UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 102 (LC) **UTLC Case Number: LC-2022-476**
Swansea Civil Justice Centre

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – ADVERSE POSSESSION – the third condition in paragraph 5 of Schedule 6 to the Land Registration Act 2002 – reasonable belief – credibility – whether an agreement without legal effect can found a reasonable belief

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN

KENNETH AND NALDA ROWLANDS

Appellants

-and-

GREGORY AND SUSAN BISHOP

Respondents

Re: Woodlands Church Road,
Johnston,
Haverfordwest,
Pembrokeshire,
SA62 3HE

Judge Elizabeth Cooke
25 April 2023

Decision Date: 11 May 2023

Mr Ben Blakemore for the appellants, instructed by Price & Kelway
The respondents were not legally represented

The following cases are referred to in this decision:

Dowse v Bradford MBC [2020] UKUT 202 (LC)
Joyce v Rigolli [2004] EWCA Civ 79.

Introduction

1. This is an appeal about parts of the garden of Woodlands, the home of the appellants Mr and Mrs Rowlands, which they have treated as their own since their purchase in 1996 but which are part of the registered title of the neighbouring property, Johnston Hall. In 2019 the appellants made an application to HM Land Registry to be registered as proprietors to the areas in question on the basis that they had acquired title by adverse possession; the respondents Mr and Mrs Bishop, who at that date were the registered proprietors of Johnston Hall, objected and gave a counter-notice to the application. The matter was referred to the First-tier Tribunal ("the FTT") under section 77 of the Land Registration Act 2002. The FTT found that the appellants were not entitled to be registered as proprietors and directed the registrar to cancel the application. The appellants now appeal the FTT's decision. Mr and Mrs Bishop have since sold Johnston Hall; they have told the Tribunal that the purchasers are aware of these proceedings.

2. The appellants were represented in the appeal by Mr Ben Blakemore of counsel, and Mr Bishop spoke for the respondents; I am grateful to them both.

3. In the paragraphs that follow I explain the basis of the appeal, and then set out the findings made by the FTT that are not the subject of the appeal. I then examine the arguments on each ground of appeal and give my reasons for allowing the appeal.

The basis of the appeal

4. Since the coming into force of the Land Registration Act 2002 title to registered land can no longer be acquired simply be taking adverse possession of it for 12 years; instead, an application for registration can be made by a person who has been in adverse possession of registered land for 10 years or more, but if the registered proprietors of the land in question serve a counter-notice under paragraph 3 of Schedule 6 to the 2002 Act then the adverse possessor can only be registered as proprietor of the land in question if one of three conditions set out in paragraph 5 is satisfied.

5. That is what has happened in this case. The respondents objected to the application, because they do not agree that the appellants have been in adverse possession of the land, and also served a counter-notice requiring the application to be dealt with under paragraph 5. The FTT found, and there is no appeal from its finding, that the appellants have established the requisite period of adverse possession. But it found that the appellants had not proved that any of the three conditions was satisfied, and so the application failed. The one condition relevant to this appeal is set out in paragraph 5(4) of Schedule 6 to the 2002 Act:

> "(4) The third condition is that—
>
> (a) the land to which the application relates is adjacent to land belonging to the applicant,

(b) the exact line of the boundary between the two has not been determined under rules under section 60,

(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and

(d) the estate to which the application relates was registered more than one year prior to the date of the application.

6. Of the four elements of that condition, points (a), (b), and (d) were agreed to be satisfied, but the FTT held that the appellants had not satisfied sub-paragraph (c); they could not show that they had held a reasonable belief that the land was theirs. The appeal is against that finding.

7. That means that the appeal is not about whether the appellants were in adverse possession for the requisite period. The issues are whether the appellants held the belief specified in paragraph 5(4)(c) and whether it was reasonable for them so to believe. With that in mind we can look at the factual findings that cannot now be challenged, and at the FTT's decision on the crucial point.

The factual background

8. The appellants' property is known as Woodlands, and the respondents' is a much larger property known as Johnston Hall which adjoins Woodlands to the north and east.

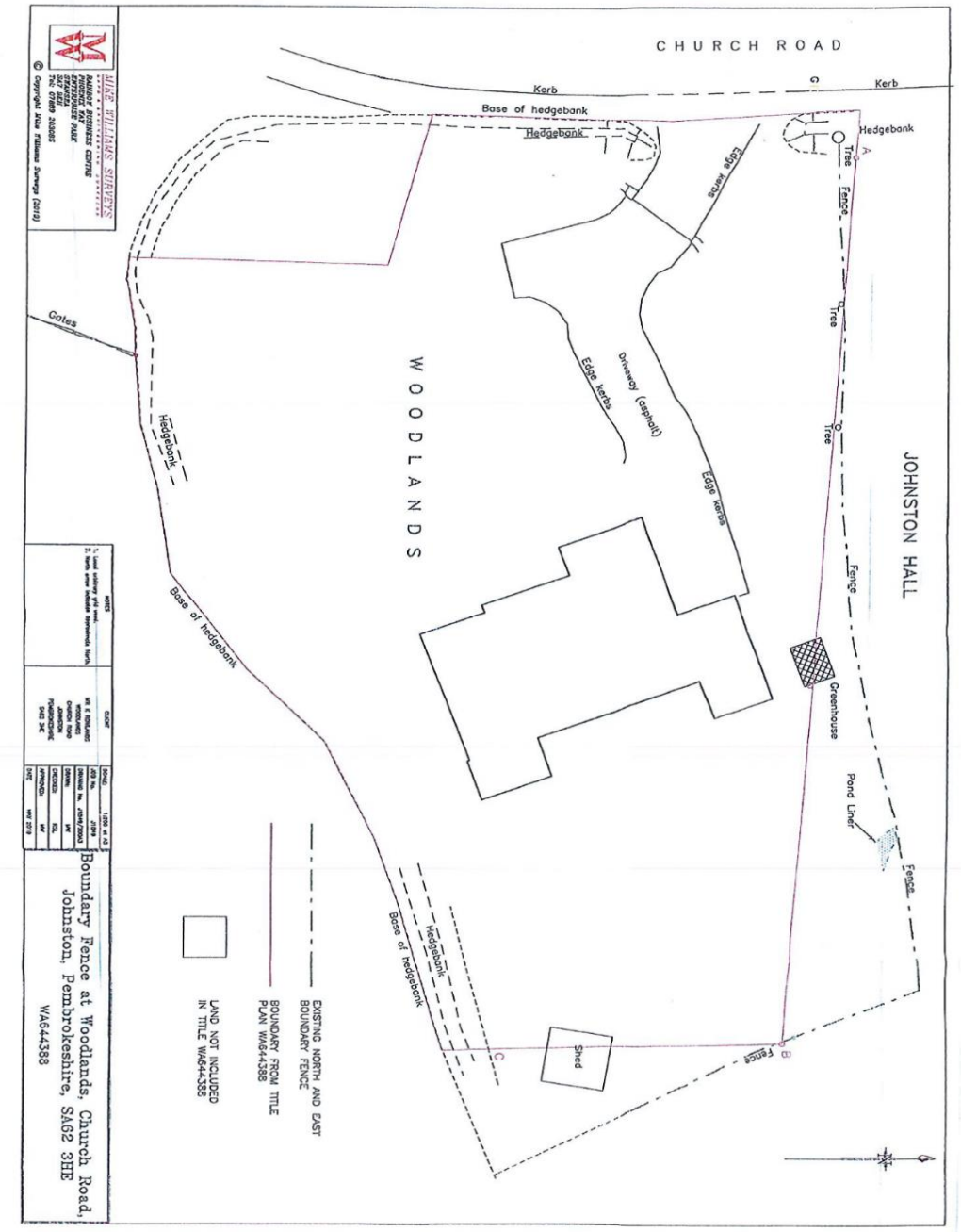
9. The diagram on the following page sets out the problem; the north and eastern boundaries of the registered title to Woodlands are marked by the solid line, and the pecked line shows what the appellants said was the position of the northern and eastern fences in 1996 when they bought the property. It can be seen that the fences enclose areas that are part of the registered title to Johnston Hall, and those are the areas that are now in dispute.

10. I say now in dispute, because all was peaceful for over twenty years and it was not until 2019 that the respondents, who bought Johnston Hall in 2013, discovered that the fences did not follow the boundary shown on their registered title plan and sought to regularise the position, which led to this litigation.

11. Mr Rowlands' evidence (as set out at paragraph 13 of the FTT's decision) was that he was told by the vendor before he purchased Woodlands that "there had been a boundary agreement between his predecessors in title, Gordon John and Gladys John, on the one hand, and the respondent's predecessor in title, Col HJ Evans, on the other. That agreement was to the effect that the northern boundary of Woodlands should be moved to accommodate a pond which the Johns wished to construct in the garden (which is there to this day)." I note from the transcript of the hearing that Mr Rowlands said more than once that the agreement related to "the boundaries" in the plural, and his commentary on one of the photographs attached to his witness statement said "… the boundary fence which separates Woodlands

from the estate has been in place since the arrangement between Colonel Evans and the previous owner of Woodlands, Mr Gordon John."

12. The respondents gave no evidence to the FTT but put the appellants to proof of their case.



13. The FTT found as follows (the numbers in brackets refer to paragraph numbers in the FTT's decision):

    a. The appellants bought Woodlands from Mr and Mrs Gordon John on 4 October 1996 (30); they had visited the property and taken photographs of it in 1995 (30).

    b. The photographs taken in 1995 show "a well-established post and rail fence along the eastern and southern boundary", traces of which were seen on the FTT's site visit, and that the disputed areas are within the fence (33). When the appellants bought Woodlands there was already a summerhouse on the western part of the additional land; it had been used by their predecessors in title and was used by the appellants (39).

    c. Around the time of the appellants' purchase there was a conversation between Mr Rowlands and Mr John about an agreement that he (Mr John) had with the owner of Johnston Hall about the position of the boundaries (34).

    d. "In my judgement, the agreement was nothing more than an informal conversation between the neighbours at that time. There is no room for a finding that it created an interest in land or was even intended to do so" (36).

    e. By 2007 bamboos growing on the respondents' land had engulfed the eastern fence of Woodlands and encroached onto the garden there (37).

    f. In 2013 Mr Rowlands put up a greenhouse, part of which was on the northern part area of disputed land (38).

    g. The appellants used the disputed areas as part of their garden as an owner would do (49). They intended to take the land for themselves and to exclude the world at large (52). They were in adverse possession for at least ten years before they made their application in June 2019 (53).

14. For the respondents' benefit I stress that those are the findings set out in the decision, none of which have been appealed. Mr Bishop at the hearing of the appeal argued that the judge's views were different, particularly about the agreement between Col John and Mr Evans, and pointed me to questions asked and remarks made by the judge during the hearing. At that stage the judge was still hearing evidence and argument and was testing and weighing what he had heard; but what he decided is what he set out in the decision and it is not open to the respondents either to argue that that was not what the judge thought. Nor can they seek to re-open, as Mr Bishop sought to do, findings of fact such as the date when the photographs were taken.

15. Having decided that adverse possession had been proved for the requisite period, the judge then went on to consider the condition in paragraph 5(4) of Schedule 6 to the 2002 Act, as set out above. Only sub-paragraph (4)(c) was in issue. On that, the appellants failed, for two reasons: the FTT did not believe Mr Rowlands' evidence that "when he bought Woodlands he could see the post and rail fence and he thought everything within it was his" (paragraph

59 of the FTT's decision). Second, the FTT took the view that the agreement between Col Evans and Mr John was of no legal effect and therefore could not found a reasonable belief. There was no belief, and even if there had been it could not have been reasonable. Therefore the condition in paragraph 5(4)(c) was not made out and the application must fail.

16. The appellants appeal with permission from this Tribunal against both those findings and I take them in turn.

The appeal on credibility

17. It is most unusual for this Tribunal to give permission to appeal a finding about credibility. The judge at first instance saw and heard the witnesses and is best placed to assess who is telling the truth, and the Tribunal will not interfere unless there is some irrationality or error of law. I therefore approach this ground of appeal with great caution.

18. It was Mr Rowlands' evidence that he believed at the time of purchase, and ever since until he was approached by Mr Bishop in 2019, that he owned the land within the fences that he saw when he purchased.

19. The FTT having acknowledged that that was his evidence said this at its paragraph 59:

> "Ordinarily, this statement made under oath would carry some weight, but I have already given reasons for the Tribunal's doubts as to the credibility of the first applicant as a witness on this point."

20. In this case the judge clearly did not regard Mr Rowlands' evidence as wholly unreliable. On the facts constituting adverse possession he found in Mr Rowlands' favour on the basis largely of his own evidence about what he did on the land; he even accepted Mr Rowlands' hearsay evidence that there had been an agreement between Col Evans and Mr John. He did so despite having set out reasons, at paragraphs 14 to 16, for doubting Mr Rowlands' credibility. But when he came to an assessment of whether Mr Rowlands believed for at least ten years that the land was his, he reverted to those reasons and found that Mr Rowlands was not telling the truth. What the appellants say is that those reasons were inadequate and that the finding that Mr Rowlands was lying about what he believed was not one that was open to the judge on the evidence; they also say that the finding was unfair because it was never put to Mr Rowlands at the hearing that he did not believe that the land within the fences was his.

21. Taking the latter point first, I have read the transcript of the hearing and I agree that it was never put to Mr Rowlands that he did not believe the disputed land was his, either by Mr Bishop or indeed by the judge who intervened frequently in the cross-examination. Mr Bishop is not a lawyer but he certainly understood the need to put his case to a witness and frequently did so in so many words. He certainly put it to Mr Rowlands that his belief was not reasonable, on more than one occasion, and that the dispute in 2019 should not have come as a surprise to him because of the boundary agreement between the previous owners of the two properties (the existence of which Mr Bishop appears to have accepted for the purpose of this line of questioning). But at no point did Mr Bishop suggest to Mr Rowlands

that he had not in fact believed that he owned the land, and Mr Rowlands had no opportunity to answer that point at first instance when giving evidence.

22. Turning then to the reasons the judge gave for doubting Mr Rowlands' credibility, at paragraph 17 of the decision stated "For all these reasons the Tribunal approaches the first applicant's evidence with caution", and those reasons appear to be the ones given at paragraphs 14 16.

23. Paragraphs 14 to 16 read as follows:

> "The applicant was asked about advice received at the time of his purchase of Woodlands. Had the agreement been intended to have a lasting effect it would have been disclosed in answers to enquiries (if any were made) at the time of purchase. The first applicant was unhelpfully vague in his recollection of the legal information he received at the time of his purchase. On the 11th March 2019 the first applicant wrote to the police in Milford Haven (page 182 of trial bundle) complaining that the first respondent was harassing him and the second applicant in connection with the dispute about the car park. Part of the harassment is said to be the respondents' current claim concerning the boundary.
> 15. The letter goes on to state that the first applicant has taken legal advice on the merits of the respondents' case. That advice is that the respondents' case is ludicrous and the Land Registry documents and "the details relating to the conveyancing of the property in 1996" verify this. The first applicant was asked about this at the hearing. He did not say he had forgotten about or could no longer trace those details when the Tribunal ordered disclosure on the 29th June 2020 and 6th July 2020 (pages 99 and 102 of the trial bundle). On any footing the contents of those documents are relevant to the issues in this case and in my judgement the first applicant's credibility is severely prejudiced by his failure to produce or explain.

24. The background to the letter to the police is complex and largely irrelevant to the appeal; suffice it to say that Mr Rowlands wrote to the police and made a number of allegations of harassment and also complained about Mr Bishop's stance about the boundary. It is difficult to see whether what is complained of in paragraphs 14 and 15 is the failure to disclose conveyancing documents from 1996, or the failure to disclose advice received in 2019. There was no mention at all at the hearing of the letters to the police in 2019, let alone any hint that he had been asked to disclose the advice or any suggestion that the advice was not as he said it had been. So it appears that what troubled the judge was the absence of conveyancing documentation from 1996, and I am aware that it is standard practice in the FTT to require disclosure of the conveyancing file in cases such as this.

25. Mr Rowlands was asked about the conveyancing process in cross-examination, very briefly. The judge asked him if he had seen the registered title plan and he said that he probably would have done, but all he could remember was that he signed the documents. He said he did not remember much about the conveyancing process at a time when he and Mrs Rowlands were excited about the purchase. It was not put to Mr Rowlands, by the judge or by Mr Bishop, that he was not telling the truth when he said he could not remember much about the conveyancing process.

26. Mr Rowlands' "vagueness" was entirely consistent with his evidence that he was unaware that the land within the fences was not what he had bought, and did not know that the registered title boundaries did not reflect that agreement and did not correspond with the fencing on the ground. He cannot be said to have been evasive, because the questions he was asked were themselves very general (and concerned more with a fencing covenant, which I consider later). He was not asked whether he told his solicitors about the boundary agreement. He was not asked why he had failed to disclose the conveyancing documents – and indeed the question would have been pointless since Mr Rowlands' evidence was that he did not remember who the solicitors were. It is difficult to see why Mr Rowlands' inability to remember details of a conveyancing process 25 years previously casts doubt on his credibility.

27. In his refusal of permission to appeal the judge observed that Mr Rowlands, in answer to a question about the conveyancing process, gave "a general response that he had received some papers. Significantly, this general response was not picked up in re-examination", and added that that was "material on which the Tribunal could reach a conclusion about credibility". But there was no reason why that point should have been explored in re-examination. Mr Rowlands had given an answer that was consistent with his case.

28. Turning then to what remains of what was described as "all these reasons" (my paragraph 21 above), at paragraph 16 of the FTT's decision the judge said:

> "The first applicant said that, as part of his management of the rear garden, he allowed the bamboos growing on the respondents' land to encroach onto the gardens at Woodlands, particularly at the eastern boundary. He said the applicants wished to make the bamboos a feature in the garden along with the gunnera he had planted. The first applicant's evidence is that this happened in the summer of 1997 (see page 4 of the witness bundle). However, in cross-examination he was less sure of the date.

29. Mr Blakemore pointed out that the questions asked of Mr Rowlands in cross-examination were themselves confusing, so that dates became muddled, although I see that at one point in the hearing Mr Rowlands did say he started to allow the bamboo to spread in 2007. However, it is difficult to see how being unsure about the date of an activity such as not preventing bamboo from spreading over a corner of one's garden, many years ago, casts doubt on Mr Rowlands' credibility.

30. So the reasons given for doubting Mr Rowlands' credibility were, in my judgment, flimsy, and insufficient to justify a finding that he was lying when he said he believed that he owned the land within the fences.

31. Mr Bishop argued that Mr Rowlands must have known where the true boundary was because he must have known about the fencing covenant which required the purchaser of Woodlands, when it was separated from Johnston Hall in 1972, to maintain the northern and eastern boundaries; he said he was not, and Mr Bishop challenged him directly about that. The judge found that Mr Rowlands was aware of the fencing covenant, having been represented by solicitors in the purchase. But I do not understand why that is relevant to his awareness of the position of the boundaries, and indeed the judge did not say that it was.

Even if he was aware of the fencing covenant, that is not inconsistent with his being unaware of the correct position of the boundaries he was supposed to maintain (by virtue only of an indemnity covenant, of course, since the positive fencing covenant itself bound only the original parties).

32. Mr Blakemore pointed out that on the other side of the scale was not only Mr Rowlands' own consistent evidence that he believed that the land within the fences was his, but also his behaviour; he continued to use the summerhouse, he put up the greenhouse, and he managed the land. And until 2019 he was never challenged.

33. The finding at paragraph 59 of the decision that Mr Rowlands was lying when he said he believed the land within the fences was his is set aside because it was both irrational (being unsupported by evidence) and unfair (because the point was not put to Mr Bishop). In the absence of any reason to doubt Mr Rowlands' credibility other than the reasons given by the judge I substitute the Tribunal's own decision that Mr Rowlands was telling the truth when he gave evidence that he believed that all the land that he saw within the fences when he purchased was his.

The appeal from the finding about the agreement

34. Was that belief reasonable? I have set out the judge's finding of fact about the "boundary agreement" at paragraph 12(d) above. At paragraph 58, having found that the requisite adverse possession had been proved and in his assessment as to whether the third condition in paragraph 5 of Schedule 6 was satisfied, the judge said this:

> "In the present case the Tribunal does not consider that the boundary agreement can form the basis for the requisite belief. If, as I have found, the agreement was simply the result of an oral discussion between neighbours, with no intention of creating rights and duties with reference to the additional land which have the quality of being capable of enduring through different ownerships of the land, according to normal conceptions of title to real property, then the agreement cannot be a reason for the applicants' belief.

35. This, Mr Blakemore argued, is doubly wrong. First, there is no requirement that the agreement, in order to found a reasonable belief, must have been legally effective. In *Dowse v Bradford MBC* [2020] UKUT 202 (LC) the Tribunal (the President, Mr Justice Fancourt) found that there was no need for a belief on the part of the adverse possessor that he had paper title to the land claimed. Second, he argued, it is not even the case that the agreement was of no effect because it was unwritten: *Joyce v Rigolli* [2004] EWCA Civ 79.

36. Understandably Mr Bishop had little to say about this ground of appeal since it is a point of law. He sought to raise doubts about the judge's findings of fact about the conversations between Mr John and Mr Rowlands, and between Mr John and Col Evans, but as I have explained it is not open to him to do that.

37. Mr Blakemore's legal argument is undoubtedly correct. Reversing the order of his points, I would observe that it is difficult to see how the judge could make any finding about the legal effect of the agreement or conversation. He had no direct evidence of what was said between

Col Evans and Mr John, let alone anything about their intentions. But in any event there are circumstances where an unwritten agreement about a boundary will have legal effect, as Mr Blakemore says, so even if the judge was right that the agreement was unwritten he had nothing on which to base his conclusion that it did not have legal effect. Moreover, even if the agreement had no legal effect whatsoever, there is no legal principle to the effect that it could not therefore found a reasonable belief. The statute does not say that the belief must be legally correct (and if it did, there would be no need for a claim based on adverse possession). The finding that an agreement, or conversation, that had no legal effect could not support a reasonable belief is manifestly incorrect and is set aside.

38. Was Mr Rowlands' belief reasonable? He had been told about an agreement, and there is no evidence that he was aware that it had no legal effect if indeed that was the case. He could see that the land was fenced occupied and cultivated in line with that agreement. He could of course have spoken with his solicitor about it and had he done so these proceedings would not have arisen because the discrepancy with the registered title plan would have been resolved. Mr Bishop argued that no-one would have taken the vendor's word about the point without checking with his solicitor, and that therefore the belief could not have been reasonable. But I observe that it may well not have occurred to Mr Rowlands that the boundary on the ground was different from that on the title plan; the shapes delineated by the solid and pecked lines on the plan above are similar, with the larger area being skewed round. What is obvious on a plan seen on paper may be entirely obscured on the ground, when one is not looking from above, and when there is planting around the boundary. What was perfectly clear on the ground was that the boundary was fenced, and that the stream on the Johnston Hall side ran into the Woodlands garden.

39. The respondents themselves seem to have shared the belief that the land occupied as Woodlands all belonged to their neighbours: at paragraph 5 of their statement of case they said "due to the overgrown nature and lack of fencing it was until very recently assumed the area around the buildings was part of Woodlands." There was fencing, as the judge found, but it had deteriorated over the years and was invisible until Mr Bishop made his way through vegetation and (the judge found) removed part of it on March 2019. The fact that the respondents did not notice anything amiss until they took measurements in 2019 is a strong pointer to the reasonableness of the belief of the owners of Woodlands.

40. For all those reasons I conclude that Mr Rowlands reasonably believed that the land within the fences was all his.

Two final points

41. I should deal with two further points raised by Mr Bishop.

42. First, a point arising from *Dowse*. He argued that the land in dispute in this appeal is too large to be "in the area of the general boundary" as required by the third condition, as was held in *Dowse*. I agree that the land in dispute is not within the thickness of the general boundary (an imprecise concept anyway, but certainly this area is bigger than any view of that thickness); but the decision in *Dowse* required that the land be "in the area of the general boundary" (paragraph 44) and this land certainly is – contrast the two acres of land in issue in *Dowse*.

43. Second, Mr Bishop made much of the fact that Mrs Rowlands has given no evidence and has taken no part in the reference to the FTT or in the appeal. I understand that she has been too unwell to do so, but I note (as did the judge in the FTT) that she has not made a witness statement confirming the truth of Mr Rowlands' evidence. Nevertheless the FTT found as a fact that both appellants had been in adverse possession of the disputed areas, and there is no cross-appeal from that finding. Mr Bishop has not suggested any reason why her state of mind should have been different from her husband's so far as ownership of the garden was concerned; I infer that Mrs Rowlands believed that the land within the fences, which she enjoyed as her garden, was part of the property, as did Mr Rowlands.

Conclusion

44. In conclusion, the FTT's decision that the appellants have failed to satisfy the condition in paragraph 5(4)(c) of Schedule 6 to the Land Registration Act 2002 is set aside, and I have substituted the Tribunal's own decision that the condition has been satisfied. I shall direct the registrar to respond to the application as if the respondents' objection had not been made.

Judge Elizabeth Cooke

11 May 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.