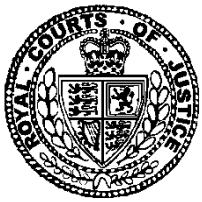

Neutral Citation Number: [2021] EWHC 330 (Ch)

Case No: CH-2020-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
ON APPEAL FROM THE COUNTY COURT AT SOUTHEND
His Honour Judge Holmes

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19/02/2021

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

(1) MERWIN AMIRTHAN AMIRTHARAJA
(2) JENNIFER SHIROMI AMIRTHARAJA

Appellants

- and –

(1) COLIN WHITE
(2) FRANCES WHITE

Respondents

- -
- -

Max Thorowgood (instructed by **Indra Sebastian Solicitors**) for the **Appellants**
Robin Howard (instructed by **Hattens Solicitors**) for the **Respondents**

Hearing dates: 2 and 3 February 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE MICHAEL GREEN

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10am on 19 February 2021

Mr Justice Michael Green :

Introduction

1. This is an appeal by the Defendants, brought with the partial permission of Falk J, from the order of His Honour Judge Holmes (the **Judge**) sitting in the County Court at Southend made on 4 October 2019. The Judge heard the trial of this matter on 2, 3 and 4 October 2019 and delivered his judgment *ex tempore* at the end of the trial.

2. The case concerns a narrow "**Passageway**" that runs between two buildings owned by the Appellants, called the "**Office**" and the "**Workshop**". The Appellants also own a petrol station and a Costcutter supermarket both of which are close to the Office and the Workshop and through which an access road runs from London Road to Ruskin Road in Stanford-Le-Hope, Essex (the **access road**). The Passageway and the Workshop are within the same registered title with number EX741623. The Appellants were registered as the proprietors of the Workshop and Passageway on 21 April 2017.

3. As I will explain in more detail below, there were purportedly three Claimants to this action, Mr William Cecil White, his wife, Mrs Frances White and their son Mr Colin White. On 23 February 2017, all three jointly purchased the property known as Hollis House, 1 Ruskin Road, Stanford-Le-Hope, SS17 OLF (**Hollis House**). They purchased Hollis House from a friend of theirs, Mr Kenneth Bright who had lived there with his wife for 40 years. The Passageway goes from the access road to the garden of Hollis House. There is a locked gate at the access road end of the Passageway (the north side) and the Respondents say that this has always been controlled, and indeed was strengthened by Mr Bright who had thereby acquired title to the Passageway by adverse possession.

4. An extraordinary aspect of this case is that Mr William White died in September 2017 yet he was included as the First Claimant on the Claim Form when it was issued on 14 January 2019. At the trial no one referred to the fact that Mr William White remained a Claimant and the Judge clearly assumed in his judgment that he was still alive. Neither of the Respondents, both of whom gave evidence, mentioned that he had died. Mr Robin Howard, Counsel for the Respondents, also appeared for them at the trial and he did not know at the time that Mr White had died. It was only after the judgment, when the Appellants changed their lawyers, that the point was raised and they have since accused the Respondents and their lawyers of misleading the Court and committing an abuse of process. On 8 April 2020, Fancourt J heard an application by the Appellants for the proceedings to be struck out as an abuse of process but he refused to do so on the basis that the proceedings were not a nullity because of the other two proper Claimants. He did however allow the Appellants to amend their Grounds of Appeal to rely on the alleged misleading of the Court by the Respondents and to argue on this appeal that the claim was an abuse of process.

5. I will come on to deal with this point but it is not the central issue on this appeal. The Judge declared that the Respondents were entitled to be registered as proprietors with title absolute of the Passageway and directed the Chief Land Registrar to alter the register by removing the Passageway from the Appellants' title to the Workshop and adding it to the title of Hollis House. The Order was made under para.2 of Schedule 4

of the Land Registration Act 2002 (**LRA 2002**), on the basis that there was a mistake on the register.

6. The Appellants' Grounds of Appeal are concentrated on the way the Judge dealt with the Respondents' adverse possession claim and in particular the reliance placed on a Statutory Declaration of Mr Bright dated 16 October 2017 that was said to evidence Mr Bright's adverse possession for the relevant period in question. Mr Bright did not give evidence at the trial and the Appellants say that the hearsay evidence contained in the Statutory Declaration was insufficient to support the Judge's conclusion that Mr Bright had the requisite intention to possess the Passageway rather than his intention merely to use the Passageway for access or storage. The Appellants also argue that the Judge did not approach the question as to whether there was a mistake on the register correctly.

7. The issue about Mr White having died shortly after the purchase of Hollis House goes to the question of whether there were "*exceptional circumstances*" under para.3(3) of Schedule 4 to the LRA 2002 such as to justify the Judge refusing to alter the register even though a mistake had been made. The Judge relied in part on a finding that it was intended that Mr White would need to use the Passageway for access in his wheelchair to Hollis House. The Appellants say that this was obviously not something that should have gone into the balance and it affected the Judge's decision on the existence of "*exceptional circumstances*".

8. The Appellants have also sought to amend their Grounds of Appeal and introduce new evidence in relation to the paper title of the Office, the Workshop and the surrounding land including the petrol station and the Costcutter. This application was opposed by the Respondents and I deal with it below.

The relevant facts

9. The Passageway runs between the two brick walls of the Office and the Workshop and was obviously created when those two one storey buildings were erected. It was unclear when that was. The dimensions of the Passageway are about 1 metre wide and 5 to 6 metres long.

10. The Office and the Workshop were previously owned by the James family who also owned other buildings and land in the vicinity. From the Office Copy Entries in relation to Hollis House, there is reference in the Charges Register to a conveyance dated 28 February 1900 of that piece of land together with other land from a Mr Frederick Hill to Mr Edward James and there were certain restrictive covenants affecting that land contained in the conveyance.

11. The Office and the Workshop were apparently owned by Mr Brian James. He died on 6 April 1993 and left both properties to his sons, Carl and Julian James. By an Assent dated 29 September 1994, Mr Brian James' Executors assented to the vesting of the Office in his sons' names. That Assent did not include the Passageway or the Workshop. The Office was first registered on 6 July 1998 under title no. EX598089.

12. In 2004, Carl and Julian James applied for first registration of the Workshop and they made a Statutory Declaration on 17 December 2004. They only applied for possessory title (in fact they ticked the box for "*possessory leasehold*" title) and the Judge thought this material. Their Statutory Declaration had a plan attached to it which clearly included the Passageway in their application. They said in the Statutory Declaration that they had "*since 1994 owned the property edged in red on the plan and exhibited hereto*" which they had inherited from their father and that "*at no time has there been any challenge to our absolute ownership of the Property*". They further declared that their father "*owned and occupied the Property for at least forty four years until his death in 1993 and we believe that at no time had he been challenged to the ownership of the Property*."

13. The registrar sent a surveyor, Mr Simon Gardner, to inspect the site and in particular to check the boundaries as marked on the plan attached to the application including the entrance to the Passageway from the Hollis House garden. The Ordnance Survey plan had marked on it points "A" to "B" being the Hollis House garden entrance to the Passageway. Mr Gardner was asked to "*Confirm position, age and nature of boundaries defining edged red in particularly [sic] between points A-B*". After visiting the site on 14 March 2005 Mr Gardner responded to this as follows:

> "Done. Positions of boundaries confirmed. Age and nature etc is given on explanatory plan, and can be seen in photos. The passageway between garages and workshop is blocked at both ends (see photos 3 and 4), although it is only rubbish which blocks it at its southern end (hence the reason I have not revised the LIS). It does not seem to have been used for many years. Mr James tells me that he already has title to it included with the two garages to the west."

The "*LIS*" I was told is the Land Information System (part of Ordnance Survey), which would record any physical features on the land. And the "*two garages to the west*" is a reference to the Office. (This was clearly incorrect insofar as it referred to the registered title, otherwise it would not have been part of the application to register with the Workshop.) In answer to the next question about the nature, use and occupation of the land, Mr Gardner said as follows:

> "The workshop is empty. Mr James holds the keys, and can be see [sic] in photo 3 unlocking it. The passageway seen in photo 4 is not used or "occupied" as such by anybody".

14. In the plan attached to Mr Gardner's report he had marked with an arrow pointing to the access road end of the Passageway: "*Door (not able to open)*." He clearly was unable to go into the Passageway. He did however take a photograph from over the door looking down the Passageway towards Hollis House. That photograph shows: a lot of branches crossing the Passageway between the roofs of the Workshop and the Office; a metal gate or possibly a cage affixed to one side at least; a ladder and some metal poles lying on the ground against one of the side walls; and a lot of other debris which appears to block the Passageway towards the Hollis House end. It certainly looks as though the Passageway had been unused or was rarely used even as an access way and that it had been possibly used to store certain items such as the ladder.

15. Following Mr Gardner's survey, the James' brothers were registered with possessory title to the Workshop and the Passageway. The Judge considered that this was a

mistake as the James brothers were clearly not in actual possession of the Passageway, which was locked on the inside and they did not have a key.

16. As for Hollis House, the earliest owners that there is evidence of are Mr and Mrs Brown who owned and occupied the ground floor flat between 1957 and 1963. Mrs Brown made a witness statement for the Respondents and was cross examined at the trial. Her evidence was to the effect that the Passageway was used by both her family and those that occupied the first floor flat as the main access to Hollis House. There was a four foot high gate at the garden end of the Passageway which was not locked and nothing was stored in the Passageway to keep it clear for access.

17. The next owner of Hollis House was Mr Fred Hall who also made a witness statement and was cross examined. He owned Hollis House between 1963 and 1968. He also apparently bought the land to the west of the Workshop from Mr Brian James and he built a property on that land which is now called Prior's Lodge.

18. In his witness statement he said he used the Passageway and that he "*had exclusive access and possession of the alleyway and so did the previous owner*". He actually rented the Office and the Workshop from Mr Brian James who he said had confirmed to him that "*the alleyway was for access to Hollis House*" but that Mr James "*did not claim ownership of the alleyway*". In his oral evidence, Mr Hall said that the Passageway "*in the early days when I bought it, it was known as access to Hollis House*". He later said that "*it was the right of way for Hollis House as far as I was aware*" and "*when I bought the place it was, I know it was a right of way, back way to my property, to Hollis House*".

19. Mr Hall was asked about the gate over the Passageway and he confirmed that when he acquired Hollis House there was a gate at the garden end of the Passageway but not the other end. He said that he put a bigger gate at the garden end to stop "*kids and that running through it at the time…*". He said that he also placed a gate on the other end but it was not locked. He confirmed that this was to "*stop people, for security, to stop people coming in and mucking about, anti-social acting*." In other words, the gates were there to deter unauthorised people coming in to the garden of Hollis House. He also said that things were not generally stored in the Passageway.

20. After passing through various other owners, Hollis House was acquired by Mr Bright in November 1977. He applied for first registration and this was granted on 19 December 1977 with title no. EX198859. The plan clearly shows that the Passageway was not included in the registered title of Hollis House. As noted above the Charges Register refers to restrictive covenants deriving from the 28 February 1900 conveyance of the land to Mr Edward James.

21. Mr and Mrs Bright were friends with and had been near neighbours of the White family for many years. The Respondents had often visited Hollis House. Mr Colin White owns 3 Ruskin Road and other properties in the area including what has been called the scrapyard which is an area of land stretching out at the back of Hollis House and neighbouring properties on Ruskin Road. As Mr and Mrs Bright intended to retire down to Devon, they agreed to sell Hollis House to the Whites. They did not use estate agents. Hollis House was transferred to the Whites on 23 February 2017. The solicitors who acted for the Whites on the conveyancing are their solicitors in this litigation, Messrs Hattens.

22. As was commented on by the Judge there was very little evidence adduced at the trial as to the conveyancing process and what the respective parties knew or did not know about the status of the Passageway. Mr Howard said that it may be clear now to lawyers looking at the documents that the Passageway was not included in the transfer of Hollis House to the Whites but they reasonably thought at the time, because of their knowledge of the property and discussions with Mr Bright, that the Passageway was included. The Appellants rely on the fact that Mr Bright did not even purport to transfer title to the Passageway, which is something he would have done if he truly believed that he owned it. He only purported to do that on 1 June 2019, after these proceedings had begun.

23. In or around February 2017, before the Appellants had purchased the Office and the Workshop, they had taken some photographs of the Passageway including some over the top of the locked door showing the further metal gate inside and lots of rubbish. Mr Amirtharaja said that he actually thought that the door was a panel and that he had never seen anyone going in or out of the Passageway. He had been buying up land and properties in the vicinity since 2011 and he had seen cars parked in front of the Passageway. No contact was apparently made however with the Respondents before the Appellants purchased the Office and the Workshop. They were registered as owners on 21 April 2017.

24. The Appellants had always planned to demolish the Office and Workshop and to replace them with a single unit which would be used as storage for the Costcutter supermarket. In May 2017, they made their first planning permission application and this gave rise to the beginning of the dispute between the parties. The Respondents registered their objection to the planning application and asserted their title by adverse possession of the Passageway. The Respondents say that this was the first time they realised that they did not have title to the Passageway.

25. In September 2017, Mr William White died. On 30 October 2017, the Respondents, including Mr William White, applied through their solicitors to the Land Registry to rectify the register to show them as the owners of the Passageway. In support of that application, the principal evidence was Mr Bright's Statutory Declaration dated 17 October 2017. In the Statutory Declaration he exhibited a number of photographs of the Passageway but these were taken in 2017 and show the Passageway cleared of rubbish and with the locked door at the access road entrance and with what appears to be a metal gate resting on the side wall of the Office. In paragraphs 4 to 6 of the Statutory Declaration, Mr Bright said as follows (the "Property" is Hollis House and the "Land" is the Passageway):

> "4. During my ownership of the Property I used the Land for access from the garden of the Property to the roadway on the other side of the gate, leading from Ruskin Road to the Petrol Station in the other direction…In addition, I was accustomed to store my long ladders along the land and along the flank wall of the two brick buildings…and I used to place items on top of the ladders and in front of them to disguise them from prying eyes which might look over the gate from the access road to the north of the land. In addition I would place any items for dumping on the land until I had enough for a load and all this was done without any consent of any third party or any payment to anyone.

> 5. Before Thurrock Council introduced garden bins for the area of the Property, I would take my garden waste and any bulky items we did not wish to carry through the Property out to my car parked alongside in the access road on an almost weekly basis. This was seen by the owners of the brick garages which abut the Land who never challenged my right to use the Land or the exit from it onto the access road. On one occasion when I opened the gate, the access was blocked with used car tyres piled up against it. I complained to the car repairers saying that I regularly used the gate for access and they removed the tyres forthwith. There was no indication that they refuted my ownership to the Land. In fact when they wanted to raise the garage roof to their building in 2009 to allow a car hoist to be installed inside their building, they asked my permission to use the gate to gain access to the Property in order to complete the work to the roof of their building from that side. I gave my consent and would unlock the gate in the morning to allow the builders access to the Property [sic] and I would then and [sic] re-lock it in the evening during the week that the work continued…
>
> 6. During my ownership of the property, I had exclusive use and occupation of the Land and I never received a claim adverse to my possession of it which use and possession I confirm was without consent of or payment to any third party or any entitlement of any third party to use the Land without my permission." (underlining added)

26. This was the only evidence relied upon at the trial to establish Mr Bright's alleged adverse possession claim to the Passageway. In considering its strength, it is important to remember that it was prepared after the dispute about ownership arose and that it was made by a good friend of the Respondents. Although he referred to replacing the gate in 1997 and fitting it with a more robust padlock as vandals had broken down the old gate, there is no evidence in there as to why he kept the door locked.

27. On 6 November 2017 the Respondents' application for rectification was rejected by the Land Registry. In the Land Registry's reasons they included the following in relation to Mr Bright's evidence:

> "No title has been referred to and the statutory declaration refers both to occupying the land in question and enjoying a right of way over the land".

28. After making a further application, the Appellants got planning permission for their proposed redevelopment on 14 September 2018.

29. As noted above, after the proceedings commenced, on 1 June 2019 Mr Bright purported to transfer the Passageway to the Respondents.

The Judgment

30. The Judge found that there were three mistakes on the register in relation to the Passageway:

(1) Messrs James ought not to have been registered in 2005 with possessory title to the Passageway because Mr Gardner had reported that no one was in possession of it; s. 9(5) of LRA 2002 requires a person to be in "*actual possession*" of the land in order to be registered with possessory title;

(2) The registrar ought to have notified Mr Bright, the registered proprietor of Hollis House at the time, that the Passageway would be registered under the Workshop's title; and

(3) Mr Bright had acquired title to the Passageway by adverse possession by the time of its first registration.

31. In relation to adverse possession, the Judge relied on the Statutory Declaration of Mr Bright. Even though he accepted that because Mr Bright was not cross examined (the Appellants decided not to insist on him being called) and that it was a hearsay statement made for the purposes of and in the context of the dispute he should be cautious about accepting it, there was no reason not to accept it despite it being a "*compressed*" account. Mr Bright's evidence was consistent with that of Mrs Brown and Mr Hall, and with much of Mr Gardner's survey in 2005. Therefore there was sufficient evidence that Mr Bright had been in actual possession of the Passageway for at least 12 years prior to the first registration in 2005 and that he had the requisite intention to possess it, both then and thereafter.

32. Having so concluded, the Judge said that he was bound to order rectification of the register unless there were "*exceptional circumstances*" under para. 3(3) of Schedule 4 to the LRA 2002. The Judge decided that there were no exceptional circumstances after taking into account the need for wheelchair access for Mr William White but principally on the basis that he considered that the Appellants were more to blame for the situation they were in than the Respondents. He added that even if there were exceptional circumstances, they would not be such as to justify refusing to order the rectification to the register.

Grounds of Appeal

33. On 5 February 2020, Falk J refused permission to appeal on Ground 1 which was concerned with the new test for adverse possession in Schedule 6 of the LRA 2002 which came into force in October 2003 and the interplay with the transitional provisions. There was no dispute before me that the relevant test for the period in question was that contained in s.15 and Schedule 1 of the Limitation Act 1980. The Judge had effectively found that throughout Mr Bright's period of ownership, ie from 1977, he had been in possession of the Passageway for more than 12 years and so he had been entitled to be registered as freehold owner by either the date when the LRA 2002 came into force (12 October 2003) or when the Workshop and Passageway were first registered on 24 January 2005.

34. Falk J gave permission to appeal on the other grounds. And Fancourt J, after hearing the application to strike out for abuse of process, gave permission to amend the grounds of appeal by the addition of a new Ground 6 alleging abuse of process in relation to Mr William White and an amendment to Ground 5 on the same basis.

35. The Re-Amended Grounds of Appeal for which the Appellants have permission to appeal are the following (adopting the same numbering):

(1) Ground 2 concerns the weight that the Judge gave to the Statutory Declaration of Mr Bright and his alleged failure to take into account certain matters said to be relevant to that consideration.

(2) Ground 3 is in the following terms:

> "As a matter of law, the use of the disputed land as found by the learned Judge by Kenneth Bright was consistent only with its uses as an easement of access and storage (if at all) together with the facts found by the Land Registry survey and was not consistent with possession as an owner with the requisite intention to possess it as an owner. The learned Judge erred in finding that Kenneth Bright had exercised a sufficient degree of control with the intention to possess so as to establish adverse possession."

(3) Ground 4 concerns whether the Judge applied the correct test as to what constitutes a mistake requiring the register to be altered and that he failed properly to consider the quality of possession and/or title of the James brothers to the Passageway and what the registrar would have done if he or she had known the true state of affairs at the time.

(4) Ground 5 refers to the Judge's findings on "*exceptional circumstances*" and says that the Judge took into account irrelevant circumstances and failed to take into account relevant matters; by amendment this includes the fact that he took into account the need for wheelchair access for Mr William White even though he had died two years earlier.

(5) Ground 6 is a claim for abuse of process because of Mr William White being included as a party and the failure of the Respondents and their lawyers to bring this to the Court's attention.

(6) Ground 7, which was previously Ground 6, depends really on some of the previous grounds being successful as it says that the Judge was wrong to have not considered whether the Appellants' predecessors in title could establish their own adverse possession and by failing to consider whether the Appellants were entitled to rely on their possession within para. 3(2) of Schedule 4 of the LRA 2002.

The Appellants' application to re-re-amend the Grounds of Appeal and adduce new evidence

36. The Appellants are not proposing a new ground of appeal; nor are they changing the substance of the existing grounds. Instead what they have sought to do is to include a more structured summary of the judgment below and to insert into the existing grounds of appeal some new factors, in particular the tracing back through the paper titles of the surrounding land with the benefit of further Office Copy Entries that were not available at the trial.

37. Insofar as the amendments are merely to the introductory sections of the Grounds of Appeal, Mr Howard agreed that they are unobjectionable but said that there was no purpose in allowing them. I agree. The content of the introductory section of the Grounds of Appeal has really been overtaken by the submissions made at the hearing and there is no point in those amendments.

38. As to the substantive amendments, there are three particular proposed amendments that Mr Howard did object to. These are:

    (1) A new subparagraph (10) inserted into Ground 2 in relation to the weight of Mr Bright's Statutory Declaration that asserted that Mrs Brown and Mr Hall did not corroborate Mr Bright's evidence because they were talking about a different passageway that passed from the rear of Hollis House straight to Ruskin Road.

    (2) An amendment to subparagraph (3) to Ground 4 which introduces the point about the paper titles and asserts that the James family were the owners of the entire estate on which the Workshop, Office, Petrol Station, Priors Lodge and the Costcutter supermarket were situated and that they therefore either had paper title to and/or had been in adverse possession of the Passageway long before any owner of Hollis House could have been in adverse possession.

    (3) A new subparagraph (3) of Ground 5 that introduced the Appellants' immediate predecessor in title, a Mr Scott Ringrose, who had not featured at all at the trial. Mr Max Thorowgood, counsel for the Appellants, did not pursue this amendment at the hearing.

39. As to the first proposed amendment in relation to Mrs Brown's and Mr Hall's evidence, Mr Thorowgood said that this was merely an interpretation of what they had said in their witness statements. However, it seems to me, that even though their witness statements may not have been carefully worded, they clearly knew which passageway was in issue and therefore what they were talking about. There is no evidence that there was any other passageway and, as Mr Howard submitted, the point was not put to them in cross examination at the trial. Indeed they were shown photographs of the Passageway at trial and they were obviously referring to it in their evidence. Mr Hall was particularly clear that the Passageway ran between the Office and the Workshop, both of which he had let from Mr James. It would be most unfair on the Respondents to be able to rely on this point now on appeal and I refuse to allow this amendment.

40. The principal objection is to the introduction of new evidence to support the points in the new subparagraph (3) of Ground 4. In fact the original Ground 4 refers to the paper title of the Passageway and to the Appellants' predecessors in title being in adverse possession of the Passageway. The conveyance on 28 February 1900 to Mr Edward James was before the Judge in the Office Copy Entries of Hollis House. Mr Thorowgood wants to introduce the Office Copy Entries in relation to the petrol station, the Costcutter, Priors Lodge and the scrapyard behind Hollis House in order to strengthen the evidence in relation to the paper title. The application is made under CPR52.21(2) and Mr Thorowgood says that it satisfies the *Ladd v Marshall* [1954] 1 WLR 1489 tests for when new evidence should be admitted on an appeal.

41. Mr Thorowgood, who did not appear at the trial (the Appellants were represented by their then solicitor, Mr Eaton of Birketts), says that these Office Copy Entries could not have reasonably been obtained and collated because the Appellants "*did not appreciate the necessity to show that they or their predecessors in title were the proprietors of the paper title*". He also submitted that such evidence would have had an important effect upon the Judge's decision because the Respondents would have to have shown that their predecessors in title had dispossessed the paper title owners of the Passageway.

42. Mr Howard pointed to certain anomalies on the face of the new evidence and said that even with this evidence the Judge would not have been able to come to the conclusion that the Appellants are saying would inevitably follow consideration of the evidence. More forcefully he submitted that paper title was never pleaded by the Appellants and it was not an issue considered at the trial. He relied on Haddon-Cave LJ's observations in *Singh v Dass* [2019] EWCA Civ 360 [15] – [18].

43. Even though I have seen the new evidence, I do not think it would be right or just to take it into account on this appeal. If it had been an issue at trial, there may have been more of an exploration as to the paper title and it is possible that more relevant documents might have come to light. These might have required evidence to be obtained from other witnesses. I therefore refuse to allow both the new evidence to be admitted on this appeal and the proposed amendments to the Grounds of Appeal. The Appellants are still entitled to run the argument as to paper title and adverse possession by their predecessors in title but they cannot do so by reference to the new evidence.

Law on adverse possession

44. Before considering the specific Grounds of Appeal, it is important to look at some of the authorities on adverse possession in order to see whether the Judge applied the correct test, in particular in relation to the requisite intention to possess (called in the cases, the *animus possidendi*) and whether the Judge assessed the evidence available to him in the correct way by reference to the applicable test.

45. The Judge referred to the law on adverse possession being "*well settled in a trilogy of cases*", those being: *Powell v McFarlane* (1979) 38 P&CR 452 (***Powell v McFarlane***); *Buckinghamshire County Council v Moran* [1990] 1 Ch 623 (***Bucks CC v Moran***); and *JA Pye (Oxford) Ltd and anor v Graham and anor* [2003] 1 AC 419 (***Pye***). The Judge went on to say in [27] that:

> "What is required for adverse possession is actual possession and possession with intent to possess. The possession must be a single and exclusive possession as was said in *Powell v McFarlane* on page 470. The necessary intention must be to hold in one's name and on one's own behalf to exclude the world at large, at page 471."

The Judge then referred to the Limitation Act 1980 and the appropriate period being 12 years. He said that the relevant end dates for the period in this case were either the commencement of the LRA 2002 on 12 October 2003 or the date of first registration

of the Workshop and Passageway being, 24 January 2005. Nothing turns on the precise period. It was common ground that the relevant adverse possession period was all within Mr Bright's ownership of Hollis House, that is from 1977 onwards.

46. The Judge was right to refer to those cases but it is important to look at them a little more closely. *Powell v McFarlane* was described by Lord Browne-Wilkinson in *Pye* as "*a remarkable judgment at first instance*" (see para. [31]). Slade J (as he then was) set out with clarity a lot of the basic principles in relation to adverse possession, distilled from prior authority much of which was binding on him.

47. In relation to the requirement to prove possession, Slade J said as follows (underlining added):

> "(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi*").
>
> (3) …
>
> (4) The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley M.R., in *Littledale v. Liverpool College* [1900] 1 Ch 19, 23 (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. <u>What is really meant, in my judgment, is that, the *animus possidendi* involves the 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</u>.
>
> The question of *animus possidendi* is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. <u>In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner</u>

> as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner."

48. A little later in the judgment, Slade J referred to the cases on intention where the acts relied on were equivocal as regards the trespasser's 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 (underlining added):

> "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."

49. Slade J was also alive to the possibility 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."

50. In other words, actions speak louder than words. 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 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."

51. In *Powell v McFarlane,* Slade J rejected the claim to adverse possession on the grounds that the acts were insufficient to evidence an intention to possess the land and to exclude the true owner throughout the whole of the relevant period. In *Bucks CC v Moran* (supra), Slade LJ, now elevated to the Court of Appeal, found for the adverse possessor who had enclosed the neighbouring plot of land owned by the County Council by placing a new lock and chain on a gate which meant there was no access to the plot except via the defendant's house or by climbing over fences or through hedges. This was the critical fact in the case as Slade LJ said that "*enclosure by itself prima facie indicates the necessary animus possidendi*".

52. Slade LJ, as he had done in *Powell v McFarlane*, considered a number of Court of Appeal authorities, starting with Bramwell LJ's oft-cited comments in *Leigh v Jack* 5 Ex.D. 264 to the effect that an owner of land can only be dispossessed if the acts of dispossession are inconsistent with the intended use of the land by the owner and that includes any intended future use of the land. This has been described since as a "*heresy*" and was finally done away with by the House of Lords in *Pye.* In *Powell v McFarlane*, Slade J was bound by *Leigh v Jack* but he was still able to interpret it, and subsequent Court of Appeal authorities where it was followed, as being explicable on the conventional grounds of the *animus possidendi* not being proved or the acts of possession being too trivial. He firmed up on that view in the Court of Appeal in *Bucks CC v Moran* (see p.639G-640B).

53. Mr Howard particularly relied on the passages referring to enclosure. Slade LJ said at 641H:

> "As a number of authorities indicate, enclosure by itself prima facie indicates the requisite *animus possidendi*. As Cockburn C.J. said in *Seddon v. Smith* (1877) 36 L.T. 168, 169: "Enclosure is the strongest possible evidence of adverse possession." Russell L.J. in *George Wimpey & Co. Ltd. v. Sohn* [1967] Ch. 487, 511A, similarly observed: "Ordinarily, of course, enclosure is the most cogent evidence of adverse possession and of dispossession of the true owner." While Mr. Douglas pointed out that the plot was always accessible from the north where no boundary demarcation existed, it was only accessible from the defendant's own property, Dolphin Place. In my judgment, therefore, he must be treated as having enclosed it."

And at p.642E, Slade LJ said:

> "If the defendant had stopped short of placing a new lock and chain on the gate, I might perhaps have felt able to accept these submissions. Mr. Douglas submitted that this act did not unequivocally show an intention to exclude the council as well as other people. (It is well established that it is no use for an alleged adverse possessor to rely on acts which are merely equivocal as regards the intention to exclude the true owner: see for example *Tecbild Ltd. v. Chamberlain*, 20 P. & C.R. 633, 642, per Sachs L.J.) In my judgment, however, the placing of the new lock and chain and gate did amount to a final unequivocal demonstration of the defendant's intention to possess the land. I agree with the judge in his saying (1988) 86 L.G.R. 472, 479:

> " ... I do not think that if the council, on making an inspection, had found the gate newly padlocked, they could have come to any conclusion other than that [the defendant] was intending to exclude everyone, including themselves, from the land."

54. Mr Thorowgood submitted that the difference between the enclosure in *Bucks CC v Moran* and this case is that in *Bucks CC v Moran* the trespasser had no rights in relation to the land and his enclosure prevented everyone including the owner from entering on to the land. In the present case, it is said that the owners of Hollis House, from Mrs Brown through to Mr Bright, all had a right to use the Passageway for access and that was with the implicit consent of the owner. He referred me to a passage from Nourse LJ's judgment in *Bucks CC v Moran* as follows (p.644D):

> "The essential difference between prescription and limitation is that in the former case title can be acquired only by possession as of right. That is the antithesis of what is required for limitation, which perhaps can be described as possession as of wrong. It can readily be understood that with prescription the intention of the true owner may be of decisive importance, it being impossible to presume a grant by someone whose intention is shown to have been against it. But with limitation it is the intention of the squatter which is decisive. He must intend to possess the land to the exclusion of all the world, including the true owner, while the intention of the latter is, with one exception, entirely beside the point."

55. In relation to enclosure, the erection and locking of a gate at the end of an accessway can be an equivocal act and it may not have been done with the intention of excluding the owner. *Littledale v Liverpool College* [1900] 1 Ch 19 was one such case. It was referred to in *Powell v McFarlane*, *Bucks CC v Moran* and *Pye*, because it was one of the Court of Appeal cases that appeared to follow the heresy in *Leigh v Jack*. In my view, however, it remains good law on the question of whether enclosure, including by a locked gate, can be equivocal as to the adverse possessor's intention. In *Littledale*, the Defendants owned two fields between which was a strip of land over which the Plaintiffs had a right of way to their field at one end. The other end was a public road. It was originally open at both ends but the Plaintiffs erected a gate at each end of the strip and kept them locked with only themselves and their tenants having a key. As the gates had been in place for more than 12 years the Plaintiffs sued to restrain the Defendants from using the strip of land. The trial judge held that the locked gates were equivocal and could have been put there to protect the Plaintiffs' right of way from being invaded by the public. The action was dismissed and this was upheld by the Court of Appeal.

56. Sir Nathaniel Lindley MR said:

> "If the plaintiffs had been strangers, having no right to or over the strip in question, the natural inference would be that they put up these gates in order to exclude every one, and that every one was in fact excluded. But the erection of the gates and the fact that they were kept locked is in this case open to a very different explanation… The gate at the Penny Lane end of the strip may well have been put up to protect the strip and the plaintiffs' right of way over it from invasion by the public, and not to dispossess the defendants. There is evidence to shew that rubbish was thrown on the strip at the Penny Lane end; but there is no evidence to shew that the gate was put up with the intention of dispossessing

> Solomon, the defendants' predecessor in title. The gate was in fact a protection to his property as well as to the plaintiffs' rights. Nor is it, I think, true to say that, whatever the plaintiffs' intentions may have been, the defendants or Solomon were in fact dispossessed of the land by the erection of these two gates. They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi - i.e., occupation with the intention of excluding the owner as well as other people. The evidence that the plaintiffs never had any such intention is extremely strong. The correspondence shews that until quite recently they only claimed a right of way. Even when they commenced this action they claimed a right of way and no more. It was only at a later stage that they claimed the ownership of the strip. When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important: see *Leigh v. Jack*. I am myself convinced that the gates were put up, not to exclude the defendants, but to protect the plaintiffs' right of way, and to prevent the public from going along the strip of land now claimed by the plaintiffs."

57. Sir F.H. Jeune was more inclined to accept that enclosure was strong evidence of intention but even he concluded that it was equivocal. He said:

> "But, on the whole, I am not prepared to take the responsibility of differing from him, because all through there has been an undoubted right of way in the plaintiffs as against the defendants, and it is very difficult to distinguish the acts done by the plaintiffs from acts which they would do, and would have a right to do, in exercise of their right of way. That observation is particularly applicable with regard to the gates. If there had been no right of way I should have thought that, when a man puts gates at each end of a strip of land and locks them, he has done as strong an act as he could do to assert his right to the ownership of the land. Such an act, which is, in fact, an inclosure, has always been held to be one of the strongest things that can be done to assert ownership. But when you find that the man who has done this had a right of way over the land, that one end of the piece of land runs out into a public road, and the other into his own land, and that along each side of the piece of land are hedges in which there has been an opening only for a short time, if ever, the erection of the gates and the locking and keeping them locked would appear referable rather to the exercise of the undoubted right of way than to acts of user such as to constitute dispossession."

58. The existence of a right of way was all important as it rendered acts of enclosure equivocal as to whether they were intended to protect the right of way or to exclude the owner. In *Bucks CC v Moran*, the defendant had no rights at all in relation to the land he had enclosed. I was also referred to two further Court of Appeal authorities: *Williams Bros Direct Supply Ltd v Raftery* [1958] 1 QB 159; and *George Wimpey & Co Ltd v Sohn* [1967] Ch 487. These both show that where the acts of possession are equivocal, the subjective intention of the trespasser is important, but that too must be demonstrated to be unequivocal.

59. All the authorities were reviewed in *Pye* (supra), and the House of Lords specifically endorsed *Powell v McFarlane* and *Bucks CC v Moran*. They also held that Bramwell LJ's proposition in *Leigh v Jack* as to the intentions of the owner and a requirement of inconsistent user was indeed heretical. It is the intention of the trespasser that is all important.

60. Even though *Littledale* was referred to alongside *Leigh v Jack*, I do not believe that the House of Lords overruled it, certainly not in relation to the potentially equivocal nature of the acts of enclosure where the person has a right of way. The House of Lords emphasised that the words of the statute should be given their ordinary meaning and that possession means physical possession coupled with the requisite intention to possess. Lord Hutton touched on the issue of equivocal acts in para [76] (underlining added):

> "Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. <u>It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess.</u> But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded."

61. The Judge did not refer to *Littledale*. He did not seem to consider intention separately from factual possession. And he only touched on the possible equivocal use of the Passageway as a right of way. His compressed reasoning was in [31] as follows:

> "The nature of the acts of possession and the consistency of those acts with other rights, for example, a right of way, has been argued. In my judgment there is a need for possession of the piece of land in question, the passageway in this case, and there must be evidence of that established by the claimants. If the only evidence of use was equally consistent with its use as a right of way, that would, in my judgment, be relevant to the determination that I have to make. However the extent of the acts of possession must be seen in the context of the land itself. There is little perhaps that can be done with a piece of land which is little more than one metre by five or six metres and therefore the acts of possession need to be seen in the context of the piece of land which is the subject of the dispute."

62. This paragraph does not address the requisite intention; it only refers to factual, physical possession. It also does not grapple with the problem identified in the authorities referred to above as to the equivocal nature of acts of possession where the trespasser is entitled to a right of way over the disputed land. The Judge referred to the use being consistent with use as a right of way. But he does not consider the requisite intention in that context. If the use is equivocal, then there needs to be clear unequivocal evidence of an intention to possess – see *Littledale, Powell v McFarlane* and *Pye.*

63. At [48] the Judge again seems to address the possible equivocal use of the Passageway:

> "Mr Eaton sought to argue that the evidence of both Mrs Brown and Mr Hall was equally consistent with a right of way as an ownership and therefore to a degree, he is right. Although placing a gate across an access route is more consistent with ownership than the simple user of a right of way. It is an act, even if not locked, that seeks to exclude others or to demarcate an area of ownership, and the whole

purpose of the moving of the gate by Mr Hall, was to seek to exclude or to discourage the youths entering the passageway."

64. Although the Judge then went on to consider Mr Bright's evidence as to the use of the Passageway, the analysis shows that the Judge did not consider that equivocal acts were fatal to a claim for adverse possession. If the gate was there to discourage youths from coming into the garden of Hollis House, there was no unequivocal intention to possess the Passageway, as in *Littledale*. The intention was to protect Hollis House from unauthorised intruders gaining access through the Passageway over which the owners of Hollis House had a right of way. There was no need to take possession of the Passageway because the right of way was all that the owners of Hollis House needed and it was what they were protecting. The Judge does not appear to have considered the intention question from this perspective.

65. This excursion into the law on adverse possession is most relevant to Ground 3. I will deal with its application to the facts in the section below. I now turn to the specific Grounds of Appeal.

Ground 2 – the evidence of Mr Bright

66. Mr Bright's Statutory Declaration dated 16 October 2017 was the critical evidence relied on by the Judge in relation to establishing the Respondents' adverse possession claim. The Appellants say that this hearsay evidence was given too much weight by the Judge and that the Judge failed to balance it against other evidence, in particular the only contemporaneous evidence as to the occupation of the Passageway contained in Mr Gardner's report and the Statutory Declaration of Carl and Julian James dated 11 December 2004. As there was no cross examination of Mr Bright, I am in as good a position as the Judge in assessing his evidence and the weight that should have been accorded to it.

67. I have set out in [25] above the contents of Mr Bright's Statutory Declaration. The Judge dealt with the weight that he should attach to it in [42] to [54]. After going through the considerations specified in s.4 of the Civil Evidence Act 1995 and finding that it was consistent with the evidence of Mrs Brown and Mr Hall and with much of Mr Gardner's report, the Judge concluded that, while he should treat it with caution, it was a truthful account and proved that "*there has been actual possession and an intention to possess in 12 years ending with first registration*" [54].

68. The Appellants relied upon some defects in the form of the Statutory Declaration but I do not think that they are material. Nor do I think that it is particularly important that the Statutory Declaration was not made for the purposes of these proceedings but for an application to the Land Registry. That was effectively the same purpose, as the Judge said. What is much more relevant, in my view, is that it is not a contemporaneous document – it was made more than 30 years after the events that it describes – and it was made in the context of the dispute having arisen and the fact that Mr Bright had not transferred title to the Passageway to his friends who had purchased Hollis House from him. The Judge referred to these points in [44] but dismissed them as not affecting the weight of the evidence.

69. I was struck by what Slade J said in *Powell v McFarlane*, which I have quoted in [49] above, that later declarations of a person's intention to take exclusive possession of disputed land are "*of very little evidential value, because they are obviously easily capable of being merely self-serving*". Even though Slade J was referring to oral evidence in court, it is equally or perhaps even more applicable to a hearsay statement out of court which has been prepared to assist friends and purchasers in their dispute.

70. It was, in my view, critically important for the Judge to weigh the evidence contained in the Statutory Declaration with the contemporaneous evidence, in particular the Report of Mr Gardner which led to the registration of the Passageway with possessory title to the James brothers. This is particularly marked by reference to the available photographs. The photographs attached to Mr Gardner's Report showed that the Passageway was very overgrown, filled with rubbish and blocked at both ends, there being rubbish bags at the Hollis House entrance. Mr Gardner reported that it did not appear that the Passageway had been used by anybody for many years. Mr Amirtharajah's photographs which he took in February 2017 seemed to confirm that the Passageway was full of debris and could not be used even as an occasional access way.

71. However, Mr Bright exhibited to his Statutory Declaration some photographs taken at the time of the Statutory Declaration that showed the Passageway completely cleared of rubbish, with no metal gate blocking the route to the locked door at the access road exit, and therefore able to be used as access. Clearly the Passageway had been tidied up after Hollis House had been purchased by the Respondents and probably for the purposes of making their application to be registered as owners of the Passageway. Mr Bright's photographs are therefore irrelevant evidence in relation to the state of the Passageway at the material time. Mr Gardner's photographs however are the only contemporaneous evidence as to the state of the Passageway.

72. The Judge found that Mr Bright's evidence was "*entirely consistent with what Mr Gardner found in 2005, say [sic] perhaps that it was a little more overgrown than the impression given by Mr White in his statement*" (I think the reference to Mr White should be to Mr Bright). The difference in the photographic evidence is much more marked than the Judge suggests. It also fails to take account of the fact that Mr Gardner, a professional surveyor, came to the view that the Passageway had not been used by anyone for "*many years*". I know that Mr Bright was not spoken to at the time and was not notified of the James brothers' application for first registration, but it was important for the Judge to test Mr Bright's evidence against the available contemporaneous evidence and I do not believe that he adequately did so.

73. The other contemporaneous evidence was the James brothers' Statutory Declaration dated 11 December 2004. They stated that they had owned the Workshop and Passageway (which they collectively referred to as the "Property") since 1994 when they inherited them from their father and there had been no challenge to their "*absolute ownership*" of them. In their application for first registration they had stated that there was no one in adverse possession of the property which included the Passageway. The Judge dismissed this Statutory Declaration as merely asserting that the James brothers had title and it did not amount to evidence of their possession. Even though the Judge said he was not able to determine ownership, as Slade J said in *Powell v McFarlane*, (see [47] above), in the absence of evidence to the contrary the owner is deemed to be in possession of the land. The only contemporaneous evidence

of ownership and possession was contained in Mr Gardner's Report and the James brothers' Statutory Declaration and Mr Bright's non-contemporaneous evidence needed to be weighed against that.

74. In any event, I do not believe that Mr Bright's Statutory Declaration clearly evidences his alleged possession or intention to possess. He describes how he used the Passageway for "*access*" to the access road "*on an almost weekly basis*" but this seems only to have been to carry his garden waste and other rubbish out to his car on the access road. He does not say what happened after Thurrock Council introduced garden bins, nor when that was. He does not say that he used it as the principal accessway to Hollis House, as it might have been in Mrs Brown's and Mr Hall's time. The other purpose for which Mr Bright said he used the Passageway was to store his long ladders and any items for dumping. All of this is consistent with a right of way and/or an easement of storage. Mr Hall's evidence was fairly clear that he had a right of way over the Passageway.

75. The principal evidence relied upon by the Judge and the Respondents is the fact that Mr Bright put a new gate in at the access road entrance when the old one was broken by vandals in about 1997 (ie in the middle of the relevant period) and he put a more robust padlock on the gate together with a bolt at the bottom. Mr Bright was clearly concerned about security because he used to disguise the ladders that he stored there. He does not say that he put the lock on to exclude the owner or to exert exclusive possession. Rather it could have been the same reason that Mr Hall put a gate in, to keep unwanted persons out and for security. The Land Registry, in rejecting the Respondents' application to rectify based on the Statutory Declaration, seemed to think that it was equivocal as between possession and "*enjoying a right of way*". However the Judge does not seem to have considered this and as to whether the gate and the lock might be equivocal acts in the circumstances.

76. The Judge concludes in [53], that "*All of the evidence supports a change from it being a principal accessway in the 1950s and 1960s to being an occasional access and storage area in the period with which I am concerned*." It is curious that such lesser use of the Passageway by Mr Bright led to the result that he had been in adverse possession of the Passageway.

77. Perhaps the most telling omission from the Judge's assessment of the weight to be applied to Mr Bright's Statutory Declaration is the fact that Mr Bright did not even attempt to explain why he did not include the Passageway in the original transfer to the Respondents of Hollis House. Had Mr Bright truly believed that he had acquired title to the Passageway and that it was his, he would have transferred it together with Hollis House. Instead this was only done after these proceedings had begun in June 2019. Mr Howard sought to explain this away by saying that the parties would not have carefully looked at the plans on the register; nor would their solicitors have been aware of any issue in this respect. But in my view this misses the point. Mr Bright made his Statutory Declaration in October 2017 after the dispute had arisen and when it was known that he had not actually transferred the Passageway to the Respondents. The reason why he did not do so required explanation and yet none was provided by Mr Bright. That impacts on whether Mr Bright truly intended to possess the Passageway. At the very least, the Judge should have considered whether the failure to deal with this in the Statutory Declaration affected the weight that he attached to it.

78. In all the circumstances, the Judge did not properly weigh the Respondent's main evidence against the uncontroverted contemporaneous evidence and did not properly assess whether Mr Bright's Statutory Declaration provided good enough evidence of his alleged possession and intention to possess the Passageway.

Ground 3 – did Mr Bright have the requisite intention to possess

79. The facts in relation to this have largely been dealt with under Ground 2 above as has the law on the requisite intention to possess. There is little or no discussion of both the facts and the law on this in the judgment.

80. The only relevant evidence of Mr Bright's intention must be his evidence. His Statutory Declaration has been analysed above and I consider, as did the Land Registry, that it was equivocal as to his intention to possess the Passageway. The evidence can reasonably be interpreted as Mr Bright continuing to use the Passageway as his predecessors had done for access to the access road while seeking to ensure that his property was secure from unwanted intruders.

81. Mr Howard said that this was really a very simple case, akin to *Bucks CC v Moran*, in which there has been enclosure of the disputed land with exclusive control of entry lying with the owner of Hollis House. He said that the fact that Mr Bright had put a gate in with it locked from the inside is the clearest possible evidence of an intention to possess. The Judge adopted that approach saying effectively that because of the nature of the Passageway the only way that possession could be taken of such a strip of land was by enclosing it with a locked gate.

82. But that, with respect, is no answer to the equivocal nature of the evidence. In *Littledale* the gates were locked and only the plaintiffs had keys but the Court of Appeal held that this was equivocal because "*the gates were put up, not to exclude the defendants, but to protect the plaintiffs' right of way, and to prevent the public from going along the strip of land now claimed by the plaintiffs.*" In *Bucks CC v Moran*, Mr Moran had no right of way or any other rights over the disputed land and so his enclosure of it could only be referrable to an intention to exclude everyone including the owner.

83. The Judge also relied on the evidence in Mr Bright's Statutory Declaration of him allowing the James brothers access to the Passageway in 2009 in order to raise the roof of the Office and that he had to unlock the gate each day so that the builders could get in to do their work. The Judge correctly pointed out that this was not directly relevant as it was outside the material period but he thought it was supportive of Mr Bright's evidence "*of the view taken by the Jameses and Mr Bright over the period with which I am concerned*." However, the James brothers had already registered their title to the Workshop and Passageway by that stage and they only needed the gate to be unlocked by Mr Bright. I do not see how that can be supportive of how the James brothers viewed their ownership of the Passageway at a time before they had registered their title to it. The best evidence of their views is contained in their contemporaneous Statutory Declaration.

84. Mr Bright also referred to an occasion, presumably within the material period (although he does not specify) when he found the exit from the Passageway to be blocked by car tyres piled up against the gate. It is interesting that in his Statutory Declaration he said he complained to the car repairers that he "*regularly used the gate for access*". He did not say that the Passageway was his. In the next sentence he says that "*there was no indication that they refuted my ownership to the* [Passageway]" but that was a non-sequitur as there was no issue about ownership; he was only complaining about access.

85. In my judgment, Mr Bright's evidence was at least equivocal as to his intention to possess the Passageway. The purpose of the locked gate is consistent with controlling access to the Passageway rather than intending to exclude the owner. When the owner wished to gain access it does not appear that there was any problem in doing so; nor does Mr Bright seem to have asserted to the James brothers at any time that he was now the owner of the Passageway. Again the clearest evidence that Mr Bright did not truly believe that he owned the Passageway is the fact that he did not even purport to transfer title to it to the Respondents. As there is no explanation for this in the Statutory Declaration, the only proper conclusion that the Judge should have drawn from it was that Mr Bright never had the requisite intention to possess the Passageway. He only ever wanted to protect his right of way.

86. Accordingly, I uphold Ground 3 of this appeal. By a combination of Grounds 2 and 3, the Judge was wrong to find, based on Mr Bright's evidence, that he was in adverse possession of the Passageway for any 12 year period up to the time of first registration.

Ground 4 – was the first registration of the Passageway a mistake?

87. As noted in [30] above, the Judge found that there were three mistakes in relation to the entries on the register:

(1) The James brothers ought not to have been registered in 2005 with possessory title to the Passageway because Mr Gardner had reported that no one was in possession of it;

(2) The registrar ought to have notified Mr Bright, the registered proprietor of Hollis House at the time, that the Passageway would be registered under the Workshop's title; and

(3) Mr Bright had acquired title to the Passageway by adverse possession by the time of its first registration.

88. The Judge cited the case of *NRAM Ltd v Evans* [2017] EWCA Civ 1013. In that case Kitchin LJ (as he then was) quoted from *Ruoff & Roper on Registered Conveyancing* (and this was partially repeated in [32] of the judgment):

> "Mistake is not itself specifically defined in the 2002 Act, but it is suggested that there will be a mistake whenever the registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that he would not

> have made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration." (underlining added)

89. It is clear that the registrar and the Court are concerned with substantive issues in relation to the registered title. Matters of process, such as whether the correct forms were filed or notice given, are not relevant mistakes requiring rectification – see *Baxter v Mannion* [2011] 1 WLR 1594.

90. Because of my finding under Grounds 2 and 3 in relation to adverse possession it was obviously not a mistake on the register for Mr Bright's purported title to the Passageway not to be added to the Hollis House title. That was the only real substantive dispute about the accuracy of the register because there would be no point, so far as the Respondents are concerned, in removing the Passageway from the Workshop title if it was not going to be added to the Hollis House title.

91. In relation to the registration of the James brothers with possessory title to the Workshop and Passageway the Judge considered that this was a straightforward mistake by the registrar because "*none of the information available to the registrar could justify such a decision*" [36]. By s.9(5) LRA 2002, possessory title can only be registered if the person is "*in actual possession of the land*". The Judge considered that Mr Gardner's Report showed that no one was in possession of the Passageway and that the James brothers did not have any means of getting onto the Passageway because they did not hold a key.

92. The context of the application at the time is important. I have not allowed the Appellants to amend their Grounds of Appeal to bring in evidence and argument on the question of the paper title ownership of the Passageway and surrounding land. But the evidence that was before the Judge showed that the James brothers had paper title to the Office in the form of the Assent from their father's executors. They similarly inherited the Workshop from their father but there does not appear to have been a similar Assent in relation to it. That may indicate a lack of evidence as to the actual paper title and may explain why they applied only for possessory, rather than absolute, title to both the Workshop and the Passageway. They did however confirm in their Statutory Declaration that they had owned the Workshop and Passageway since their father's death and that he had owned and occupied both unchallenged for at least 44 years.

93. The relevant test for correcting a mistake on the register is whether the entry that was made on the register would have been different had the registrar known the true state of affairs at the time. The true state of affairs was as stated in Mr Gardner's Report and the James brothers' Statutory Declaration and application. These were the only documents considered by the Judge in relation to this. On the basis of those same documents the registrar concluded that the James brothers should be registered with possessory title (which was all they were asking for), taking into account presumably the difficulty of establishing actual possession of a narrow strip of land used only for access. Perhaps the registrar relied on the principle set out by Slade J in *Powell v*

McFarlane that the paper title owner or those claiming title through the paper title owner are deemed to be in possession of the land. As no one else appeared to be in possession of the Passageway and it had not been used for many years, the James brothers who were claiming to have inherited the Passageway from their father were deemed by the registrar to be in possession of it.

94. In any event, there is no "*true state of affairs*" that has emerged since 2005 to undermine the registration of the Passageway together with the Workshop. The Judge reinterpreted the evidence that was before the registrar. That was not an appropriate way to apply the relevant test for a mistake.

95. In relation to the failure to give notice to Mr Bright, while that was certainly unfortunate, I do not think that it was a relevant mistake. As I have said above, the mistake has to be as to the substance of the title registered not as to a faulty process that has been adopted.

96. In the circumstances, it follows from my findings on Grounds 2 and 3, that Ground 4 also succeeds.

Grounds 5 and 6 – "*exceptional circumstances*" and abuse of process

97. In the light of the above findings, the appeal will be allowed and the Judge's Order set aside. That means that the remaining Grounds do not come into play. The question of "*exceptional circumstances*" is only relevant under para. 3(3) of Schedule 4 of the LRA 2002 if the Court is otherwise required to order the register to be rectified to correct a mistake.

98. In the circumstances I will not say much about this but I do feel that I must address the issue that has given rise to a lot of ill-feeling, namely the failure to bring to the Court's attention the death of Mr William White. This also incorporates the allegation in Ground 6 that the proceedings were an abuse of process.

99. I should first of all say that I accept, as did Mr Thorowgood, that Mr Howard knew nothing of Mr William White's death before, during and after the trial. I absolve him of any blame in this regard and it is regrettable that the Appellants have escalated their complaints against him. I have no doubt that if he had known he would have drawn it to the Judge's attention, and certainly after hearing the Judge's oral judgment delivered which referred in [1] and [58] to needing to use the Passageway for wheelchair access for Mr William White.

100. All are agreed that the situation is utterly bizarre. On the Respondents' side there was a change of the solicitor handling the litigation and even though the original solicitor knew that Mr William White had died, the other solicitor may not have done and he was responsible for issuing the proceedings in Mr William White's name despite him having been dead for 2 years. He also signed two inaccurate statements of truth.

101. The reason the Judge included those passages about the wheelchair was not because this was a point urged on him by Mr Howard; rather he picked it up for himself from the evidence of Mr Colin White who had said that the original reason for the purchase

was because they thought that Hollis House would be adaptable to the needs of his elderly father and then "*the access would be built for either wheelchair*". It is extraordinary also that Mr Colin White did not think to mention that his father had however since died but maybe he thought that everyone already knew that and he was only describing the situation at the time of the purchase. The Judge however did not know and clearly assumed that that was still the intention. What is even more difficult to fathom is that the Appellants knew, as did their solicitor advocate at the trial, and yet they did not say anything.

102. To my mind this was just a very unfortunate series of events. The Respondents gained no benefit from including Mr William White as a Claimant. Nor were they seeking to put forward the wheelchair access point. I reject Mr Thorowgood's suggestion that this was done deliberately and that the Respondents' failure to correct the error was "*contumelious*". As Fancourt J held on the Appellants' application to strike out, the proceedings were not a nullity because of the presence of two proper Claimants. They were also not in my view an abuse of process.

103. It did however have an impact on the Judge's decision in relation to "*exceptional circumstances*" and the wheelchair access point added weight, in the Judge's mind, to the Respondents' side of the balance that had to be struck between the competing factors. I do not think it was a decisive factor but its removal would clearly affect the way the Judge approached this question. I do not think that it would have changed the Judge's overall conclusion that the Appellants were more to blame for their lack of rigour in investigating the title to the Passageway during the conveyancing process than the Respondents.

104. The Appellants say that the Judge's reasoning on "*exceptional circumstances*" was flawed, quite apart from the wheelchair access point. They say that the Passageway was part of the registered title that they bought, that it had been so registered for more than 12 years when they bought and that they were entitled to rely on that registered title. Furthermore they had bought with the intention of redeveloping the site of the Office and the Workshop and had since obtained planning permission to do so. All these were powerful reasons for the existence of exceptional circumstances and they were not counterbalanced by anything similar on the Respondents' side. The relative blame in relation to their respective conveyancing processes cannot detract from the fact that the Appellants thought they were acquiring title to the Passageway, which was necessary for their development plans. All the Respondents can perhaps say is that they too thought they were acquiring the Passageway with Hollis House.

105. I do not need to resolve these issues and I will not do so. I think an appellate court should be slow to interfere in a decision of the first instance trial judge who has had to balance a number of different factors. This has been described as a multi-factorial exercise – see *Paton v Todd* [2012] 2 EGLR 19. It is even more difficult to judge that balancing exercise where one of the factors that was taken into account is now apparent that it should not have been. I do not know how the Judge would have dealt with this if he had known that Mr William White had died two years earlier.

Conclusion

106. For the reasons set out above, I will allow the appeal and set aside the Declaration and Order for rectification of the register made by the Judge. The Respondents' action will stand dismissed.

107. I will hear the parties at a convenient time on any consequential matters such as costs if there is no agreement on them.