registration.

30. So far, the law is straightforward, but it all turns on the meaning of the word "possession". In *JA Pye (Oxord) Ltd v Graham* Lord Browne-Wilkinson, giving the leading judgment in the House of Lords, quoted with approval at paragraph 32 the words of Slade J in *Powell v McFarlane* (1977) 38 P & CR 452 who said, at page 469, that he regarded the word "possession" in the statute (then the Limitation Act 1939, but that makes no difference) as

> "bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land; likewise I would have regarded the word 'dispossession' in the Act as denoting simply the taking of possession in such sense from another without the other's licence or consent."

31. Lord Browne-Wilkinson went on to dispel the myth that adverse possession must involve some sort of "ouster" of the paper title owner, at paragraph 36:

> "It is said that [the squatter] has to "oust" the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatter's use of the land has to be inconsistent with any present or future use by the true owner. In my judgment much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply 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."

32. At paragraph 41 Lord Browne-Wilkinson again quoted Slade J, this time from page 470-471 of *Powell v McFarlane*:

> "Factual possession signifies *an appropriate degree of physical control*. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly.... 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."

33. The emphasis there is mine, for reasons that will become clear. The important word “exclusive” is in square brackets because the text in the law report reads “conclusive” which seems to be a typographical error because Slade J went on in the same paragraph to discuss “what acts constitute a sufficient degree of *exclusive physical control*” (again the emphasis is mine).

34. Once possession in that sense has been taken, there is authority to the effect that an occasional presence by the paper title owner does not stop time running against him or her. In *Strachey v Ramage* [2008] EWCA Civ 348 the land in dispute was part of a field, and was fenced off from the rest of the paper title owner’s land. Rimer LJ in the Court of Appeal observed, *obiter*, that the paper owner’s activities on the disputed land, including passing over it with horses and ponies, picnicking and walking dogs did not stop time running; “nothing less than the resumption of exclusive possession (*Bligh v Martin* [1968] 1 WLR 804 at 012) or the issue of proceedings to recover it will do.” In *Bligh v Martin* the disputed land was a field, and the paper title owner grazed his heifers on to it during the winter months but was found not to have dispossessed the person in adverse possession and therefore not to have stopped time running.

Why the appeal succeeds

35. The FTT found as a fact that Mrs Thorpe had the rectangle paved in 1986. That was the major factual issue at first instance. There is no appeal from that finding and the evidence relating to it was not re-heard on appeal. Having found that fact the FTT concluded that at that point Mrs Thorpe took possession of the disputed triangle. At paragraph 67 of his decision the judge in the FTT said:

> “In my view the construction of paving upon the disputed land comprised in the title of the Respondents was an act giving rise to factual possession. Whatever may have been the surfacing at the front on No 9 prior to 1986, as I have found, when in that year the surface

was dug out and refilled with stones, on which were laid paving slabs and bricks, into an apron of approximate rectangle [sic] in shape, there was a taking into the possession of No. 9 of all the land comprising that shape; it could not be characterised as treated by [Mrs Thorpe] as partly her neighbour's land. Such land was treated by the Applicant as being her own. Whilst it remained possible for access and egress to No. 8 to be enjoyed across the paving, and this may well have occurred on occasions, I find that the paving comprised physical possession of the disputed land. I do not think that such use amounted to the taking of possession by the Respondents. The Applicant's possession was manifested also, albeit to a lesser extent, by her parking cars on the same on occasions, cleaning the surface with a pressure washer and tending to weeding."

36. Mr Halliwell argued before me that in the light of that finding, it followed that Mrs Thorpe remained in possession thereafter unless Mrs Sutherland re-took possession before the expiry of 12 years, in the light of the authorities to which I have referred in paragraph 34 above. There is no reference to those authorities in the decision of the FTT, but I believe that that is why the paucity of evidence of acts of possession by Mrs Thorpe after 1986 did not trouble the FTT. That is why the finding that Mrs Thorpe occasionally parked on the disputed triangle could sit comfortably, for the FTT, alongside a finding that Mr and Mrs Frank occasionally did so too; it took the view that Mrs Thorpe, having established possession, remained in possession even if she parked there only occasionally, whereas the Franks' occasional parking did not avail them because it was not sufficient to establish re-possession.

37. I remind myself that while I can make my own findings of fact on the evidence that I have heard, I start from the proposition that the paving took place in 1986. I must assess the decision of law, made by the FTT on the basis of that fact, as an appeal tribunal.

38. The paving itself was a major operation involving the whole rectangle, and the process of excavating and paving was a trespass on the disputed triangle. That trespass lasted for a fortnight. But then it stopped. And after the work was

done the rectangle reverted to being an open space, accessible equally by Numbers 8 and 9 and by visitors to both addresses – indeed it was even more accessible than it had been before now that the lip had gone. It is difficult to see that what had been done, and the situation that obtained the day after the work was finished and thereafter, was sufficient to amount to possession within the meaning of the Limitation Act 1980 and the authorities quoted above. There can be adverse possession without enclosure, of course, but the authorities are clear that for a person to be in adverse possession he or she must be in control of the land (see paragraph 32 above and the words I have emphasised). There is no need for any forcible ouster, but there must be some degree of exclusivity (see paragraph 33 above). Here there was, on Mrs Thorpe's own evidence, no control. There was no appearance of control and no exclusion of anyone.

39. There are cases where paving has been found to be a component in adverse possession; but I do not agree with Mr Halliwell's assertion, in his skeleton argument, that it is well-established that paving can in itself "suffice … as an assertion of adverse possession." In *Williams v Usherwood* (1983) 45 P & CR 235 adverse possession consisted of putting up a fence, parking and paving. In *Kynoch v Rowlands* [1912] Ch 527 there is an obiter dictum by Joyce J that to acquire title by adverse possession in, say, a ditch "my neighbour must take actual possession of it, as for instance by cultivating the ground, building up or paving it as in *Marshall v Taylor"*; yet in *Kynoch v Rowlands* the land in dispute was walled off from the rest of the paper owner's property, rubbish was dumped on it, and some paving put in, yet the claim to adverse possession failed. *Marshall v Taylor* is reported at [1895] 1 Ch 641; adverse possession consisted of filling in a ditch (separated from the paper owner's land by a hedge), paving part of the surface, planting a rose garden and installing a chicken house. In no case has paving alone been found to be adverse possession. I do not suggest that it could not do so; but I find that it did not do so here. In making that finding I take into account what the FTT said in paragraph 67 about the nature of the locality, the urban environment and the small parcels of land in Harcourt Close. Nothing about the environment

suggests to me that at the start of 1987 the fact that Mrs Thorpe had laid paving on the disputed triangle meant that she was still in possession of it. She had trespassed in order to have it paved, but had then ceased to do so and left the land open. Having the land paved in 1986 was a trespass while the process lasted, but it cannot on any reasonable view be regarded as the taking of possession of the land for the future.

40. Accordingly Mrs Thorpe was not in possession of the disputed triangle in 1986 after the paving was completed.

41. I have found that thereafter Mrs Thorpe power-washed the paving once a year, weeded once a month or six weeks, and may have parked on the disputed triangle occasionally but generally parked on her own land in front of the window. I also accept her evidence that when she had visitors they parked on the rectangle, and I have no difficulty in accepting that they will have parked on the disputed triangle, particularly if there was more than one car visiting.

42. None of those facts, taken together, can amount to adverse possession. Nor do they do so even when considered in the light of the fact that the paving was laid by Mrs Thorpe's son for her and that the flags and bricks were bought by her.

43. In the absence of factual possession, an intention by Mrs Thorpe to possess the disputed triangle does not assist her, but as the FTT's findings as to intention were challenged I go on to consider that finding.

44. Intention to possess is usually perfectly obvious from the fact of adverse possession – particularly where the disputed land has been fenced or otherwise enclosed, or cultivated and so on. The FTT addressed this point briefly at paragraph 68, saying that the paved rectangle "had the appearance of an area of hard-standing which was an adjunct to No. 9" and that "The perimeter bricks in particular have the connotation of the demarcation of a boundary." From that appearance or connotation the judge found that Mrs Thorpe had the intention to possess the disputed land, including the disputed land.

45. The judge had had the benefit of a site visit, whereas I have only seen photographs. Because there has been a re-hearing I have had the opportunity to assess Mrs Thorpe's own evidence of her intention. I approach this very

carefully indeed because intention evidenced by the self-serving statement of the adverse possessor is to be given very little weight. In particular, a statement by someone who knew she was trespassing that she intended all along to possess the land to the exclusion of all others would be unconvincing. Nevertheless, I have found Mrs Thorpe to be a candid and honest witness who gave evidence of what she recalled, and I believe her evidence that she was unaware that the land did not belong to her. Her sincerity was evident, as was her frankness as to the lack of attention she paid to the plans when she bought and her lack of understanding of them even now. She has the requisite intention to possess because she thought she owned the rectangle. Were I not convinced of her sincerity on that point I would have to find that intention was not made out, because in the absence of credible evidence from the adverse possessor – and I accept that it is rare that such evidence will be credible, but I find it was here – the intention must be evident from the acts of possession themselves. Here it was not. Mrs Thorpe has certainly manifested an intention to make the rectangle look nice and to make it accessible to vehicles, but that is ambiguous and does not tell anyone anything about Mrs Thorpe's own intention.

46. However, factual possession is not established and therefore Mrs Thorpe's intention to possess is immaterial. Accordingly this appeal must succeed.

Conclusion

47. The Appellants have therefore been successful. I will hear from counsel as to the form of the order I should make, but it will include a direction to the registrar to cancel the separate registration of the disputed triangle and to return that land to Mr and Mrs Franks' title.

48. At the hearing of the appeal Mr Halliwell asked me to make a decision at the outset as to whether the appeal succeeded against the finding that Mrs Thorpe took possession of the land in 1986. Had I found that the appeal failed on that point, it would then have been for Mr and Mrs Frank to show that Mrs Sutherland re-took possession before the expiry of the limitation period in 1998; they would have had the burden of proof and it would not have been necessary for Mrs Thorpe to give evidence. Mr Denehan did not object to that

order of proceedings and accordingly I gave my decision at the hearing itself that the FTT's decision as to the taking of possession in 1986 could not stand. The reasons I gave are reproduced at paragraphs 38 and 39 above. Mr Halliwell then asked for permission to appeal to the Court of Appeal on that point, which I refused. He then sought an adjournment, pending a renewed application for permission to the Court of Appeal, which again I refused on the basis that to abandon the appeal hearing would be a considerable waste of time and cost for the parties. However, it was agreed between the parties that time for Mrs Thorpe to ask the Court of Appeal for permission to appeal on that point will run from the date of this decision and not from the date of the hearing.

Elizabeth Cooke
TRIBUNAL JUDGE

RELEASE DATE: 7 November 2017