PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

Case Number: REF/2018/0907

Title Number: CL 337142

Property: Land lying to the east of 7 Harbour View, Porthleven, Helston TR13 9JH

Applicant: Christine Mary Daniell

Respondent: Porthleven Harbour and Docks Company

DECISION

Adverse possession – first registration – Limitation Act 1980, sections 15, 17 and Schedule 1 paragraphs 5 and 8 - factual possession – garden and viewing area across road from Applicant's main property – possession by licence or tenancy, and following expiry of licence or tenancy – aggregation of successive periods of possession – whether possession of predecessor abandoned – extent of land acquired by possession

Authorities referred to:

JA Pye Limited v Graham [2003] 1 AC 419
Powell v McFarlane (1977) 38 P&CR 452
Chapman v. Godinn Properties Limited [2005] All ER (D) 313 (CA)
Heaney v. Kirkby [2015] UKUT 0178, HHJ Kaye QC
Cooper v. Gick REF 2007/0103, 25/3/08
Thorpe v Frank [2019] EWCA Civ 150
Megarry & Wade, *The Law of Real Property*, 9th edition para. 7-036, 7-46, 7-047
Site Developments (Ferndown) Limited v. Cuthbury Limited [2011] Ch. 226, p240
Mount Carmel Investments Limited v Thurlow [1988] 1 WLR 1078 (CA)
Zarb v. Parry [2012] 1 WLR 1240 (CA)
Ezekiel v. Fraser [2002] EWHC 2006 (Ch.), HHJ Rich QC
Williams v. Jones [2002] 3 EGLR 69
Street v. Mountford [1985] AC 869

Topplan Estates Limited v. Townley [2004] EWCA Civ. 1369
J Alston & Sons Ltd v BOCM Pauls Ltd [2009] 1 EGLR 93 (Ch.D, HHJ Hazel Marshall QC)
Re. Ellenborough Park [1956] Ch. 131
Mulvaney v. Gough [2003] 1 WLR 360

Before Judge Paton, sitting at The Law Courts, Launceston Road, Bodmin, Cornwall PL31 2AL

On 13 to 15 July 2021 (site visit 12 July 2021)

For the Applicant: Mr. Gavin Bennison, instructed by Michelmores LLP, Bristol

For the Respondent: Mr. Jonathon Rushton, instructed by Burkill Govier, Farnham

Introduction

1. By an application on form FR1 made as long ago as 16 January 2018, the Applicant Mrs. Christine Daniell applied for first registration of title to an area of unregistered land lying to the east of her property 7 Harbour View, Porthleven, Cornwall. She claims to have acquired title to that land by adverse possession. She acquired 7 Harbour View, registered title CL 115575, on 11 May 2012. After renovating it, she has used it as a holiday and holiday letting property since about 2014. Her principal residence is in Worcestershire.

I. THE DISPUTED LAND

2. Harbour View consists of a row of what appear to be former fishermen's cottages on a road situated immediately to the west of, and overlooking, the Inner Harbour at Porthleven. This case is concerned with one part of an area of land across that road from numbers 1 to 8 (there is no number 5, it having been demolished some years ago).

3. The area across the road from 1 to 8 Harbour Cottages has been referred to by the Respondent, the Porthleven Harbour and Docks Company, as the "Peninsula", but without wishing to disparage that usage I shall refer to that whole area as "the Strip". The Strip is a long triangular area, whose northernmost point opposite number 1 Harbour View begins at the junction of Harbour View with the main B3304 road

running through the village. It then broadens out and extends south all the way to the site of what has been referred to as to the former China Clays building, but is now a restaurant. The Strip is bounded on its western side, alongside the Harbour View road, by a traditional 'Cornish hedge', namely a grass covered dry stone wall with the appearance of a flat-topped bank, which rises gradually in height north to south, to a height of around 1 metre in the area with which this case is concerned. At the eastern, harbour facing side of the Strip, there is a substantial and abrupt drop in height to the harbour area below, via a 'cliff face' partly covered with foliage. The Strip therefore overlooks from a height the harbour area and Porthleven generally.

4. The Respondent, the Porthleven Harbour and Docks Company, claims to be the owner of the whole Strip, title to which is unregistered. This claim is based on the Porthleven Harbour Act 1879, and subsequent conveyances or transactions pursuant to it (now lost), as attested to in a 1978 statutory declaration made by a Mr. Hagenbach. The Applicant does not admit that paper title. As I explained to the parties at the outset of the hearing, the only application before the Tribunal is the Applicant's FR1 application, which is hers to make and prove. Any person, not just someone who has or claims to have paper title to the application land, may object to an FR1 application. It is not necessary for that person to prove that they themselves have title. In the absence of any further application by the Respondent for first registration of its own title, it is not therefore necessary for the Tribunal to make any final finding as to that paper title, and it would not be appropriate to do so. It is sufficient for the purposes of this application to note that the Respondent is clearly interested in and owns land in Porthleven Harbour area generally, and claims to own this land as part of that – hence its objection to the application.

5. The Applicant does not claim the whole Strip, but only one relatively small part of it, roughly opposite and across the road from number 7. This part- the disputed land – has been referred to variously as a "garden", a "viewing area" and a "dug out". To put the claim in context, while the initial stretch of the Strip opposite numbers 1 to 3 is essentially just grassland, beyond that there are four distinct areas which have been created (or "dug out" – see above) within it, for use as garden, amenity and viewing areas.

6. One of these, perhaps the oldest, is opposite number 4, and was the subject of the evidence of Mrs. Vivienne Issitt, who has lived in number 4 all her life. It consists of a small rectangular concreted area with a very low wall around it, and a bench. Mrs. Issitt's evidence was that her father created this area a long time ago (in the 1940s), and that the Respondent Company (of whom he had first asked permission) said that if he kept it neat and tidy, he could have it. She says that she and her family have used it exclusively ever since then, have never paid rent for it, and that she has twice refused to do so, citing "squatter's rights". Any claim by Mrs. Issitt for that land is not, however, before the Tribunal.

7. Another such area, at the southern end of the Strip and perhaps the newest, is that roughly opposite number 8, adjacent to the former China Clays building (now the "Harbourside Refuge" restaurant). In relatively recent times, in about 2014, this was substantially refashioned as a paved courtyard with white block walls and a metal gate. It is now the subject of a licence agreement between a company (Trafalgar Square Limited) and one Paul Hamilton, for £750 per year, for use as a garden in conjunction with number 8 Harbour View. Trafalgar Square Limited is a company associated with the Respondent, through a common director Mr. Trevor Osborne.

8. Between those areas, but quite distinct and separated from them, are two further areas roughly opposite numbers 6 and 7. The number 6 area is a small level garden area, with hedging separating it from the number 4 area and other land to the north, and from the harbour to the east. While this was briefly the subject of debate and some cross-examination, it appears that historically, there has always been some demarcation and separation between the number 6 and number 7 areas, which appears (from the photograph to which I am about to refer) to have a been a further low section of bank or dry stone wall.

9. The 'number 7 area', which is the disputed land the subject of this application, underwent significant changes as a result of works carried out to it by the Applicant in May 2017. With apologies for resort to the cliché of "a thousand words", its nature and condition before those works is best captured in the photograph which I append as "Figure 1", one of four photographs appended on the pages following. This also shows the number 6 and 4 areas beyond it, and the low section of bank or wall separating it

from the number 6 area (behind the blue folding chair). It can be seen that this land comprised a roughly semi-circular gravelled area, with some flagstones laid close to the slope of the bank, on which there is a bench. It was separated from the drop to the harbour below by a fairly basic wooden fence. Just below the fence in the photograph was a low section of blocks on which someone unknown had, many years before, daubed the word “Private”.

10. Access to each of these three areas from the Harbour View roadside was achieved by stepping on some ‘footholds’, including some pieces of stone, embedded in the bank. Those opposite numbers 4 and 6 are still there today. There were also such ‘footholds’ opposite the number 7 area, but they were later removed then replaced, as described further below. In the case of the number 7 area, once one ascended the bank via the ‘footholds’, there was then a descending flight of stone steps to the gravelled area, with a rough wooden handrail on the right. I attach as “Figure 2” a photograph showing these steps, looking back from the number 7 area towards Harbour View.

11. The significance of those photographs is as follows:-

i) they were taken by the Applicant immediately before the works carried out by her in May 2017

ii) it was clear from the evidence of Mrs. Issitt and other witnesses, and I find, that this is essentially how this land was laid out for a period potentially in excess of 50 or 60 years, going back to Mrs. Issitt’s childhood.

FIGURE 1: THE LAND BEFORE MAY 2017 (FROM BANK/STEPS ABOVE)

FIGURE 2: THE LAND BEFORE MAY 2017 (LOOKING UP TOWARDS BANK)

FIGURE 3: THE LAND AFTER THE MAY 2017 WORKS

FIGURE 4: THE LAND AFTER THE MAY 2017 WORKS (LOOKING BACK TOWARDS 7 HARBOUR VIEW)

12. In May 2017, the Applicant carried out works to the area which (again, for ease of exposition) are best appreciated by the photographs inserted on the previous page as Figures 3 and 4. In broad terms, and without descending to detailed measurements, she:-

    i) created new walls on its northern and southern sides
    ii) erected a new paling fence on the eastern (harbour) side
    iii) cut through and removed a section of the bank and the former descending stone steps and hand rail, creating a new level gate access from the road
    iv) at least to some extent, cut into and 'straightened off' the former sloping bank shown behind the bench in Figure 1, replacing it with a perpendicular brick retaining wall; and
    v) resurfaced the ground.

13. Because of the dates and time periods involved, it is common ground that the sufficiency or otherwise of the adverse possession claimed and relied upon in this case must depend on the position as depicted in Figures 1 and 2, prior to the 2017 works. The 2017 works could not improve the Applicant's position, or the extent of any land claimed. She must rely on periods of possession prior to May 2017 to establish her claim, and so is limited to such possession as was enjoyed of the land shown in Figures 1 and 2.

14. In the absence of a detailed scale plan, it is not presently possible to say precisely to what extent, if any, the land as depicted in Figures 1 and 2 has been 'expanded' by the 2017 works as shown in Figures 3 and 4. The Respondent submitted, through its counsel, that there had been a significant enlargement of the area in use. The Applicant, through her counsel, did not admit any significant enlargement or encroachment, save as to some levelling off of the former sloping bank, but accepted that the adverse possession claim must be limited to what can be seen in Figures 1 and 2, consisting essentially of the former surfaced area and the steps leading to it, but not the bank itself.

15. The plan accompanying the FR1 application, and the filed plan for the provisional title number allocated to it, shows only a "general boundary". That is the only application to which the Tribunal can direct the Registrar to give effect (in whole or part) or cancel. If the application succeeds to any extent, there could be a further issue over the precise boundary between the land acquired and any remaining adjacent land to which the Respondent can prove title. There could also be, related to that, issues over alleged trespass by the 2017 works, and potentially whether the Applicant would also need to establish a right of way over or through any land retained by the Respondent.

    I shall return to these issues further below.

16. After that somewhat lengthy introduction to the land in dispute, it is now necessary to consider the evidence as to its history and use.

II. FINDINGS OF FACT

17. There is relatively little dispute over the primary facts in this case**.** Most of these are apparent from the documentary and photographic evidence. I heard oral evidence from the Applicant, Mrs. Gillian Foster, Mrs. Vivienne Issitt and (for the Respondent) Mr. Trevor Osborne. To the extent that their evidence was relevant to the factual issues in the case, as opposed to e.g. opinion or conjecture, I found them all to be straightforward and honest witnesses. Nothing turns in this case on any particular clash of evidence between them.

18. I will therefore first set out my findings of fact on the basis of their and all the other evidence in the case.

Number 7 title history

19. The recent title history of 7 Harbour View was agreed and documented, and is as follows:-

    i) prior to 23 March 1973, it was owned by the Respondent. By a conveyance of that date, the Respondent conveyed it to one Lottie Kitto Miners for £3750. The

conveyance states the Respondent's root of title to be an 1870 Indenture.

ii) On 27 May 1983, Lottie Kitto Miners conveyed it to Victor and Edna Upton.

iii) On 15 May 1984, following the death of Edna Upton, it was conveyed by Victor Upton to one Lily Morris.

iv) On 15 May 1996, Ms. Morris conveyed it to a Mr. and Mrs. Pratt.

This appears to have been the conveyance which induced its first registration, under title CL 115575 with effect from that date.

v) On 3 August 2001, the Pratts transferred that title to one Anne Curtis.

vi) On 1 May 2003, Ms. Curtis transferred it to Gillian Irene Foster and her (now late) husband, Mr. Foster.

vii) Mr. Foster died in April 2010. On 11 May 2012, Mrs. Foster as surviving proprietor transferred it to Mrs. Daniell, the Applicant, who was then registered as proprietor with effect from 8 June 2012.

It is common ground that neither the registered title, nor any of the above conveyances or any plans attached to them, make any reference to or purported to convey any land other than the main number 7 cottage and its immediately adjacent courtyard garden.

The disputed land: pre-1973

20. Mrs. Vivienne Issitt gave evidence in support of the Applicant's claim. While a good deal of her statement and evidence concerned her 'own' dug out area opposite number 4, she also stated, and I find, as follows:-

i) in addition to the number 4 area which her father had created, for as long as she could remember there had also been similar areas opposite numbers 6 and 7. She had played on the whole of the Strip as a child.

ii) she could also remember sitting on the bench in the number 7 area (which she thought might even have been the same bench shown in Figure 1) with Mrs. Miners, whom she called her "Auntie Lottie"

iii) she did not know, and there was no evidence of, when that area was first created, and by whom. She thought that the gravelled area had been there when she was a child. She was not sure about the flagstones. Otherwise, it had always had the general appearance and layout depicted in Figures 1 and 2.

iv) the number 4, 6 and 7 areas were nevertheless distinct areas, used by the occupants of those properties. Although as children she and her friends may once have roamed over the whole Strip, and while over the years occasionally teenagers and other members of the public have set foot on it, the dug out areas were not used as 'communal' areas for the whole of Harbour View. The number 7 area was used exclusively by her "Auntie Lottie".

21. Mrs. Issitt, understandably not being acquainted with the above conveyancing history, appeared to believe that, as with her own family and number 4, Lottie Miners and her family had owned number 7 for several generations. As set out above, that was not the case. Although there is no documentary, or indeed any other evidence about this, it seems likely that the Miners family were tenants of number 7 prior to 1973, with the Respondent as their landlord, from whom Mrs. Miners then purchased the freehold. From the price paid and the conveyance, this would appear to have been a conveyance for full value, rather than e.g. an enfranchisement under the Leasehold Reform Act 1967. So she and her family were probably either periodic common law or statutory tenants of number 7. Any use that she and her family had made of the dug out area on the Strip would have been in their capacity as such tenants. In any event, the Applicant does not rely on any pre-1973 periods of possession in support of her claim.

1983 memo, letter and draft tenancy agreement

22. On the second day of the hearing (after the conclusion of the Applicant's witnesses' evidence on the first day) the Respondent sought permission to adduce and rely upon

some new documents dating from 1983, discovered by Mr. Trevor Osborne the previous evening. Mr. Osborne first acquired control of the Respondent in 1978. He explained that its historical records are divided between its Porthleven offices, his own home in Bath and another location, making full inspection of all records difficult. He and his counsel were naturally apologetic for the late disclosure of the new material, and accepted criticism that more thorough searches and disclosure could have been made sooner.

23. The documents were, nevertheless, potentially highly relevant to the proceedings and so disclosable. They were as follows:-

i) a memo dated 15 February 1983, from Mr. Osborne himself to his employee Arthur Cox. This stated as follows:

"*Ref. 113 – Mrs. Miners Garden Seat*

Please inspect the area of land Mrs. Miners occupies, put a plan, sketch on the file and inform Mrs. Miners that we cannot continue collecting 10p per annum, which is highly uneconomical and the minimum rental charge is £5.00, although I would expect to achieve £20 per annum for a small garden overlooking the Harbour. Please discuss this with her and put her on a correct annual rental licence agreement at the appropriate modern rent. This should be done by discussion and the rent should be commencing at least 6 months if not a year ahead. Please use the anniversary date of the present arrangements."

On the reverse side of the memo, in what Mr. Osborne said was the handwriting of Mr. Cox, there are some measurements ("17'6 x 13'6"), a reference to "£5 p y seat and garden area", then some illegible words followed by "tidy".

ii) a letter dated 28th February 1983 to Mrs. Miners from the Respondent (via a Ms. Sheldon Allen), stating:

"*Further to your telephone conversation with our Mr. Arthur Cox on Friday last, regarding the garden seat opposite Harbour View on land belonging to the Porthleven*

Harbour & Dock Company, we now understand that you wish to retain this seat.

We attach a copy of an Agreement which we shall be pleased if you will sign and return one copy to the Office for our file."

iii) a draft "Agreement", with a date of 1 March 1983 at the top right but undated in the body of the terms. Without setting it out in full, this appears to be a draft tenancy agreement, with Mrs. Miners as "the Tenant", "rent" of £5 per annum payable in advance each year on 25 March, a restriction as to use ("only for the purpose of a Garden Seat and the small area surrounding it.."), an agreement to maintain it in a "neat and tidy condition", a covenant by the Respondent for quiet enjoyment, and provisions for both forfeiture on non-payment of rent and termination on 12 months' notice.

There is no evidence that Mrs. Miners ever signed and returned this draft agreement, and she sold her property just two months later. Nor are there any records or receipts for rent.

24. Counsel for the Applicant (Mr. Bennison) objected to the late disclosure and production of this material, on the basis that he would have wished to ask Mrs. Issitt some questions about it during her evidence on the first day. After some consideration, and weighing any such potential prejudice against the relevance and probative value of the material, I granted permission for the material to be produced in evidence. Mrs. Issitt had already given evidence, in her statement and orally, that she had not heard of Mrs. Miners ever paying rent for the land, her only source for this being conversations with Mrs. Miners' niece. Had she been asked about these documents, to which she was not a party and of which she could have had no direct knowledge, the most she could (and almost certainly would) have said was to repeat her evidence as to lack of knowledge of any rent payment by Mrs. Miners. She could not have spoken directly to the contents of the documents themselves.

25. I consider that these documents should therefore be admitted, and are relevant and probative in these respects. They show:-

i) that in 1983 as now, the Respondent regarded itself as the owner of the Strip

ii) that the number 7 area (now the disputed land) was a distinct and recognisable area within that Strip

iii) that in early 1983, it was apparent and obvious to the Respondent (via Mr. Osborne) that this area was being used – "occupied" is the word used – by Mrs. Miners

iv) the issue which vexed Mr. Osborne was that she was not paying enough for her occupation of it, and so should pay "an appropriate modern rent". The area was therefore clearly regarded by him as a distinct parcel of land for which she should pay a rent, as its sole occupying tenant. It was not a question of her paying for the privilege of sharing it with others. She was the only person occupying it, so she was the one who should have been paying a proper rent for it.

v) the memo suggests, admittedly by way of second hand hearsay (Mr. Osborne accepted that he was not personally involved in the collection of such rents) that Mrs. Miners had been paying the grand sum of 10p per year for her occupation. There are no receipts for the payment of these sums, but I accept Mr. Osborne's evidence that such small sums are likely to have been paid over the counter into the Respondent's petty cash, and that traditional Porthleven residents such as Mrs. Miners always liked to pay any debts they owed, even small ones. It would have been odd for this figure of 10p, and the statement made in the memo, to have come from thin air. Mr. Osborne had no reason to make this up in 1983. His concern was that not enough was being paid, not that Mrs. Miners had failed to make any payment of what was due.

I therefore find that, on the balance of probabilities, Mrs. Miners had before the date of that memo been paying the Respondent for her occupation of the number 7 garden area, in the sum mentioned (10p per year).

vi) I also find, on the balance of probabilities (given that only the draft has been located) that the proposed tenancy agreement was never in fact entered into by Mrs. Miners, almost certainly because at that time, she was in the process of selling number

7. That sale completed on 27 May 1983, after which she moved to “a flat in Penzance”, according to Mrs. Issitt.

1983 to 2003: the ‘evidential void’

26. There is almost no evidence from this period. None of the successive owners of number 7 from between those dates provided any evidence. All we have are their names from the conveyances and transfers set out above.

27. The most which can be said, and which I find, is as follows:-

i) the disputed land was ‘still there’. It is just about visible, as a lighter coloured area along with the number 4 and 6 areas, in a 1997 aerial photograph.

ii) it did not fall into ‘rack and ruin’, or the possession of someone else. The gravelled area, the steps and rear fence, and probably also the bench itself, remained in place, as they appear in the Figure 1 and 2 photographs.

iii) it is likely that the successive occupiers of number 7 would have made at least some use of this area. It would have been surprising if they had not, or if they had remained unaware of its existence. To that limited extent, the hearsay evidence from Mrs. Daniell, that unnamed local residents to whom she had spoken had said that successive owners of number 7 had used this land, is not surprising.

iv) it is also likely, however, that the Respondent would not have lost all interest in demanding money for such use. In March 1983 it had gone to the trouble of drafting a tenancy agreement, at a proposed rent of £5 per year, possibly rising to £20. Mrs. Miners then sold number 7 and moved away before signing anything, but I find that it is likely that the Respondent would have returned to this subject with the subsequent owners of number 7, rather than simply giving them a ‘free pass’.

v) that tallies with Mrs. Issitt’s evidence that in about 1999, the Respondent wrote to her asking for rent in return for her occupation of the area opposite number 4, which she refused to pay. It is unlikely that the Respondent would just have singled her out

and not also written to the then owners of number 7, Mr. and Mrs. Pratt.

vi) this also tallies with correspondence exchange between conveyancing solicitors on the occasion of the 2003 sale from Ms. Anne Curtis to Mr. and Mrs. Foster, considered below.

2003 conveyancing correspondence

28. On 3 April 2003, the solicitors acting for Mr. and Mrs. Foster on their proposed purchase of number 7 from Anne Curtis said in a letter to Ms. Curtis's solicitors:-

"*…our client was advised by your client's partner that the small garden area, which is opposite the property, was for the exclusive use of the owners of number 7 Harbour View. Our client was advised that a payment in the region of £40 per annum was paid to Porthleven Harbour Company. We would be grateful if you could kindly supply us with further details in this respect.*"

29. Ms. Curtis's solicitors replied as follows, on 10 April 2003:

"*Our client has now confirmed that your client will need to apply to the Harbour & Dock Company, The Shipyard, Porthleven to inform the Company of your client's purchase and they will then invoice them for any monies due on account in connection with the maintenance of the communal areas. When our client purchased the property, she was informed that the charges would be £40.00 per annum. They have never received an invoice since they have occupied the property but they have recently contacted the Company to see if any monies are due. We have no objection to advising our client to agree to a retention of say £60.00 being 18 months' contributions which we would be prepared to hold here until such time as an invoice is forthcoming.*"

30. I draw the following conclusions and make the following findings from this exchange:-

i) I find that Ms. Curtis's predecessors in title to number 7, the Pratts (1996 to 2001), had probably received from the Respondent Company in about 1999 a similar letter to

that described by Mrs. Issitt at number 4, asking them to pay rent in return for the exclusive use of 'their' area, that they had agreed to pay (and paid) it, and that they so informed Ms. Curtis when she purchased in 2001. The figure of £40, by that time, is a plausible updating of the figures previously mentioned by Mr. Osborne in 1983.

ii) her solicitors' reference to "maintenance of the communal areas" is something of a misnomer and 'red herring'. There is no evidence that the Respondent ever levied some form of general 'maintenance charge' from residents for 'communal areas', nor (despite counsel's probing on this issue in cross-examination) that the areas opposite numbers 4, 6 and 7 were ever 'communal' in the sense of being used by all Harbour View residents, as opposed to just the respective owners of those properties. Although their response appears on first reading to be referring to something else, I find that in fact "the charges" of £40 to which they refer are one and the same as the subject of the preceding letter - the £40 charges for the exclusive use of the number 7 garden area, of which Mr. and Mrs. Foster had been informed by Ms. Curtis's partner prior to the purchase.

iii) Ms. Curtis (with or without her partner) had not, however, been invoiced for or paid the £40 per annum during her brief period of ownership. On the balance of probabilities, I find that she had probably had some contact with the Respondent following her 2001 purchase, if not a formal written licence or tenancy agreement, and her understanding was that her use of the number 7 garden area was by their permission for which money would be due – albeit that by the time of her 2003 sale, she had not yet in fact paid for it. Her solicitors proposed a retention from the sale proceeds to allow for such payment.

The Fosters' period of ownership 2003-2012

31. Mrs. Gillian Irene Foster provided a statement and gave oral evidence, and I found her to be a straightforward and honest witness, whose evidence I accept. The key points of her evidence were as follows:-

i) between 2003 and 2010, she and her husband used number 7 as a holiday home and second property. Their main residence was in Yorkshire, but they and their wider

family visited number 7 regularly, on average at least once a month, and for longer periods during holiday seasons.

ii) their clear understanding, upon which they acted, was that the number 7 garden area was for their exclusive use as owners of number 7. As Mrs. Foster said, they "treated it as their own".

iii) they used and maintained it accordingly, as their own private garden and viewing area. They liked to sit there with a coffee or glass of wine and enjoy the Harbour view. Mr. Foster kept the area tidy and free of weeds and overgrowth, including trimming the section of bank by which they accessed it. Mrs. Foster planted a 'rambling rose' on part of it.

iv) they did not enter into any licence agreement with, or pay rent or any other monies to, the Respondent. On one occasion, in about 2007, the Respondent did approach them and proposed that they should pay rent. They refused. Mrs. Foster's evidence was that her husband, who took the lead in such matters, expressed the view that "..we had looked after the land all that time and had been told it came with the house so why should we start paying rent now?" They were aware that the owners of number 8 had begun paying rent for 'their' area, but the Fosters did not. They had no further contact with the Respondent over the matter, and continued as they had before.

v) in March 2010, they visited number 7 and this land for what would prove to be the final time, to put their property on the market for sale. Mr. Foster was ill by this time, and he died in April 2010.

vi) number 7 remained on the market for sale for approximately two years, although I did not hear evidence about that process. Mrs. Foster, understandably following such a bereavement, did not wish to drive down from Yorkshire by herself to visit number 7, of which she presumably had fond memories shared with her late husband.

vii) During that time, the land was not therefore used or maintained by her, or anyone else. A Google Street View image from 2011 shows that the grass on the bank area had become somewhat overgrown.

vii) it was eventually sold to the Applicant Ms. Daniell on 11 May 2012.

The Applicant's period of ownership, and evidence

32. The Applicant gave oral evidence, confirming her Statement of Case and Statement of Truth on her FR1 application to be true, and was cross-examined at length by Mr. Rushton. Much of this cross-examination was as to her personal or financial motives in carrying out the May 2017 works and now claiming this land. On the relevant issues of what she has actually done on and with the land in her time of ownership, there was relatively little dispute, and I find as follows:-

i) When she purchased number 7, although it was not included in any of the title documents (and I have seen no conveyancing correspondence), I accept that Mrs. Daniell understood that the land over the road was for the "exclusive use" of number 7. Although she was a little unclear on this (it being over 9 years ago), I find that she derived this understanding from communications with Mrs. Foster via the selling agents, and from conversation she had with neighbouring owners and occupiers before and after her purchase. She could see that there were similar areas opposite numbers 4, 6 and 8, and she understood and was told that this land was the corresponding area for number 7.

ii) she spent her initial two years of ownership refurbishing and updating number 7, but did in that time visit it regularly for this purpose, and also to use it as a second and holiday home. In that time she also used the land across the road, which she understood to be for her exclusive use with number 7. She made similar use of it to that of previous owners, namely as a private garden and viewing area.

iii) from about 2014 or 2015, she let number 7 (which she renamed "Crab Pot Cottage") for holiday use. The Respondent, as apparently is part of its business, itself acted as her letting agent for this purpose. The Applicant did not discuss the use of the land with the Respondent. The land was not advertised as available for use by holiday visitors, but the Applicant continued to use it on her own visits to number 7.

iv) in 2014, she was concerned by works carried out by the Respondent in connection with development of the adjacent area opposite number 8. In the course of these works workmen removed part of the bank, including the 'footholds' which provided access to the number 7 area. Her evidence, which I accept, was that she "remonstrated" with the workmen and insisted that they put back what she regarded as the steps leading to her land. They did so, and in fact replaced them with something better – a flight of graduated concrete steps, leading up from the road to the top of the bank.

v) on 8 April 2016, she wrote to Mr. Osborne of the Respondent. This was a friendly letter, which mentioned that number 7 was now "letting successfully with PLC [i.e. the Respondent]". The most relevant part of it for present purposes was the following:

"*My next project is to improve Crab Pot's garden area across the road. I have been wondering for some time if I could buy the adjacent garden land of no. 6 which I believe you own? The garden to my cottage is rather small so I am sure you can understand why I would like to make the plot somewhat larger.*"

It is clear from this letter that she therefore assumed, and indeed asserted, that the "garden area across the road" already belonged to number 7 ("Crab Pot"), and that what she was looking to buy was the adjacent number 6 garden area as well.

Despite sending a holding response on 5 May 2016 saying that the Respondent would in touch on this matter shortly, there is no record that Mr. Osborne or the Respondent ever responded substantively to it.

vi) in May 2017, the Applicant carried out (by contractors) the works described in paragraph 12 above, and took several photographs, showing the position before and after the works were carried out. Although her motives in doing so are not strictly relevant to this application, I find that she genuinely wished to improve this area, to make it safer and more pleasant to use by both herself and holiday lessees. It was not, as was hinted, some form of calculated 'land grab', influenced by the similar reconfiguration of the adjacent number 8 area. She had not advertised it as available for use in holiday lettings because of concerns about safety, although she gave some

evidence that holiday lessees had on occasions used the area anyway.

33. The current dispute and application has its origins in those works. Mr. Osborne wrote on 2 June 2017, stating that he was "surprised" that the Applicant had "undertaken substantial works on property which is in the ownership of the Porthleven Harbour and Dock Company". He asserted that it had been made clear to the Applicant "on several occasions" that the Respondent owned the land, and said that while he was prepared to consider the formal grant of a licence, "no such consent is presently granted pending the resolution of this matter". He referred to an alleged email to him from his office dated 11 July 2015, stating that "Jo says that she has already explained the licence situation to Tina [the Applicant]" and that the Applicant might be approaching the Respondent about the land.

    He did not say, and it is not alleged, that the Respondent had already granted any licence to the Applicant, and there is no satisfactory evidence, from "Jo" or anyone else, that before 2017 the Applicant had been told or understood anything other than the position as stated in her April 2016 letter, namely that this was "Crab Pot's garden area across the road".

34. Mr. Osborne also referred to, and enclosed, a letter which he specifically claimed "was delivered to your property on 28 July 2011..by Damelza Storbeck in my office". This was a letter apparently sent to all residents in Harbour View, in relation to the whole of what I have referred to above as "the Strip". The letter stated that it was the "private property" of the Respondent, and ask the recipients to sign and return the letter to acknowledge this and that "no rights or privileges" could be claimed over this land. It stated that the Respondent was aware that this land had been "on occasion maintained/tendered by the residents and owners of the properties opposite this land".

35. The copy enclosed with Mr. Osborne's 2 June 2017 letter had the words "7 Harbour View (Tina Daniel)" handwritten on to it. This is odd, and must have been done after the event with the sending of this 2017 letter, because in 2011 the Applicant was of course not the owner of number 7. While I acquit Mr. Osborne of personal responsibility for this, it was plainly a misleading document in this regard. It was being presented as something which had actually been delivered to the Applicant at

number 7 in 2011, not as a document now to be signed by her. The evidence is that the owners of at least numbers 1, 2 and 6 had signed and returned such a letter, while Mrs. Issitt at number 4 did not. If any copy of this letter was delivered to number 7, it was never received by Mrs. Foster (the owner at that time, who never visited the property after March 2010), and 2017 was the first occasion on which the Applicant saw it.

36. Some pre-application correspondence followed, including a 19 October 2017 letter in which the Applicant's solicitors laid out her case on title to the land by adverse possession. The Land Registry FR1 application followed on 16 January 2018, the Respondent objected to it, and it has taken until now for the dispute to come to a hearing.

III. THE APPLICABLE LEGAL PRINCIPLES

37. There was little dispute over these. Since the disputed land is unregistered, it is the 'old' law of adverse possession under the Limitation Act 1980 which applies.

Factual possession and intent to possess

38. The following propositions are relatively settled and clear, principally from the decision of the House of Lords in *JA Pye Limited v Graham* [2003] 1 AC 419, refining and applying the decision of Slade J. in *Powell v McFarlane* (1977) 38 P&CR 452:

(1) The 12-year limitation period prescribed by section 15(1) of the Limitation Act 1980 commences when a person enters into adverse possession: Limitation Act 1980, Schedule 1, para. 8. Upon expiry of the limitation period, any paper owner's unregistered title is extinguished: section 17.

(2) what must be established is a sufficient degree of factual possession of the land in question, with an intent to possess it.

(3) Factual possession generally connotes a sufficient degree of single and exclusive physical custody and control of the land: *Pye* at [40]-[41], per Lord Browne-Wilkinson. What constitutes a sufficient degree of physical custody and control is fact-

dependent; in particular it depends upon the nature of the land and the manner in which it is commonly used or enjoyed. Typically, one is looking for the adverse possessor to be dealing with the land in question as an occupying owner might have been expected to: [41].

(4) Physical enclosure of the land may establish factual possession but is not a prerequisite. There are many illustrations of this in the case law. Mr. Bennison referred to *Chapman v. Godinn Properties Limited* [2005] All ER (D) 313 (CA) (unenclosed but surfaced access strip) and some cases involving unenclosed but cultivated verge or garden land (*Heaney v. Kirkby* [2015] UKUT 0178, HHJ Kaye QC; and *Cooper v. Gick* REF 2007/0103, 25/3/08, Michelle Stevens-Hoare sitting as a Deputy Adjudicator). To those one might add *Thorpe v Frank* [2019] EWCA Civ 150 (paving of unenclosed area of forecourt: see McCombe LJ at paragraphs 40 to 56, confirming that enclosure was not necessary and that the question was whether what was done, such as the paving in that case, were "..the sort of actions that one would expect an occupying owner to do in dealing with this land.")

(5) An intention to possess connotes an intention to exercise such custody and control on one's own behalf and for one's own benefit i.e. to use the land "as one's own": [40], [71]). It is not however necessary to prove a deliberate intention to oust or exclude the paper title owner or registered proprietor: [71], per Lord Hope; or, conversely, any particular belief in ownership or entitlement. It is well-established, and clear from *Pye* and other cases, that the mere fact that the possessor knew or believed that someone else had paper title to the land, and/or that they would have accepted a licence or tenancy if offered one, does not preclude an intent to possess.

(6) Where the person in possession makes as full use of the land as the owner might have been expected to, that conduct will normally also establish the necessary intention to possess without the need for further evidence, unless the paper title owner can adduce evidence justifying the contrary conclusion: [76], per Lord Hutton.

(7) There was a minor difference between counsel on whether the statement of Slade J. at p472 of *Powell* - that "clear and affirmative evidence" was required as to the intent to possess, and whether the dictum that the person in possession had to make it

"*perfectly clear to the world at large by his actions or words that he has intended to exclude the owner as best he can."* – provided an additional element to the test for adverse possession. I prefer and follow the statement of Lord Hutton in *Pye*, above, that in general the intent to possess may be inferred from acts of possession explicable as the acts of an occupying owner. Slade J.'s statement in *Powell* still applies to a factual situation in which the acts in question might be regarded as "equivocal" or ambiguous as acts of possession. If the acts are unequivocal and unambiguous, the intent to possess may readily be inferred from them without more.

The following further principles, potentially of relevance to the present case, are also relatively clear.

Successive squatters, continuity, and abandonment

39. An applicant for title, in an FR1 application such as this, is entitled to aggregate and rely upon successive periods of adverse possession by themselves and their predecessors in title to establish their claim. Time runs against the paper owner from the time when adverse possession began, and so long as adverse possession continues unbroken it makes no difference who continues it (see Megarry & Wade, *The Law of Real Property*, 9th edition para. 7-036; previous edition cited with approval by Vos J. in *Site Developments (Ferndown) Limited v. Cuthbury Limited* [2011] Ch. 226, p240).

40. By Schedule 1 paragraph 8(2) of the Limitation Act 1980:

"Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession."

41. I accept the submissions of Mr. Bennison, counsel for the Applicant, that "ceases to be in adverse possession" in this section means one of two things:-

i) either the paper owner or some other person takes or re-takes possession of the land. As to this, a mere threat to do so, or assertion of title in correspondence, or a mere

temporary entry on to the land short of taking possession, will not suffice: see e.g. *Mount Carmel Investments Limited v Thurlow* [1988] 1 WLR 1078 (CA) (correspondence) and on retaking possession, see most recently *Zarb v. Parry* [2012] 1 WLR 1240 (CA); or

ii) the person in possession abandons that possession. If they do, then Schedule 1 paragraph 8(2) has the effect that the limitation 'clock' is reset in favour of the paper owner or other person claiming title.

This is the position assumed in Megarry & Wade, supra, at paragraph 7-037.

42. As to what constitutes abandonment of possession for these purposes, there is relatively little authority on the point. A finding of abandonment by a previous squatter was made ("not without some hesitation" – per Nicholls LJ, p1087G) on the somewhat exotic facts of the *Mount Carmel Investments* case (above) at p1086B-1088C, in which it was found that a fraudster (R) who had forged a lease, fled the country then later been imprisoned had abandoned the possession he had established up to that point (so that the plaintiff could not rely on this prior possession, and a purported assignment by R of his right and title, as its second string argument against a later squatter, the defendant). Mr. Bennison also referred to the decision and an obiter dictum of HHJ Rich QC in *Ezekiel v. Fraser* [2002] EWHC 2006 (Ch.). In that case it was held that the claimants could rely upon their own previous 16 year period of possession against a later squatter, despite having then left the property unsecured for a year after that, since this gave them a better right to possession than the later squatter. HHJ Rich QC also stated that:

"In my judgment, in any case, their possession, once taken, persists even in the absence of physical control so long as their animus possidendi persists, but this does not matter because they are entitled, for the reasons I have given, to rely upon it as founding their better right to possession as against the defendant."

43. For my part, I would agree, and add that an absence of present physical occupation or use of land is not the same thing as, and does not necessarily amount to, an abandonment of possession of it. In oral argument, I posited the example of someone

who takes possession of additional garden land adjacent to their house, then leaves the country to work in Australia for a year. In that situation, they have not abandoned their possession of the garden land any more than they have abandoned possession of their house, although they are during that time in occupation of neither. If, on the facts, sufficient possession of land has been taken, I agree with Mr. Bennison that to find abandonment it would be necessary to find an unambiguous intention to abandon that possession, meaning an intention never to resume, assert or rely upon it, for oneself or for the benefit of any successor. The facts of *Mount Carmel Investments* may be a somewhat extreme example of this, but even then, with the burden on the person asserting abandonment to prove it, the Court found it only just established on the balance of probabilities.

Granting of licences or tenancies, and position on their expiry

44. It is clear that a person who enters into possession pursuant to a licence or tenancy granted by another person claiming title cannot be in adverse possession, for as long as such a licence or tenancy subsists. In the case of a tenancy, on expiry of such a tenancy (without any statutory continuation) the possession of the land, which by definition the previous tenancy will have conferred, will become adverse against the former landlord, subject to any later written acknowledgment of title or payment of rent [see Megarry & Wade, supra, paragraphs 7-046 and 7-047, Limitation Act 1980 Schedule 1 paragraph 5 (periodic tenancy without a lease in writing) and e.g. *Williams v. Jones* [2002] 3 EGLR 69.]

45. Some licences in relation to land may also confer possession of it, even if (subject to the *Street v. Mountford* [1985] AC 809 test) they are properly construed as licences rather than tenancies. On their expiry, the possession previously enjoyed by licence may also become adverse for the purposes of the Limitation Act 1980, as in *Pye* itself, and also *Topplan Estates Limited v. Townley* [2004] EWCA Civ. 1369 (former grazing licence agreements). In *J Alston & Sons Ltd v BOCM Pauls Ltd* [2009] 1 EGLR 93 (Ch.D, HHJ Hazel Marshall QC) it was accepted that:-

i) a licence is personal to the parties to it, and does not pass and survive so as to bind or benefit successors in title, so is terminated on a change of ownership (paragraphs 20

and 53); and

ii) in a "..case of someone 'holding over' after the termination of an actual permission to occupy land…..It is axiomatic that where a person remains in possession after the termination of such a licence by its expiry in time, time runs against the paper owner licensor, because his right to recover possession accrues at that time." (paragraph 114, per HHJ Marshall QC)

iii) by reason of Schedule 1 paragraph 8(4) of the 1980 Act, and the principles under it, on expiry or termination of a previous licence, a further licence will not be implied merely from acquiescence by the paper owner/former licensor in continued possession. Any implied licence must be "real" and be found on or inferred from specific evidence (supra, paragraph 114 and following).

IV. THE LAW APPLIED TO THE FACTS AS FOUND HERE

46. The Applicant brings her case on two alternative bases, which Mr. Rushton, counsel for the Respondent, helpfully termed the "long case" and the "short case". Each are based on the aggregation of successive periods of adverse possession by different owners of number 7. The "long case" is that such possession goes back as far as 1973, and Ms. Lottie Miners, so that any title to the land was "…extinguished at the latest on 24 March 1985 because of 12 years' adverse possession by Ms. Miners and her successors in title.." (Statement of Case paragraph 34; FR1 application, box 5). The "short case" relies just on the aggregated possession of the Applicant and her immediate predecessors the Fosters prior to the FR1 application (Statement of Case paragraph 35, FR1 application box 5), so between 2003 and 2018. The Statement of Case did not specifically plead and rely upon the possession of predecessors in title between 1985 and 2003, but did assert in general terms that the Applicant's predecessors in title had used the land "since at least 23 March 1973" (paragraph 24).

I will deal with both the "long" and "short" cases in more detail below, but first make the following findings relevant to them both.

Factual possession

47. My first conclusion is that between 1973 and the present, successive owners of number 7, beginning with Lottie Miners, have enjoyed and exercised exclusive factual possession of the land shown in the photographs at Figures 1 and 2.

48. During oral argument I suggested, not entirely flippantly, that in large part the case turned on looking at those photographs and asking 'is this factual possession'? In my judgement, it is, for the following reasons:-

i) this is essentially a small and self-contained additional patio garden, with the added attraction of a sea view. That is the only reasonable and sensible use of it. That is the use which would be made of it by someone acting as if they were the owner of it.

ii) that conclusion is not prevented by the fact that it was not, until the Applicant's works in May 2017, comprehensively fenced and enclosed. At all material times it was naturally enclosed and demarcated as a distinct area by the physical features shown in the photographs and described above. The suggestion on the papers, and in the Respondent's Statement of Case, that this was part of an overall "communal" area consisting of the Strip was not borne out by any of the evidence. This area has always been visibly distinct from the other 'dug out' areas opposite numbers 4, 6 and now 8. It has been surfaced and partly paved (see *Thorpe v. Frank*, above), and has at all times had some natural and some man-made boundary features, namely the sections of bank, the descending steps with the handrail, and the blocks and fencing on the harbour side of it.

iii) it has been used, on all the evidence, as an additional garden for number 7, by owners and occupiers of that property; and not by 'all comers' or residents generally. The fact that on a handful of occasions unknown third parties might have clambered over the bank to sit on the bench (e.g. teenagers smoking and drinking) does not detract from the general picture that this land 'goes with' number 7 and has been treated as such.

iv) importantly, this is how the position appeared to the Respondent itself in 1983, by

the last months of Ms. Miners' ownership of number 7. It was in no doubt that it was her, and her alone, who "occupied" this land as a distinct parcel. That is why Mr. Osborne wanted her to pay what he regarded as a more appropriate "rent" for it, rather than 10p a year. That is why the agreement which was drafted for her to sign to that end was, in substance as well as in terminology, a tenancy agreement, under which she would pay "rent", observe a covenant as to its use, and have quiet enjoyment of it. That was an accurate reflection of the extent of her enjoyment – in other words, exclusive possession – at that time.

Extent of factual possession

49. This relates to the discussion at paragraphs 14 and 15 above. An unusual feature of this case is that the disputed land is garden land not contiguous with the Applicant's main property, but rather 'at one remove' from it, across a road and over a bank. In my judgement, the factual possession I have described and found above applies to the following areas, with reference to the photographs at Figures 1 and 2:-

i) the surfaced and paved area visible in those photographs, including the area where the bench and chair are situated, up to the low natural boundary with the 'number 6 area' (to the north) and the fence and blocks (with the word "Private" on them) to the east on the harbour side

ii) the site of the descending stone steps, bounded by the handrail

iii) the sloping 'rock face' section of bank behind the bench in Figure 2, as a natural boundary feature;

but <u>not</u>:-

iv) the 'bank' itself, by which I mean the flat topped grass section of bank visible in Figure 2, including the area which until about 2014 contained a few 'footholds' facing the road by which the bank could be ascended, later replaced by concrete steps in that year, then removed completely to create the new gate opening in May 2017.

50. The precise extent of the land claimed was not the subject of a detailed plan, and the title plan provisionally allocated shows only general boundaries, but on any view of the evidence the Applicant can only obtain title to land of which she can actually establish factual possession for the requisite period. In my judgement, and subject also to the further discussion below, that claim only extends as a matter of law and fact to the areas numbered (i) to (iii) above.

51. I briefly considered, and raised in oral argument, whether the use of the garden area itself [areas (i) to (iii)] could be regarded as use akin to the exercise of an easement, perhaps of the recreational or garden variety exemplified by *Re. Ellenborough Park* [1956] Ch. 131, but on submissions and further reflection, I am satisfied that the use was too exclusive to be such an easement. In *Ellenborough Park* and e.g. *Mulvaney v. Gough* [2003] 1 WLR 360, it is clear that the existence of such easements depended upon them being over a communal rather than an exclusive garden. For the owners and occupiers of one house exclusively to use that area as a garden amounts to possession of it, not the exercise of an easement.

52. The same cannot be said, however, of the use of area (iv) above. That use has not been by way of factual possession, but as a means of access to the area beyond which was actually possessed. The various persons who used and possessed the garden area used the footholds and the top of the bank to *pass and repass* to and from the descending steps and bench area. They did not *possess* those footholds and that section of bank – alternatively, such use as they made of them was equivocal and equally referable to and explicable as the exercise of a potential easement on foot. They just stepped on one of three sets of footholds on the bank, to gain access to an area over that bank.

53. I considered carefully whether this reasoning might also apply to the descending steps shown in figure 2, but in my judgement this area is distinguishable from the rough ‘footholds’ on the other side. Those steps and the handrail which bounds them are effectively an integral constructed part of the garden area on the ‘other’ side of the bank, rather than simply being a means of access to it. I consider that enjoyment and possession of that garden area as a whole extended to those descending steps as part and parcel of it.

54. Whether the Applicant, if her claim succeeds in whole or part, can also establish that she has an easement over the former 'footholds' and bank area is not an issue before the Tribunal, nor could it be while title to those areas remains unregistered. It could be an issue in Court proceedings between her and any person claiming title to the bank who sought to prevent access to it, or could be the subject of an application for a caution against first registration of such title. That is a matter for the Applicant, and potentially the Respondent if it continues to claim title to this area. As I have already stated once, I shall return to that issue at the end of this decision.

Adverse possession: the "long case"

55. In my judgement the long case as actually pleaded, based on the possession of Lottie Miners, fails on the finding of fact made at paragraph 25 above. I have found that, as the 1983 memo stated, on the balance of probabilities she had been paying 10p per year to the Respondent for her use of the land up to that time. Her undoubted factual possession (as I have found) of that land was therefore pursuant to a licence or, more probably as a matter of law and substance, a tenancy - as was then offered to her again in 1983. It could not therefore be adverse possession for the purposes of the Limitation Act 1980.

56. As for the period from May 1983 to May 2003, I have already commented on the 'evidential void' in this period. It is telling that the Applicant did not plead in terms, as an alternative case, adverse possession by successive owners in this period, since she had no evidence from any of them. Nevertheless, on the basis that she made such a claim in general terms (at paragraph 24 of the Statement of Case), and since I have found that it is more probable than not that such use did continue by owners of number 7 during this period, such a claim is not wholly precluded.

57. I repeat, however, my findings at paragraph 27 above. Just as, on the balance of probabilities, I can conclude that there was such use and possession, I can likewise conclude (and do) that the Respondent in that period would have continued its intended practice, as established in May 1983, to charge for it by way of agreed annual payment. As stated, that is supported by the fact that it had gone to the trouble in February 1983 of drafting a proposed tenancy agreement for Mrs. Miners, at a rent of

£5 per year, with the intention that such rent might rise in time to £20. It is further supported by the evidence at the 'other end' of that period, from the 2003 conveyancing correspondence, of a by then established annual charge of £40 per year. That suggests a gradual rise in the charges over this whole period, in line with inflation or some other index.

58. I therefore find it more probable than not that such charges were levied and paid during this period, or at least the majority of it, even in the absence of detailed ledgers and receipts or evidence from the number 7 owners from that time. As set out above, I find that such charging by way of licence or tenancy had continued at least up to the ownership of Ms. Curtis in 2001, albeit that she herself was said in the 2003 correspondence not to have paid the sums due during her 18 months of ownership, but then asked for a retention out of the purchase monies to enable her to do so. The correspondence suggests that she clearly understood that she was liable to so pay.

59. For these reasons, I find that the Applicant's "long case" does not succeed, and she must therefore rely on the "short case" of the aggregated possession of herself and the Fosters from 2003 onwards.

Adverse possession: the "short case"

60. Based on the findings at paragraph 31 above, I am entirely satisfied that Mr. and Mrs. Foster exercised and established factual possession of the land described above, with intent to possess it, in the first seven years of their ownership of number 7. The use they made of it was that of occupying owners. This was so despite the fact that it was only their second or holiday home. They were still regular visitors to Porthleven, and when they were there, they would use and (as I found) possess this land in conjunction with their ownership of number 7. Their possession was exclusive, in accordance with their understanding when they purchased number 7.

61. In contrast to the evidential position between 1983 and 2003, there is clear affirmative evidence from this period that they did not pay rent or other money in return for possession of the land under licence or tenancy. Indeed, in 2007 they actively refused to do so, on the basis that they were already in possession of the land without paying

for it. The Respondent, it seems, did not press the matter further with them, until it wrote a letter to all residents in 2011, which I am satisfied (for the reasons already stated) Mrs. Foster never saw.

62. As emerged from Mrs. Foster's oral evidence, and was then dealt with by supplemental submissions, an important issue arising is the effect of Mrs. Foster never returning to Porthleven, or therefore the disputed land, after the death of her husband in April 2010. Between then and the sale to the Applicant in May 2012, number 7 and the land lay empty, while number 7 was put up for sale through agents.

63. The question of law, in my judgement, was correctly identified by Mr. Bennison as being whether that absence amounted either to a dispossession of Mrs. Foster, or an abandonment by her of the possession of the land which she and her husband had established up to that point. There is no evidence that anyone else took possession of the land so as to dispossess her, so the issue is really just that of abandonment.

64. Applying the principles set out above at paragraphs 40 to 43 above, and in the light of the evidence, I do not consider that Mrs. Foster abandoned her pre-existing possession of the land between April 2010 and May 2012, although she was not physically using it in that time.

65. The key to this finding is the evidence of the Applicant, which I have accepted, that when she purchased number 7, she clearly understood that this land across the road was for the exclusive use of owners of number 7. It was not just a random parcel of land which she later stumbled upon herself separately by chance. That understanding and assumption, upon which I find she clearly acted in the following years of her own ownership, must have come from somewhere. I find that this understanding did emanate, as she recalled, from Mrs. Foster via the selling agents.

66. That suggests that, far from intending to abandon whatever rights or title she had to this land, Mrs. Foster still regarded such rights or title as enuring for the benefit of the persons to whom she eventually sold number 7. She and her husband had been told when they purchased number 7 that this land "came with the house", so it is likely that she intended this to remain the case when she sold it on. This distinguishes this case

from an abandonment case such as *Mount Carmel Investments*, where the former adverse possessor fled and abandoned any continuing interest in the land or what happened to it. I also find, following the obiter dictum of HHJ Rich QC in *Ezekiel v. Fraser*, that it was sufficient for Mrs. Foster to retain possession by retaining her intent to possess the land while physically absent from it pending sale. As I posited during oral argument, cessation of occupation and use is not the same thing as abandonment of legal possession previously established.

67. As to the Applicant's own period of ownership, I have found that she continued such factual possession with intent to possess the land, so much so that she could write to Mr. Osborne of the Respondent in April 2016 stating in a 'matter of fact' way that this was "Crab Pot's garden area across the road". By that date, through the operation of the Limitation Act 1980, and her possession in succession to that of the Fosters, it was.

Giving effect to the application and decision

68. As I have stated, the Applicant's May 2017 works have complicated the position somewhat, to the extent that what is now on the land is not precisely co-extensive with what was there previously. The precise extent of any such variation, and so the precise boundary between the land to which the Applicant has acquired title and any land to which she has not, is not currently a matter before the Tribunal. Nor could it be, in the absence of any detailed scale plan, but also because the land to which (as I have found) the Applicant has not acquired such title (the bank) is not currently registered. As I have also stated, the same applies to the issue of what, if any, easements the Applicant needs, or has, over any such other land.

69. I have endeavoured in my decision, through the use of the enclosed pictures at Figures 1 to 4 and my written findings, to describe with as much detail as is possible the extent of the adverse possession I have found, and so the extent to which the Applicant's application succeeds. Looking at the "plan 2" in the hearing bundle, which I was told is the plan relating to the FR1 application (and so the filed plan of the provisional title CL 337142 allocated to the land), in my view the correct direction to the Chief Land Registrar would in due course be to give effect to the application <u>in part</u>, since the shape as currently depicted on that plan (even allowing for the general boundaries

rule) appears to extend all the way to the highway at Harbour View and so include the whole of the former section of the bank in that vicinity; when I have decided that the application does not succeed to that full extent.

70. If, however, I simply made a direction to the Chief Land Registrar to give effect in part to the application, and even if I described that part in the words used above and with reference to the photographs, the Land Registry would be likely to require more detail, and in all probability a detailed plan so that effect could properly be given to the direction. The parties might then face a prolonged delay and impasse in giving effect to the application and decision.

71. I am concerned as far as possible to avoid storing up difficulties and further disputes between the parties, in this and other respects. As well as the need for a more detailed plan, there is the potential prospect of a further dispute over access to the land. The parties could of course go off and make fresh applications to the Land Registry on these matters. The Respondent could apply for first registration of its claimed paper title. The Applicant could object to that, generally or on condition that an easement be noted over such title so as to give her access what is now her land. Those applications could be referred to this Tribunal, and the parties could go through a costly process similar to that which have experienced over the last 4 years, although it would be likely to take less time. Or they could, at similar cost, commence Court proceedings.

72. The parties are free to do that if they so wish, but the directions I will make accompanying this decision will give them an opportunity, and a time period in which, to resolve those and all other issues, including the issue of the costs of these proceedings.

73. Because I intend in due course, but not yet, to direct the Chief Land Registrar to give effect to the Applicant's original application in part, the first direction I will make is that the parties endeavour to produce and agree a detailed plan, on a scale and to a standard appropriate to a determined boundary application (so in conformity with Land Registry Practice Direction 40), to give effect to my findings as expressed above:-

i) in paragraphs 49 to 53 above; and

ii) with reference to the photographs I have referred to as Figures 1 to 4.

The aim of such a plan will be to depict, on a scaled plan of the land as it is now, the land as it was configured and possessed immediately prior to the May 2017 works.

74. I am prepared to allow a reasonably generous period of time for that process. In default of agreement of a plan, the parties will be at liberty to file their own rival plans, and I will then make a decision as to which plan to use with the final direction, on the basis of written submissions if necessary.

75. Within that period, there will also be an opportunity for either party to make any application they wish to make as to the costs of these proceedings. The Applicant may consider that, because her application has succeeded in part, she has been the successful party, but I do not know what (if any) offers and negotiations there may have been between the parties, or other factors potentially relevant to any costs order. I will therefore not express any provisional view on the appropriate costs order, and leave each party to make an application if they so wish, accompanied by a schedule of costs in form N240 for the purpose of summary assessment of any costs awarded.

76. In colloquial terms, ‘while they are at it’ the parties may well consider it worthwhile in this period to negotiate and attempt to agree all remaining issues between them, including any issues as to the Respondent’s paper title to the wider Strip area, and any right of way the Applicant may claim over it. The Tribunal cannot make them negotiate, or agree anything, but it may save them a great deal of future time, uncertainty and costs if they are able to reach an agreement on all of those issues, in conjunction with the existing issues as to the plan and costs (both liability and any assessment) in these proceedings. I therefore commend that approach to them and their legal representatives. The directions given will allow a reasonable time for that to be pursued. Any requests for extensions of time in relation to the plan and costs issues will be looked upon favourably if the parties are still in the course of such overall negotiations.

77. I take this opportunity to thank the parties and their legal representatives (solicitors and counsel) for the efficient and professional manner in which the hearing was presented. It is regrettable that the application took so long from its inception to reach a final hearing, but I hope that the parties at least appreciated the fact that the Tribunal was able to sit 'face to face' in Cornwall without any difficulty for that hearing.

DATED this 23rd day of July 2021

Judge Ewan Paton

BY ORDER OF THE TRIBUNAL