Ref/2022/0181

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM H M LAND REGISTRY

BETWEEN

ANDREW TUTTON

APPLICANT

and

(1) MRS ANN ROSAMOND KINGSTON
(2) MR DAVID JOHN ELLIS KINGSTON
(3) MR MATTHEW JOSEPH KINSTON
(4) MS HANNAH JO SNELSON
(As Executors of the Estate of John Ellis Kingston Deceased)

RESPONDENTS

Property Address: Land to the South East of Flax Farland, Eydon Road, Woodford Halse, Daventry, NN11 3RG

Before Judge Muir

Sitting by Cloud Video Platform
on 21st June 2023 and 3rd July 2023

Applicant's Representative:	Rachel Coyle
Respondents' Representative:	Peter Petts

Adverse Possession – Unregistered Land – factual possession – intent to possess – agricultural land. Whether permission granted and whether acts of possession sufficient to establish possession.

DECISION

Introduction

1. The Applicant is the freehold owner of The Poplars, Eydon Road, Woodford Halse, Daventry, NN11 3RG. On 20th August 2021, Mr. Tutton applied to be registered with possessory freehold title of a parcel of land adjoining his property ("the Disputed Land") on the grounds that he and his predecessor in title, his son Graham Tutton, had been in adverse possession of that land for a period in excess of 12 years. To avoid confusion I shall refer to Andrew Tutton as "Andrew" and Graham Tutton as "Graham". No disrespect is intended.

2. Prior to the hearing, I had the benefit of a site visit. The Applicant was represented by Ms Coyle of Counsel and the Respondents were represented by Mr. Petts of Counsel. I am grateful to both Counsel for their helpful submissions. I also heard evidence from Andrew and Graham on behalf of the Applicants and Matthew Kingston on behalf of the Respondents. All the witnesses gave careful and considered oral evidence and did their best to assist the Tribunal.

3. The Disputed Land is unregistered. It comprises approximately 0.75 of an acre and forms part of a former railway cutting. Originally two railway lines crossed the Disputed Land; the Great Central Railway at the lower level and the Stratford Upon Avon and Midland Junction Railway on a bridge over the lower track.

4. On 31st October 1986 the Disputed Land together with the 3 further acres of land to the south of the Disputed Land was conveyed to Mr. John Ellis Kingston by the British Railways Board. I shall refer to the land conveyed which lies to the south of the Disputed Land as the South Cutting. Mr Kingston, now deceased, was also the freehold owner of Home Farm which comprises some 150 acres and has been in the Kingston family for approximately 200 years, Home Farm abuts the Disputed Land to the north-east and the south. Mr Kingston died in 2018 and the objection to this application is raised by his estate.

5. To the north of the Disputed Land lies another part of the railway cutting which originally contained the Great Central Railway ("the North Cutting"). This was purchased from the British Railways Board by another local farmer, Jim Anthony, at some point in the 1980s. Mr. Anthony used the North Cutting for pig farming.

6. It was common ground, that in or around the late 1980s/early 1990s, Mr. Anthony dumped a huge quantity of soil onto the Disputed Land in order to fill in the original railway bridge and level out the land so that the area was more accessible. The Respondents said this was done by mutual agreement with Mr. Kingston because it allowed them to access their areas of the railway.

7. In September 1993, John Kingston retired from farming and let Home Farm, but not the Disputed Land, to the Smiths who remain tenants of the same. The Smiths did not give evidence in this case.

8. On 31st May 2002, Mr Anthony sold part of his land to Graham. The land transferred is described as follows:

"First part – Land forming part of the Great Central Railway registered under Title No. NN102989". This is the land I have described as the North Cutting.

"*Second part – Land known as Flax Furlong being part of land comprised in a Conveyance dated 26th July 1982 made between D C Horgan (1) and A M Cole (2)".* This land is parallel to and lies to the north-east of the North Cutting. I shall describe this parcel as "the Paddock".

"Third Part – land formerly forming part of the Great Central Railway and to the south of the land first described to the extent that the Transferor has an interest therein". This area is part of the Disputed Land but only so far as it meets the bridge over which the Stratford line original went.

9. The plan to the 2002 Conveyance has a manuscript addition in relation to the "Third Part" which says "Not registered or on Title Deeds. Used to be old Bridge occupied since 1982. Not accessible unless over Anthony's land". Solicitors acted for both

parties on the sale. Graham's evidence was that he had always believed that the Disputed Land formed part of his purchase and had treated it accordingly.

10. John Kingston died in 2018 and his estate vested in the Respondents. None of the Respondents is actively involved with running Home Farm.

11. On 31st January 2019, Graham transferred the North Cutting and the Paddock, which were both registered by that time, to his father, Andrew. Graham himself then moved up to Cumbria to set up a new farm there.

12. In 2020, the Kingstons sought to register Home Farm and the Disputed Land. They succeeded in registering the farm but the Tuttons objected to the registration of the Disputed Land on the grounds that they were in possession of it. The documentation in relation to that objection and how it was dealt with was not before the Tribunal. However, the Kingstons faced an additional problem at that time in that the 1986 Conveyance had been lost and their application for registration appears to have been abandoned. A copy of the conveyance has subsequently been obtained.

13. In July 2021, Andrew replaced the fencing on the Disputed Land.

<u>The Parties' Respective Cases.</u>

14. The Applicant's case is that they (Andrew and Graham) always believed that they owned the Disputed Land and treated it as their own. They relied on various activities on the Disputed Land since their acquisition of the North Cutting and the Paddock in 2002 which were largely not in dispute. These activities can be summarised under the following headings:

    (1) Exercising bloodhounds between 2002 and 2009 and using a quad bike ramp and horse jump for that purpose.

    (2) Planting Poplar Trees in or around 2005.

    (3) Grazing Sheep, Cattle, Horses and Ponies and riding horses.

    (4) Enclosure of the land.

(5) Storage, parking and tipping.

15. The Respondent's case is that, even if these activities are established:

(1) The Applicant has failed to particularise the dates he claims to have adversely possessed the land or when the various activities took place.

(2) The Tuttons, the Anthonys and the Kingstons were all close friends and neighbours for over 40 years and John Kingston granted the Tuttons many indulgences over the years. This amounted to oral and/or implied consent.

(3) It is denied that the only access to the land is from the Applicant's land or that the Applicant maintained the fencing prior to June 2021. The Respondents said there were three other entrances to the Disputed Land from Home Farm.

Description of the Disputed Land, Fencing and Access.

16. On the site visit we entered the Disputed Land from the North Cutting which forms part of the Applicant's land. There is no discernible boundary between the North Cutting and the Disputed Land and neither party claimed that there had ever been any fencing or other boundary feature to prevent access. Although there were no sheep on the Disputed Land on the site visit there were sheep on the Northern Cutting and there was no barrier to them wandering onto the Disputed Land.

17. The western and eastern sides of the Disputed Land were separated from the rest of Home Farm and the land to the west by the original concrete post fencing erected by the Railway Board which runs along both sides of the former railway cutting. This is still visible. Graham said in oral evidence that over the years he had patched up the railway fence with barbed wire fencing to fill in the gaps and keep the sheep in.

18. Where the Disputed Land meets the South Cutting on the eastern side, Graham said, the fencing was originally barbed wire but in or around 2002, Graham installed a quad bike ramp and a horse jump. This enabled him to get from the Disputed Land to the South Cutting either on a quad bike or by horse when he was exercising his pack of bloodhounds.

19. On the top of the former railway bridge, there was originally pig wire erected by Jim Anthony to stop animals or people from falling down the steep slope to the South Cutting below. A photograph produced by the Respondents and dated around 2020 shows a wooden fence like structure on top of the bridge. The Respondents' Statement of Case suggested that this was a gate onto the South Cutting but Mr. Petts accepted in closing that the oral evidence did not support this. It does seem an odd place to have a gate as it would lead straight onto a steep slope. This wooden fence has subsequently been replaced by Andrew's new post and wire fencing.

20. The Tuttons did not claim to have erected any of the fencing themselves prior to 2021 other than a fence erected by Graham along the north-western side of the former railway track on the Disputed Land in or around 2005. This is not on any boundary. The purpose of this wire fence was to stop the sheep from wandering up the slopes and hiding amongst the vegetation which made them difficult to round up. The Tuttons did, however, patch up the existing fencing from time to time to prevent the sheep from escaping. In or around 2005 Graham planted approximately 75 poplar trees behind the sheep fence. Graham said that these trees were left over from another project and he planted them as a wind break.

21. The Applicant's case was that the only access to the Disputed Land is from their registered land. This is either by continuing along the former railway cutting from the North Cutting or through a gate leading from the Paddock onto the north-eastern corner of the Disputed Land.

22. The Respondent says that there are at least two other accesses to the Disputed Land from Home Farm. The first is through a small gate in the original railway fence on the north-eastern side of the Disputed Land and Home Farm and marked "A" on the Respondent's site plan. The second is over the quadbike ramp and horse jump (marked "B" on the Respondent's site plan).

23. Graham was unsure whether there was ever a gate at point "A" and there was no evidence on behalf of the Respondents that such a gate was ever used. I also note that the plan to the 2002 conveyance asserts that the only access to the Disputed Land was from the Anthony's land. There are two photographs of the area. The first photograph of point A was taken in around 2020 and shows a child standing in front of what could be a wooden gate. However, Graham's evidence was that the wood is, in

fact, a wooden pallet. There was some debate as to whether this photograph actually shows point A because although the right hand “gate post” looks the same as in the later photograph, the area beyond the “gate” looks flat on the earlier photograph whereas there is, in fact, a fairly steep slope.

24. The second photograph was taken in circa July 2021 and shows the new fencing erected by Andrew. It is a post and barbed wire fence which does not contain a gate. In front of the fence, on the Home Farm side, the photograph shows some wooden pallets which Graham said were used to plug any holes in the fencing.

25. In relation to the access at point B there was no dispute that the quadbike ramp and horse jump had been put there by Graham. The very purpose of these items was to facilitate access between the Disputed Land and the rest of the South Cutting. Ms Coyle submitted that these structures were not actually on the boundary but it seems to me that it doesn’t make much difference as their purpose was to allow the bloodhounds to reach the open land on the South Cutting and they would not have been necessary unless there was some form of barrier which would otherwise prevent access.

26. Although there was very little evidence in relation to maintenance of the fencing, clearly some form of fencing would have been required to ensure that sheep or other livestock did not escape. There was no evidence that the Kingstons had carried out any fencing works or had any reason to do so. I therefore accept that prior to July 2021, the Tuttons carried patch repairs to the existing fencing in order to stop the sheep from escaping.

27. As regards the access, I am satisfied that the only practical means of access was from the Applicant’s land. I do not consider that the quadbike ramp or the horse jump were an access per se. They were a means of making it easier to jump over the fence which presumably needed to remain in place to keep the sheep in. As regards the alleged gate at point A. the Respondents were unable to put forward a positive case about this gate because they simply didn’t know what the position was. There was also no evidence from the Tuttons that they had ever used point A for access which, given that they had permission to exercise their bloodhounds on Home Farm, might have been a useful point of access.

28. If there was ever a gate at point A, I accept Graham's evidence that it was blocked by a pallet put in place to stop the sheep walking through. It follows that I am satisfied that the only access to the Disputed Land is from the Poplars.

Bloodhounds, Quadbikes and Horse Jumps

29. In around 2001, Andrew became the Master of a pack of bloodhounds. Between 2002 and 2009 or thereabouts between 30 and 50 bloodhounds were kennelled on the Paddock. These dogs needed to be exercised twice a day. They could be let out to run around freely on the Paddock but they also needed to be taken on long runs.

30. John Kingston was a supporter of the hunt. It was common ground that in or around 2002, Mr Kingston had a conversation with Andrew during which he gave Andrew permission to exercise the bloodhounds on Home Farm. It was submitted on behalf of the Applicant that this permission covered only exercise on Home Farm itself and not on the Disputed Land. However, it is difficult to see why Mr. Kingston would have made such a distinction. Given that he wasn't actively using the Disputed Land there is no logical reason for him to have given permission to exercise the hounds on the area of farmland leased to the Smiths but not on the Disputed Land. It seems unlikely that the conversation would have gone into this level of detail. I therefore find that the permission given in 2002 extended to the whole of Mr. Kingston's land. It may well be that the Tuttons did not know what the extent of that land was.

31. However, it does not seem to me that the exercising of the bloodhounds is an act of possession in any event. Graham said in oral evidence that he would take the hounds on different routes over up to 20 different farms in the area. Once out of the Paddock he would keep the dogs close so that they did not disturb livestock and would accompany them either on foot, on horseback or on a quadbike. One route was from the Paddock, then through the North Cutting to the Disputed Land. From there he would go over the quadbike ramp or horse jump and continue on down through the South Cutting to the bridle path beyond. Graham would use this route every other day but would use other routes on the days in between.

32. Even if permission had not been granted, the exercising of the dogs over 20 farms does not manifest an unequivocal intention to possess. It could be explained, for example, by a right of way.

33. On the site visit we also saw a jump in the middle of the Disputed Land which the Tuttons said was used to teach the bloodhound puppies how to jump over fences. They described this as "popping". There is no mention of "popping" in either of the Tuttons' witness statements and Mr. Petts described this as something of an afterthought. However, I am satisfied that the Tuttons both gave their evidence honestly and there is no reason to doubt that during the period that they had the bloodhound pack, the Disputed Land was used to teach the puppies.

Sheep, Horses and Cattle

34. Although both Andrew and Graham refer to cattle in their witness statements, neither of them mentioned ever keeping cattle on the Disputed Land in oral evidence.

35. However, sheep are a different matter. Graham is a sheep farmer and at one point had approximately 2000 sheep. The sheep roam on the North Cutting and his evidence was they also graze on the Disputed Land which keeps it tidy. This is corroborated by the erection of the fence in 2005 to keep the sheep off the wooded part of the Disputed Land. In order to prevent the sheep straying onto Home Farm and the South Cutting fencing would have been required to keep them in. It appears that that fencing was rather rudimentary until July 2021 when Andrew re-fenced, but it served its purpose. As there is no barrier to access from the North Cutting to the Disputed Land it is inevitable that sheep did graze on the Disputed Land.

36. The Respondents' case with regard to riding horses was that the only riding which took place was as part of the local hunt and that such use had been permitted by John Kingston. Neither Graham or Andrew mentioned riding on the Disputed Land in oral evidence other than in the context of exercising the bloodhounds. As with exercising the bloodhounds (with or without horses), I do not consider that riding over someone else's land as part of a hunt manifests an intention to possess the land.

37. As regards the grazing of horses and ponies, Graham's evidence was that the Paddock had been purchased to provide more room for ponies. There were 8 stables on the Paddock. Graham said that the horses stayed in the Paddock but were sometimes allowed down to the North Cutting. The railway was an asset because the track area was very dry. Following the transfer of the Paddock and the North Cutting to Andrew in 2019, Andrew erected a fence in the North Cutting to stop the horses going up the

slope and hurting themselves. Andrew said he would sometimes turn the horses out onto the railway line to graze but mostly the horses were in the Paddock.

38. There was little discussion about horses on the Disputed Land itself. Both Andrew and Graham talked about horses on the North Cutting. The photographs of the horse jump adjacent to the quadbike ramp show that it was relatively low and could be jumped over by a horse. The Tuttons also said that they could not let the bloodhounds loose outside the Paddock because they would get out. It therefore seems surprising that a valuable horse would be allowed to roam onto the Disputed Land. I am not satisfied that there was regular use of the Disputed Land by horses albeit in the absence of any barrier between the Disputed Land and the North Cutting it is possible that occasionally a horse or pony strayed onto this area.

Storage, Parking and Tipping

39. On the site visit I saw a static caravan, a pile of old tyres, a pile of large logs, an oil but, water buts, a pile of pallets, rolled up barbed wire, the remains of a jump, a trailer and an old horse box housing old doors on the Disputed Land. The witness statements also refer to storage of telegraph poles and various other agricultural items. None of these items looked to be of recent vintage or of any particular use. Graham's evidence was that anything useful had been removed by him when he moved up to Cumbria in 2019. Mr. Petts described the use as being indicative of the Tuttons dumping detritus on someone else's land or fly-tipping, rather than an act of possession.

40. Graham said that he used to tip muck and grass cuttings on the Disputed Land. He also said that the Disputed Land was very overgrown when he owned it but that it had subsequently been cleared by his father, Andrew.

41. There is also a visible "hook" in the path which leads from the original railway track. The route from the North Cutting to the Disputed Land is fairly straight but once on the Disputed Land, the pathway hooks round and leads towards the gate to the Paddock. This hook is visible on the land registry plans which are, of course, based on the Ordnance Survey maps. Graham said he had created this path.

Consent

42. The Respondents case was that Mr John Kingston had granted the Applicant permission to use Home Farm to exercise the bloodhounds. As set out above I find that this permission extended to the whole of the Kingson's land. However, I do not

consider that taking dogs over the Home Farm including the Disputed Land in order to reach other land constitutes an act of possession. Mr. Matthew Kingston said that his father also granted the Applicant other indulgences which, in effect, amounted to not complaining about their use of the Disputed Land. I do not consider this to be permission implied or otherwise. It is merely acquiescence.

The Law

43. The Disputed Land is unregistered and the Applicant's case is brought under s. 15 of the Limitation Act 1980 which provides that:

> *"(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him…*
>
> *(6) Part 1 of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.*

44. Paragraph 1 of Schedule 1 to the Limitation Act 1980 provides as follows (so far as is relevant):

> *"Where the person bringing the action to recover land… .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."*

45. Paragraph 8 of Schedule 1 to the Limitation Act 1980 provides:

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

46. The leading cases on adverse possession are *Powell v McFarlane (1977) 38 P & CR 452* and *J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419.* In *Pye,* Lord Brown-Wilkinson said at paragraph 36 "*The question is simply whether the … squatter has dispossessed the … owner by going into ordinary possession of the land for the requisite period without the consent of the owner".* In the Pye case, the paper owner was physically excluded from the land by the hedges and the lack of any key to the road gate.

47. Possession has two separate elements to it, namely:

(1) Factual possession consisting of a sufficient degree of physical custody and control; and

(2) An intention to possess being an intention to exercise such custody and control on one's own behalf and for one's own benefit.

48. The requirements for factual possession were set out by Slade J in *Powell v McFarlane:*

"The question what acts constitute a sufficient degree of physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed…. 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"

49. In *Pye,* Lord Browne-Wilkinson said at paragraph 43 that the intention to possess requires an intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow. What is required is an intention to possess not an intention to own.

50. In *Powell v McFarlane,* Slade J referred to various cases on intention where the acts relied on were equivocal as regards the trespassers' intent to exclude the true owner. He referred to Sachs LJ's judgment in *Tecbuild Ltd v Chamberlain (1969) 20 P&CR 633* CA where he said:

"As regards adverse possession in cases such as the present, it is of no use relying only on acts which are equivocal as regards intent to exclude the true owner. If authority were needed for that proposition, it could be found in the judgment of Harman L.J. in George Wimpey & Co. Ltd. v. Sohn [1967] Ch 487 ; indeed, in that case it was pointed out that even all-round fencing is not unequivocal if other explanations exist as to why it may well have been placed round the land in question, as, for instance, to protect the ground from incursions of others ."

Slade J then concluded this section by saying that:

"In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner."

51. Slade J also recognised that later statements made by the person in court as to their intention at the material time have little evidential value. He said:

"I would add one further observation in relation to animus possidendi . Though past or present declarations as to his intentions, made by a person claiming that he had possession of land on a particular date, may provide compelling evidence that he did not have the requisite animus possidendi , in my judgment statements made by such a person, on giving oral evidence in court, to the effect that at a particular time he intended to take exclusive possession of the land, are of very little evidential value, because they are obviously easily capable of being merely self- serving, while at the same time they may be very difficult for the paper owner positively to refute. For the same reasons, even contemporary declarations made by a person to the effect that he was intending to assert a claim to the land are of little evidential value for the purpose of supporting a claim that he had possession of the land at the relevant date unless they were specifically brought to the attention of the true owner."

52. The person's intention must be clear from the actions he or she has taken so that it would be apparent to the owner that the person is seeking to dispossess him or her. As Slade J said later on in his judgment:

"*In view of the drastic results of a change of possession, however, a person seeking to dispossess an owner must, in my judgment, at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him."*

53. In determining whether Andrew was in factual possession of the Disputed Land I am required to consider the nature of the Disputed Land and what an owner occupier might have done with it. It was common ground that the land was of little agricultural use and there was no suggestion that the Kingstons had ever used it for any particular purpose. It does not seem to have been incorporated into Home Farm at any point and Matthew Kingston's evidence was that it had been allowed "to revert to a natural state".

54. One way of manifesting an intention to possess is by excluding the paper owner and the outside world by enclosing the land. Mr. Petts referred to the case of *Sava v SS Global Limited and others [2007] EWHC 2087 (Ch).* Mr. Sava's activities included grazing sheep, horses and ponies. The boundaries of the land were generally fenced or hedged and required only limited further fencing to be carried out which Mr. Sava did in order to keep the sheep within the fields. There was a garden gate onto the land which had no lock on it. The Court of Appeal held that the failure to prevent the paper owner from having free access through the garden gate meant that his intention to

possess was equivocal. It did not matter whether the paper owner had actually used the garden gate entrance.

55. Mr. Petts also referred me to Paragraph 7.031 (v) of Megarry and Wade which states that:

"*The intention to possess must be manifested clearly, so that it is apparent that S was not merely a persistent trespasser, but was seeking to dispossess. If S's acts are equivocal then S will not be treated as having the requisite intention to possess."*

The footnote to this passage provides a useful summary of some authorities on this proposition:

"*Tecbild Ltd v Chamberlain (1969) 20 P. & C.R. 633 at 642 (grazing ponies and allowing children to play on the land insufficient); Powell v McFarlane, above, at 472 (grazing a cow, shooting, and taking pasturage by a 14-year-old boy regarded as a taking of profits from the land rather than as evidence of an intention to dispossess); Buckinghamshire County Council v Moran, above, at p.642. In Port of London Authority v Mendoza [2017] UKUT 146 (TCC); [2017] 2 P. & C.R DG12 the mooring of a boat was regarded as too equivocal to demonstrate, by itself, an intention to possess the bed of the river.*

56. On the question of fencing, Ms Coyle referred me to *London Borough of Hounslow v Minchinton (1997) 74 P & CR* where the defendant had incorporated land belonging to the Council into his garden. The Council had no access. The Court of Appeal said that the motive for the defendant enclosing the land (in order to keep dogs in rather than other persons out) was irrelevant. The important thing was that they intended that their dogs made full use of what they plainly regarded as their garden. Ms Coyle also referred to *Batt v Adams [2001] 2 EGLR 92.* In that case it was said:

> *"34. The only factor that appears, at first sight, to point in the direction to exclude anyone, is the fact that Mr Higgs maintained and repaired the fence separating the disputed land from Rushymead. … A fence is a barrier. It keeps things in and it keeps things out. No doubt it is reasonable to assume in many cases that a person who maintains a fence is doing so for both purposes, but that is not necessarily so. Having read all the evidence and the transcript of the cross-examination, there is nothing in this case that suggests that Mr Higgs was doing anything other than putting up a sufficient barrier to keep his livestock in. This also is not unequivocal evidence of an intention to exclude others."*

57. In *Inglewood Investments Company Ltd v Baker [2002] EWCA Civ 1733*, Dyson LJ said:

"In this particular case, the purpose of the fence appeared to be, and Mr Baker said it was, to keep sheep in. It does not seem that he would have put that fence up if he had been grazing cattle rather than sheep. In those circumstances it was open to the judge to conclude that there was no intention of Mr Baker to possess the land."

58. Ms Coyle also referred to the case of *Chambers v Havering London Borough Council [2011] EWCA Civ* in which these cases were considered. Lewison LJ said that the various cases were not inconsistent with one another and the significance of fencing turned on the facts in each case. He went on to say:

"In a case of adverse possession, where the defendant relies upon the existence of fencing, the Judge will plainly have to consider its significance. In some cases, it will be cogent evidence, perhaps the most cogent evidence, of adverse possession where its effect is wholly to exclude the paper owner, even if it was erected to keep animals inside rather than to exclude people, including the paper owner. In other cases, when considered in the context of the evidence as a whole, fencing may be not be inconsistent with the absence of actual possession and of an intention to possess on the defendant's part, even where the fencing physically excludes the paper owner."

59. As regards the acts of possession, I have found that the relevant acts are the grazing of sheep, the training of puppies and the storage of items on the Disputed Land. I have to consider whether these activities are sufficient to show that the Tuttons were in control of the land and manifested an intention to possess it.

60. Ms Coyle relied on the decision in *Batt v Adams* referred to above. The facts were not dissimilar to the present case. There was no discernible boundary between Mr. Adams' field and the disputed land and the squatter had farmed them together for both arable and dairy farming as a single field. It was not in dispute that the disputed land was of poor agricultural quality and the Court found that it had been used as such land would commonly be used. Factual possession was therefore established.

61. Ms Coyle also relied on *Red House Farms (Thorndon) Ltd v Catchpole [1977] 2 EGLR 125* where again the land had no agricultural value and it was held that use of the land for shooting was sufficient to establish possession in those circumstances.

Conclusion

62. Graham Tutton's evidence was that he had always believed that the Disputed Land formed part of the title he purchased from Jim Anthony in 2002. There was and is no discernible boundary between the North Cutting and the Disputed Land and therefore

it is not obvious where one plot ends and the other starts. Until the transfer to his father in 2019, Graham used his land for sheep and they too would have no knowledge of where the boundary lay.

63. As set out above, that Graham maintained the fencing around the Disputed Land to prevent the escape of his sheep. This would have been necessary throughout the period that sheep were on the land.

64. As regards alternative accesses, I take into consideration the nature of the land. This is not an environment where one would expect to see locked gates and barricades. It is a rural area. No doubt it would be possible for the world at large or the paper owner to climb over the horse jump, quad bike ramp or indeed any of the barbed wire fencing but this is not a formal or convenient access. As regards the gate at point A, there was insufficient evidence to support its existence. While the primary purpose of maintaining the fencing was to keep the sheep in, inevitably it also kept other people out. The motive for erecting the fencing is irrelevant. The Disputed Land is visually and practically enclosed as part of the North Cutting.

65. In my judgment since 2002, the Tuttons treated this land in the way that an occupying owner of a rural plot of little agricultural value might use it. They mended the fences, they planted poplar trees, they grazed sheep on it, they stored and dumped agricultural items on it, they created an access onto it from the Paddock, they created a path and they put jumps on it to train puppies. Taken together these actions show that the Tuttons treated the land as part of their holding and occupied it as an owning occupier would have done. There was no evidence that the Kingstons or anyone else had done anything on the land since 2002.

66. I shall therefore direct the Registrar to give effect to the Applicant's application for first registration of the Disputed Land.

67. The usual rule is that costs follow the event. The parties may, by 5pm on 4th August e 2023 file and serve any applications and submissions in relation to the costs of these proceedings. Any party seeking an order for payment of any or all of their costs shall also file a schedule of costs, in or substantially in court form N260, for the purposes of a potential summary assessment. Thereafter I shall determine the issue of liability for costs and give any necessary further directions for the assessment of costs awarded.

Judge Nicola Muir

Dated this 6th July 2023

By Order of the Tribunal