



[2019] UKFTT 0721 (PC)

REF/2018/0794

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

MICHELLE SORRELL SMITH

APPLICANT

and

DOUGLAS CHAPMAN
TRACEY ANN CHAPMAN

RESPONDENTS

Property Address: land to the south of 231 Witham Road, Black Notley, Braintree,
Essex CM77 8NQ

Title Number: EX434209 and EX475729

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place London WC1E 7LR

On: 25th September 2019

ORDER

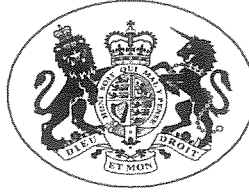
IT IS ORDERED that the Chief Land Registrar shall give effect to the Applicant's application in Form AP1 dated 17th August 2017

Dated this 28th day of October 2019

Owen Rhys

BY ORDER OF THE TRIBUNAL





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Applicant representation: Mr Thorogood of Counsel (instructed by Nockolds Solicitors)

Respondent representation: Mr Michael Murphy of Counsel (instructed by Birketts LLP)

D E C I S I O N

Introduction

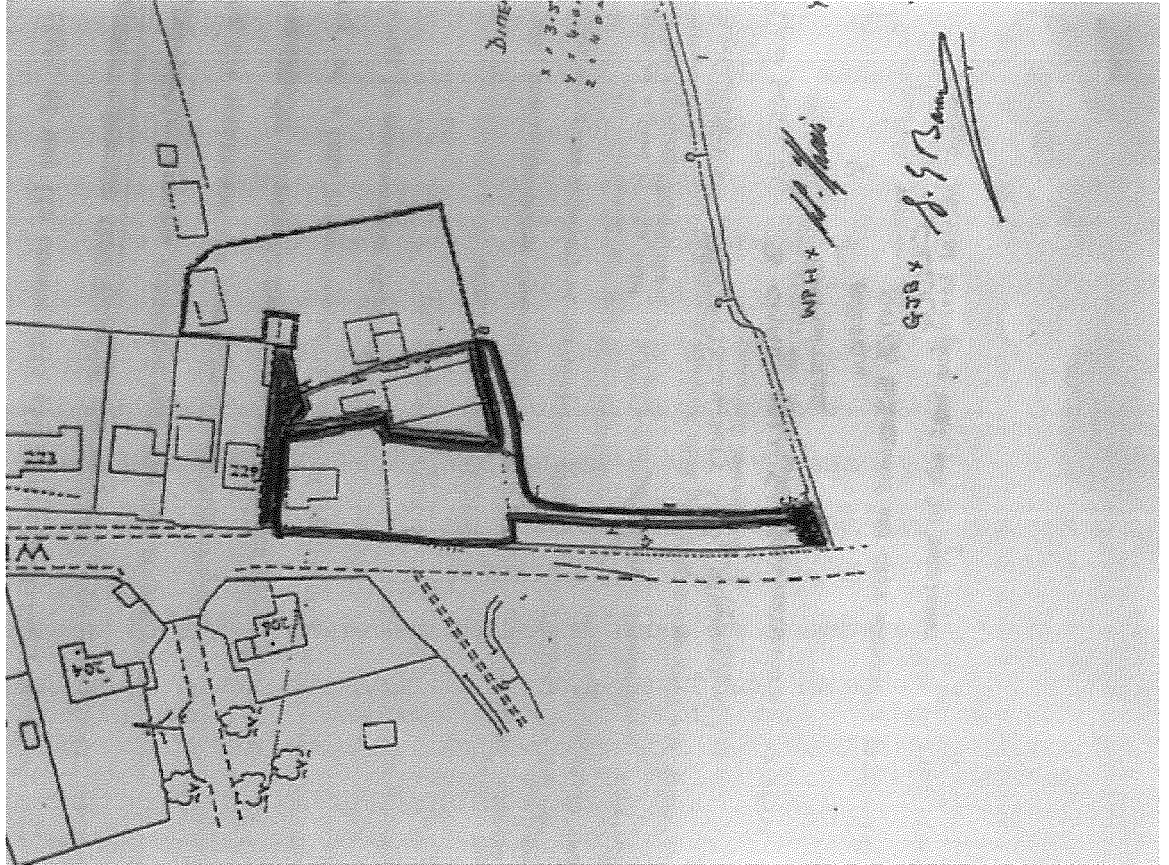
1. The Applicant is the registered proprietor of title EX475729, which is an area identified in these proceedings as “the Field”. The Respondents are the registered proprietors of title EX434209, being the property known as 231 Witham Road,

Black Notley (“No. 231”). By an application in Form AP1 dated 17th August 2017, the Applicant applied to HM Land Registry under paragraph 5 of Schedule 4 of the Land Registration Act 2002 to alter the register of No.231 in two ways. First, by removing from the title plan a small rectangle of land tinted blue on the Notice Plan attached to the Case Summary (“the Blue Land”). Second, by cancelling Entry no.2 on the Property Register, being an easement over the Field in favour of No.231. The Respondents objected to both limbs of the application, although by the date of the hearing they had withdrawn their objection to the second limb of the application. The dispute was referred to the Tribunal on 20th September 2018. I heard the case over the course of two days, having had the benefit of a site view on the afternoon preceding the hearing.

2. In order to understand the application, it is necessary to explain the conveyancing history of the parties’ titles. The story begins with a Transfer dated 7th December 1990 (“the 1990 Transfer”) and made between William Percy Davis (1) and Gordon John Barnes (“Mr Barnes”) (2). The transferor transferred two parcels of land, the first being land forming part of title EX408709 and edged green on the plan attached to the 1990 Transfer (to which I shall refer as “the Green Land”). The second parcel was unregistered land, being land edged red on the Transfer plan (“the Red Land”). The Red Land consists of a rectangular parcel to the north, with a long narrow spur to the south (“the Spur”) running parallel with the public highway (“Witham Road”) to the west. The Green Land adjoins the Red Land to its east, lying to the north and east of the Spur. The First Schedule contains the appurtenant rights granted by the transferor, including the following: *“A right of way (in common with all others similarly entitled) with or without vehicles for all reasonable purposes connected with the proper use of the property over and along the access way the approximate position of which is shown coloured brown on the plan”* The area coloured brown (“the Brown Land”) is shown on the plan at the southern end of the Spur, connecting the Track to the public highway, namely Witham Road. There is a second right of way, coloured blue on the plan, running along the northern end of the Green Land and the Red Land. The land comprised in the 1990 Transfer was given a new title

number, EX434209. As I have said, this is currently registered to the Respondents.

3. This is the plan to the 1990 Transfer (with north to the left and south to the right):

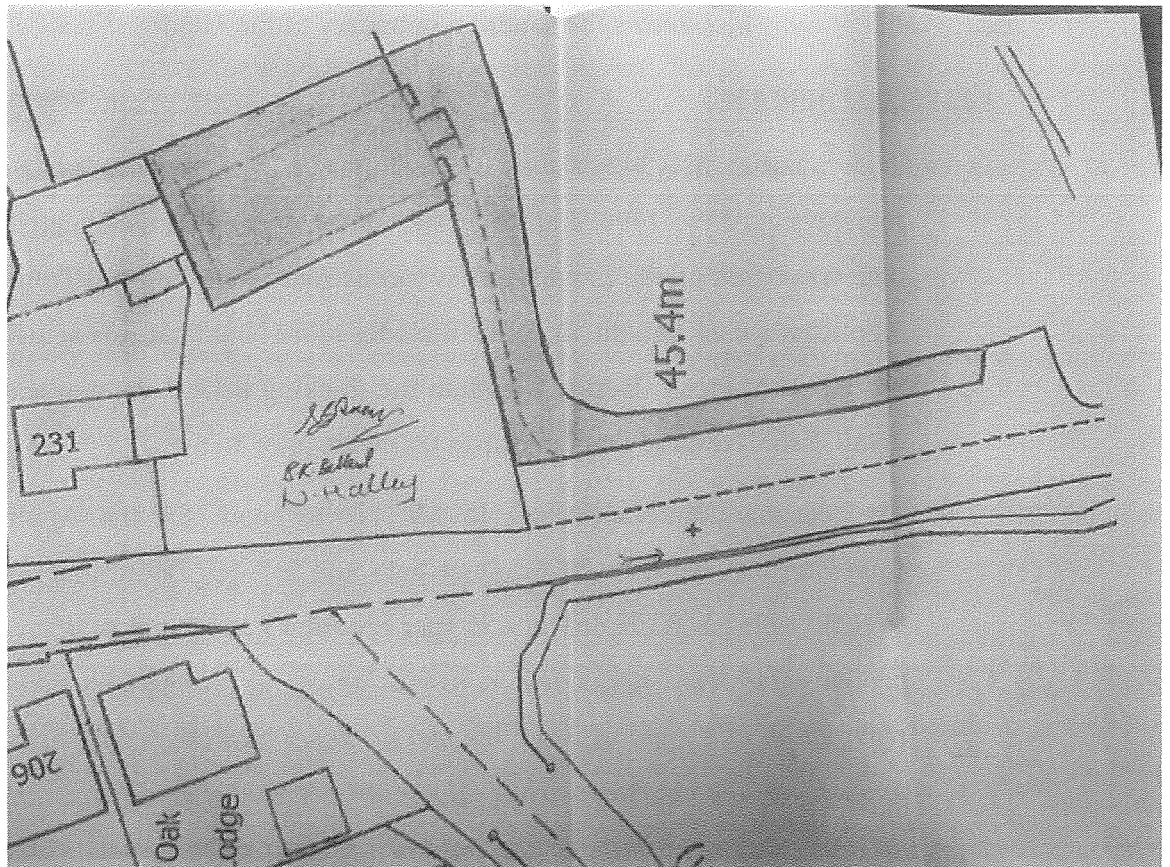


4. By a Transfer dated 18th December 1992 (“the 1992 Transfer”) and made between William Percy Harris and WP Harris Limited (1) and Gordon J Barnes Limited, the Field was transferred to the transferee. The Field comprises a parcel of land situated to the east and south of the Green Land and the Red Land, including the Brown Land, and a thin sliver of land between the western edge of the Spur and the eastern edge of Witham Road. The Field was registered under title EX475729. On 28th June 2000 title to the Field was transferred from Gordon J Barnes Limited to Mr Barnes, thus combining in his name the titles to the Red Land, the Green Land and the Field. It is this fact – the unity of seisin to give it its technical term – which form the basis of the Applicant’s claim that the right of way over the Field granted by the 1990 Transfer has been extinguished. The southern boundary of the Field is formed by a small brook which runs under Witham Road

and in an approximately east-west alignment, and is the feature shown on the 1990 Transfer plan.

5. By a Transfer dated 31st March 2014, Mr Barnes transferred the Field to the Applicant in consideration of £31,000. The Applicant had begun working for Mr Barnes in 2012 and was known to him. Subsequently, he made a third codicil to his Will, in which he devised the following property to the Applicant: *“If at the date of my death I am still the owner of the Piggeries adjoining number 231 Witham Road Black Notley I give the same to the said MICHELLE SORRELL SMITH free of Inheritance Tax and for the avoidance of doubt the Piggeries shall include the road or track included within the registered title a strip of land surrounding the same BUT shall exclude the garden to the front of such Piggeries the extent of the property gifted being shown tinted pink on the attached plan such gift being subject to and with the benefit of all rights and easements necessary for the proper enjoyment of the land bequested and my retained property.”* The plan attached to the codicil is detailed, and evidence (referred to below) has been obtained from the surveyor (Mr Chinery) who drew it on the basis of his site

survey.



6. The land tinted pink on this plan includes the entirety of the Green Land, together with a section of the Red Land to the south and west of the Green Land, and the entirety of the Spur comprised in the Red Land). However, if one compares the codicil plan with the 1990 Transfer plan, it is apparent that a small section of the Spur, at its southern end, has been excluded.
7. Mr Barnes died on 11th May 2014, and by an Assent dated 8th August 2016 (“the Assent”) his personal representatives vested title to the Piggeries in the Applicant. The assented property was described as follows: “*the land and buildings shown coloured red on the attached plan forming part of the freehold property registered under title number EX434209.*” The plan, drawn to a scale of 1:1250, is clearly based on the survey plan attached to the third codicil, with the same small section of the Spur apparently excluded from it. The land comprised in the Assent was registered under title number EX942578. The title plan is as always based on the current Ordnance Survey, and relates the Assent plan to the physical features shown on the Ordnance Survey. This shows the Spur terminating at the

northern edge of an opening onto Witham Road, some distance from the line of the brook which forms the southern boundary of the Field.

The correct approach

8. Title number EX434209 was created upon Mr Barnes's application for first registration of the 1990 Transfer. The extent of the title as depicted on the filed plan was based on the Land Registry's construction of the 1990 Transfer. It is the Applicant's case that the title plan includes more land than was actually conveyed by this instrument. Before I explain the thinking behind the application in more detail, I shall refer to the authorities that were cited to me.
9. The starting point, according to Mr Thorowgood, for the Applicant, is the following passage from St Edmundsbury and Ipswich Board of Finance v Clark (No.2) [1975] 1 WLR 468 at 476 (per Sir John Pennycuick): "*First, what is the proper approach upon the construction of a conveyance containing the reservation of a right of way? We feel no doubt that the proper approach is that upon which the court construes all documents, that is to say, one must construe the document according to the natural meaning of the words contained in the document as a whole, read in the light of surrounding circumstances.*" I do not think that this could be regarded as a controversial statement of the law.
10. Both Counsel relied on the decision of the Court of Appeal in Cameron v Boggiano [2012] EWCA Civ 157, although they each cited different passages from it. Mr Thorowgood drew attention to paragraphs 57 to 60 in the judgment of Mummery LJ, which I set out below, together with some additional passages
 57. *On the basis of those authorities, I agree that, if the transfer and/or the transfer plan is clear and unambiguous, the approach of the judge to the construction issue in this case would undoubtedly be correct. A mismatch between a clear plan and the actual physical features on the ground is not in itself a reason that could possibly justify ditching the title documents and determining the position of the disputed boundary by reference to the topographical features alone.*
 58. *However, it is well settled that the approach to construction and to the use of extrinsic evidence of topographical features is different when the title documents and plans are not sufficiently clear about the position of the boundary. In her lead judgment in Dixon v. Hodgson Black LJ cited from another recent decision of this court. Pennock v. Hodgson [2010]*

EWCA Civ 873 was decided just before the second part of the trial in this case. It was neither cited to the judge nor at the hearing of this appeal. The case contains a discussion on the construction of parcels in a conveyance based on two binding decisions of the House of Lords: Eastwood v. Ashton [1915] AC 900 at 906 and Alan Wibberley Building Limited v. Insley [1999] 1 WLR 894. Pennock was cited with approval in the recent case of Brown v. Pretot [2011] EWCA Civ 1421.

59. *The main ground of appeal in Pennock was that the trial judge had construed an unambiguous conveyance by relying on inadmissible evidence of physical features of the land conveyed that were neither mentioned in it nor identified in an attached plan that was stated to be “for the purpose of identification”, meaning that it did not define exact boundaries. It was also a case in which the properties were previously in common ownership. It concerned title to the bed of a narrow stream shown by a black wiggly line on a plan taken from the Ordnance Survey map, which does not fix precise boundaries, and attached to the conveyance of the part of the land sold off first.*
60. *The Court of Appeal upheld the decision of the trial judge on the ground that the key plan attached to the conveyance was insufficiently clear to establish the exact position of the boundary. The plan did not contain any relevant measurements that fixed the position of the boundary. A general boundary was shown by quite thick coloured lines in the vicinity of a stream that the claimants said was a boundary feature belonging to them. It was held on appeal that the judge was entitled to take the plan in his hand and look at the physical features on the ground as at the date of the relevant conveyance. That was not a breach of the exclusionary principle regarding extrinsic evidence, which would contradict the clear terms of the documents. The judge was right to conclude that the conveyance did not define the boundaries of the property conveyed and that it was necessary, in order to determine the boundary on the conveyance plan and to render it certain, to take account of topographical features. In that case they included a post and wire stock fence as part of the surrounding circumstances that would indicate to a reasonable person what were the boundaries of the property being conveyed.*
61. *A similar approach was taken by Lewison J in Chadwick & Ors v. Abbotswood Properties Ltd & Ors [2004] EWHC 1058 (Ch) where he said:-*

“43. ...Where the definition of the parcels in a conveyance or transfer is not clear, then the court must have recourse to extrinsic evidence, and in particular to the physical features on the ground...”

“44. The question is one to be answered objectively: what would the reasonable layman think he was buying? Since the question must be answered objectively, it follows that

evidence of the parties' subjective intentions, beliefs and assumptions are irrelevant; as are their negotiations."

62. *In that case, as here, the reference to the plan was not qualified by the expression "for identification only" suggesting that the plan was intended to control the description of the property. However, it was held that extrinsic evidence of surrounding circumstances was admissible to identify the property described in the parcels clause as "known as."*

63. *Where the lack of sufficient clarity is in a plan marked "for identification only" it is, in my view, easier to justify regard to the topography to assist in construing the contract/transfer plan than in a case like this where the plan was not so designated and has been prepared as a defining document. Even so, if that document is insufficiently clear to the reasonable layman with the plan in his hand to determine the position of the boundary of No 7 Choumert Mews, the court is entitled to seek assistance on the construction of the plan and title documents by taking account of the topographical features at the relevant date.*

11. Mr Murphy, for the Respondent, also relies on paragraph 53 of Cameron v Boggiano, in which Mummery LJ said that *"it would also be quite wrong to approach construction by disregarding the contents of the title documents to be construed and by relying only on the topographical features shown on the photographs and apparent on a visit to the mews."* However, I think it is fair to say that Counsel were essentially agreed on the correct approach to construction to be adopted, but differed of course in their conclusions.

The Applicant's case

12. Mr Thorowgood draws attention to terms of the 1990 Transfer and the background to it. The purchaser, Mr Barnes, was acquiring the Red and Green Land, together with the means of access to both parcels across the Field to the south. The access was created by granting a right of way over the Brown Land (which adjoined Witham Road), together with the spur of land leading north from the Brown Land into the Red and Green Land. The obvious and only purpose of the Spur was to provide access. It was established by unchallenged evidence that Mr Barnes intended to and did use the building on the Green Land for the purposes of his tea blending business. Furthermore, it was established by the Applicant, and admitted by the Respondents, that the physical means of access from Witham Road into the Field has at all material times comprised an area of cast concrete or tarmac. This hard surfaced area had been constructed prior to the

date of the 1990 Transfer and remains in place today. I shall refer to it as “the Access”.

13. The plan to the 1990 Transfer shows the spur connecting the Red and Green Land to the Brown Land, which was the intended means of access to and egress from Witham Road. That is the sole function of the Brown Land. The Spur enters the Brown Land from the north, but does not pass behind (to the east of) the Brown Land. On the plan, the Brown Land occupies the area between the end of the Spur, and the southern boundary of the Field formed by the brook. The 1990 Transfer also conveys the benefit of “*A right of way (in common with all others similarly entitled) with or without vehicles for all reasonable purposes connected with the proper use of the property over and along the access way the approximate position of which is shown coloured brown on the plan*”.
14. The nub of the Applicant’s case lies in the words “*the access way the approximate position of which is shown coloured brown on the plan...*” The argument goes thus. The obvious purpose of the grant of a right of way over the Brown Land is to enable the dominant owner of the Red and Green Land access to Witham Road, via the Spur, which was also conveyed at the same time. The Spur, connecting the Brown Land to the dominant land, is shown on the plan as terminating at the northern edge of the Brown Land. The position of the Brown Land as shown on the plan, however, is only approximate. This appears from the wording of the 1990 Transfer itself. This therefore introduces an element of ambiguity, because, in the words of Mummery LJ in Cameron v Boggiano, the plan is “*insufficiently clear to establish the exact position of the boundary*”. It is therefore permissible to admit extrinsic evidence of the physical features, and “*..... the judge was entitled to take the plan in his hand and look at the physical features on the ground as at the date of the relevant conveyance. That was not a breach of the exclusionary principle regarding extrinsic evidence, which would contradict the clear terms of the documents. The judge was right to conclude that the conveyance did not define the boundaries of the property conveyed and that it was necessary, in order to determine the boundary on the conveyance plan and to render it certain, to take account of topographical features.*”

15. Applying that approach to the 1990 Transfer plan, Counsel submits that the intended boundary of the Spur was the northern edge of the Access. The Spur did not need to and was not intended to extend beyond the Access, since its only purpose was form an access route between the dominant (Red and Green) land and Witham Road. The Brown Land was intended to represent on the plan the approximate position of the Access. In point of fact, the Access was situated further north at the time of the 1990 Deed and to that extent the Brown Land is shown in the wrong position. If the Land Registry had carried out a survey, and had regard to the actual position of the Access when drawing the title plan, it would have placed the southern boundary of the Spur at the northern edge of the Access, essentially in the same position as to the southern boundary of the existing title EX942578. It follows, therefore, that the section of the Spur lying to the south of the Access, and included within the Respondent's title EX434209, has been included in error. This is the area coloured blue on the Land Registry Notice Plan – the Blue Land.

16. At paragraph 3.7 of his skeleton argument Mr Thorowgood submits as follows:

“Construing the [1990] Transfer as a whole, in light of the available background material including principally:

i. 3.7.1 Mr Barnes' purpose in acquiring the Track;

ii. 3.7.2 The fact that the cast concrete Accessway afforded the most efficacious (if not only) means of access to the red land (the Track) from the public highway existing at the time of the transfer

it is difficult to resist the conclusion when examining the plan that the northern face of the Accessway defines the southernmost limit of the tongue of red land constituting the Track. Further, given the express acknowledgment contained within the grant of the right of way over the Accessway (without which the transfer of the tongue of red land would be pointless) that the position of the Accessway as it is shown on the plan is approximate, it is the natural and ordinary construction of the language used that the southernmost extent of the red land is controlled by the true position of the Accessway.”

The Respondents' case

17. The Respondents' primary argument is that the terms of the 1990 Transfer are clear, and that there is no justification for looking at extrinsic evidence or

surrounding circumstances in order to construe the deed and plan. Mr Murphy submits that the case falls within the terms of paragraph 53 of the judgment in Cameron v Boggiano: in that “*it would also be quite wrong to approach construction by disregarding the contents of the title documents to be construed and by relying only on the topographical features shown on the photographs and apparent on a visit to the mews.*” He submits that the Applicants are in effect inviting the Tribunal to disregard the clear terms of the 1990 Transfer, in order to prefer evidence of the physical circumstances existing at that date.

18. The Respondents also have another string to their bow. They contend that the Blue Land was retained by Mr Barnes at the date of his death, was not comprised within the gift made by the third codicil and was not assented to the Applicant in 2016. Furthermore, they contend that it was not retained as part of the Field and therefore did not pass to the Applicant on her purchase of the Field in 2014. They contend that Mr Barnes deliberately held it back from the gift under the Will. Accordingly, when the Respondents acquired EX434209, the Blue Land was included. They say that Mr Barnes’s intention was to create a ransom strip between the Access and the Field and Piggeries.

Conclusion

19. In my judgment, the Applicant’s suggested construction of the 1990 Transfer is correct. The obvious intention behind the 1990 Transfer was to create a corridor between the Red and Green Land and the Access (wherever it may have been) and thence to Witham Road. That was the purpose behind the Spur, which was to function solely for the purpose of the access route. There cannot have been any intention or reason to transfer a sliver of land south of the Access. In my judgment, this would have been perfectly plain to “*the reasonable layman with the plan in his hand*”. The actual position of the Access on the ground would have been the governing factor with regard to the length of the Spur required to link the Access and the dominant land. The indication in the First Schedule to the 1990 Transfer that the Brown Land was shown in its approximate position only is sufficient to open the door to the admission of evidence of the surrounding physical circumstances at the date of 1990 Transfer, principally the position of the Accessway. I reject Mr Murphy’s submission that the 1990 Transfer is so clear

and unambiguous that there is no room for the admission of such evidence. That is manifestly not the case.

20. Accordingly, the filed plan for Title number EX434209 did not accurately delineate the land transferred by the 1990 Transfer, and to that extent constitutes a mistake. The Blue Land should have been omitted and remained within the title to the Field.
21. As to the other points raised by the Respondents, my conclusion is as follows. If the Applicant's case succeeds, it is still necessary to determine the actual position of the Access in order to draw a corrected title plan. The Respondents deny that the Access is in the position that the Applicants contend for. However, the Access is clearly visible on the ground, and furthermore its position has been plotted on the current Ordnance Survey. If reference is made to the title plan of EX434209, the Access can be seen, bounded on the north by a broken line leading in from Witham Road and the green line being the southern boundary of EX942578. Although, as I have said, the Respondents contend that the Access is in some other position, they have produced no surveying or other evidence to make good that claim, and I cannot see that there is any material before me that can possibly gainsay the Ordnance Survey (or, indeed, the evidence of Mr Chinery as to what the codicil and Assent plans show). For what it is worth, the position shown on the Ordnance Survey appears consistent with my physical inspection of the site. Since the registered boundary is a general boundary in any event, precise accuracy is not required. In my judgment, the position of the Access is sufficiently identified on the current Ordnance Survey and Land Registry plans, certainly for the purposes of altering the title plans of the affected titles.
22. As to their other argument (described at paragraph 18 above), it is quite difficult to understand how this argument works, as a matter of fact and law. If the Applicants are right, the Blue Land should never have formed any part of EX434209, and was included by mistake, but properly should have been retained within the Field. Further, evidence was obtained from Mr Chinery, who drew the survey plan attached to the third codicil, and which forms the basis of the Assent plan. Although he is not a member of any professional surveying organisation, he

has experience in land surveying and has an HND qualification. His evidence was that he surveyed the land prior to drawing the codicil plan, and that the southern extent of the Spur was drawn along the line of the then existing gate which separated the Access from the Spur. His instructions were to include within the land gifted by the codicil the land between the Access and the Piggeries. This is consistent with the manifest intention of Mr Barnes to give the Applicant not only the Piggeries, but the means of access to it. This is apparent from the terms of the gift, which includes these words: “*such gift being subject to and with the benefit of all rights and easements necessary for the proper enjoyment of the land bequested and my retained property.*” Although Mr Chinery’s evidence was criticised on the grounds that he is a friend of the Applicant, and because he is not a member of the RICS, I found his evidence to be entirely reliable. I reject any suggestion that there was ever intended to be a ransom strip between the Access, the Piggeries and/or the Field

23. I therefore direct the Chief Land Registrar to give effect to the Applicant’s application in Form AP1 dated 17th August 2017, by removing the Blue Land from the Respondents’ title. In my view this alteration would constitute rectification for the purposes of Schedule 4 of the Land Registration Act 2002. However, since the Respondents are not in possession of the Blue Land, and since there are no exceptional circumstances present, the register must be rectified. As to the second limb of the application – the removal of the right of way noted on the register – the Respondents have applied to withdraw their objection, recognising that the unity of seisin point is unanswerable. I shall direct the Chief Land Registrar to give effect to this limb of the application as well.
24. I propose to order the Respondents to pay the Applicant’s costs, subject to any written representations received from the Respondents within 7 days of the date of this Decision. The Applicant must inform the Tribunal within the same timescale whether a detailed or summary assessment is required.

Dated this 28th day of October 2019

Owen Rhys

BY ORDER OF THE TRIBUNAL



