REF/2022/0396

PROPERTY CHAMBER, LAND REGISTRATION DIVISION

FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

HENRYK JAN IWASKIEWICZ

APPLICANT

- and -

KAYALAIPILLAI SUHITHARAN

RESPONDENT

Property Addresses: 2 and 4 Beancroft Road, Marston Moretaine, Bedford

Title Numbers: BD256408 & BD215296

Before: Judge Alexander Bastin

Sitting at: Alfred Place

On: 22 & 23 February 2024

Applicant's Representation: **Matthew Feldman (counsel)**

Respondent's Representation: **Noel Dilworth (counsel)**

DECISION

Applicant's Form AP1 application pursuant to paragraph 5 Schedule 4 Land Registration Act 2002 for alteration of register based upon mistake – removal of land from respondent's title plan and its inclusion within applicants' title plan – applicant relying on documentary title and adverse possession – whether adverse possession part of the matter referred - whether there is a mistake – whether proposed alteration will prejudicially affect registered proprietor's title - whether respondent in possession – whether exceptional circumstances which justify not altering the register

Cases referred to

Paton v Todd [2012] EWHC 1248 (Ch)
Rees v 82 Portland Place Investments LLP [2020] EWHC 1177 (Ch)
Sainsbury's Supermarket Ltd v Olympia Homes Ltd [2005] EWHC 1235 (Ch)

Introduction

1. This is my judgment on Mr Iwaskiewicz's ('the Applicant') original application dated 1 July 2019 to alter the register made by a Form AP1 signed on 26 June 2019 ('the Application'). The Applicant has since 21 July 2000 been the registered freehold proprietor of 4 Beancroft Road, Marston Moretaine, Bedford ('No. 4') and Mr Suhitharan ('the Respondent') has since 1 March 2019 been the registered freehold proprietor of the neighbouring No. 2 Beancroft Road ('No. 2'). The Applicant seeks the removal of land ('the Disputed Land') from the Respondent's title and its inclusion within his. By his solicitors' letter dated 23 July 2019 the Respondent objected to the Application and since the matter could not be resolved by agreement before HM Land Registry ('HMLR'), it was referred to the Tribunal on 10 June 2022 pursuant to Sections 73(7) and 108(1)(a) Land Registration Act 2002 ('the 2002 Act'). The parties have been represented by solicitors throughout these proceedings, both whilst before HMLR and the Tribunal.

The parties' properties and the Disputed Land

2. The location and juxtaposition of the parties' properties and the Disputed Land can be seen in Figures 1 and 2 below.[1] On Figure 1 the Applicant's title, No. 4, is edged red and the Disputed Land is tinted blue. On Figure 2, the Respondent's title is edged red. The Disputed Land consists of a garage and drive that are situated between the parties' properties, albeit presently within the Respondent's title. I conducted a site view on 21 February in the presence the parties, the Applicant's solicitor and the Respondent's solicitor and counsel. I saw the Disputed Land from both parties' properties and noted that:

    2.1 No. 2 is situated on the corner of two roads and that it has no off-street parking save for the Disputed Land.

    2.2 No. 4 has private off-street parking other than the Disputed Land.

    2.3 The ground surface differs between the Applicant's undisputed parking space and the Disputed Land.

[1] Figure 1 is an excerpt from No. 4's title plan and Figure 2 is an excerpt from No. 2's title plan.

2.4 There are two means of access to the garage on the Disputed Land: either over the parking area / drive and through the main up and over garage door or through a side door that opens onto the Applicant's fenced garden.

Figure 1 – taken from No. 4's title plan

Figure 2 – taken from No. 2's title plan

Summary of the parties' cases

3. The Applicant's case before HMLR was that the Disputed Land was mistakenly included within the Respondent's title. His Form AP1 refers to his own Statutory Declaration sworn 3 May 2019 and a Statement of Truth by Rosemary Forsyth signed 14 June 2019.

4. In his Statutory Declaration, the Applicant states that No. 4 was sold to him as including the Disputed Land – he exhibits the sales particulars – and that throughout his ownership he has maintained, used and occupied it without anyone's consent. He adds that the garage door faces No. 4 and no third party has ever used it. He also says that he believes the error came about on first registration because No. 4's frontage is 65 feet and it is described as 'having a frontage… of sixty six feet or thereabouts…' in a conveyance dated 18 August 1944 ('the 1944 Conveyance').

5. In her Statement of Truth, Ms Forsyth states that she has owned and lived at 41 Bedford Road, Marston Moretaine ('No. 41'), situated directly across the road from the Disputed Land[2], since 29 May 1998 and that in all that time the Disputed Land has been used and maintained by the owners of No. 4 including the Applicant since July 2000. She confirms that she is not aware of anyone else using or claiming ownership of the Disputed Land throughout her ownership of No. 41.

6. In his Statement of Case for these proceedings, the Applicant clarifies and develops his case a little further by setting out that which I have summarised in paragraphs 4 and 5 above and pleading that he has been in adverse possession of the Disputed Land for in excess of 22 years since 21 July 2000.

7. The Respondent's objection to HMLR states that his predecessor in title, Rebecca Ruffhead, had owned No. 2 from 2 March 2007 and 1 March 2019 and not disclosed a dispute as to the boundary when she sold to him – he refers to sections 1 and 8 of her Property Seller's Information Form. He also suggests that any representation in the sales particulars should be taken up with the estate agents and that the absence of a plan to the 1944 Conveyance means it is not clear whether the Disputed Land is within the 'sixty six feet or thereabouts'. A print-out of Zoopla's sales particulars for No. 2 from March 2011 make no mention of the Disputed Land (i.e. no mention of a parking space or garage) although reference is made to a 'rear garden' and 'storage barn'.

8. In his Statement of Case, the Respondent acknowledges that the Application is put upon two bases: error in first registration and adverse possession (albeit referred to as 'squatting rights'). He argues, however, that (a) the documentary evidence relied upon is inadequate, and (b) No. 2 is registered land and there is no evidence of adverse possession having been established prior to 13 October 2003 as provided for in the transitional provisions at paragraph 18(1) Schedule 12 of the 2002 Act. He also sets out arguments as to the period from 13 October 2003 onwards.

The legal framework

9. The legal framework for alteration of the register relevant to this matter is:

    9.1 Paragraph 5(a) Schedule 4 of the 2002 Act provides that the Registrar may alter the register for the purpose of correcting a mistake.

    9.2 Paragraph 1 Schedule 4 provides that an alteration to correct a mistake constitutes 'rectification' if it prejudicially affects the title of the registered proprietor.

[2] This can be seen on Figures 1 and 2.

9.3 Paragraph 6(2) Schedule 4 provides that such 'rectification' requires the registered proprietor's consent in relation to land in his possession unless (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or (b) it would for any other reason be unjust for the alteration not to be made. The burden of proving that an application falls within one of the two exceptions is on the party seeking rectification – see *Sainsbury's Supermarket Ltd v Olympia Homes Ltd*.

9.4 A registered proprietor claiming to be in possession of land subject to a rectification application has to show that they have factual possession by demonstrating that they have an appropriate degree of exclusive physical control of the land. Their possession must be exclusive and they must deal with it as an occupying owner might have been expected to have done so and that no one else has done so. This is a matter of fact which will depend on all the circumstances which include, in particular, the manner in which the land is commonly enjoyed. See Section 131(1) of the 2002 Act, Megarry: The Law of Real Property at 9.023 and Ruoff & Roper: Registered Conveyancing at 46.012-46.013.

9.5 Paragraph 6(3) Schedule 4 provides that if on an application for alteration under paragraph 5 the Registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration.

10. I will deal with adverse possession in the next section.

The issues

11. Prior to trial counsel filed an agreed list of what they considered the issues to be:

11.1 Was the Disputed Land mistakenly included within No.2's title?

11.2 If so, should it be removed from No.2's title and included within No. 4's title?

11.3 Alternatively, has the Applicant established adverse possession of the Disputed Land (a) for 12 years prior to 13 October 2003 (i.e. under the 'old law'), or (b) for 10 years ending on the date of the application and one of more of the three conditions pursuant to paragraphs 1 and 5 Schedule 6 of the 2002 Act (i.e. under the 'new law')?

12. On pre-reading, I had no concerns about the issues set out paragraphs 11.1 and 11.2 above (save, perhaps, for the broadness of 11.2) but the advancing of an alternative case based adverse possession (both old and new law) as per paragraph 11.3 seemed problematic. I flagged this with parties' solicitors and the Respondent's counsel at the site view and asked for them to consider the matter overnight and address me at the opening of the first day of trial.[3] This prompted a Supplementary Skeleton from Mr Dilworth and a request to defer the start of trial by 30 minutes or so in order for Mr Feldman to take instructions. This request was granted and upon re-convening for the start of the trial proper, Mr Feldman sensibly and appropriately conceded the adverse

[3] The Applicant's counsel did not attend the site view.

possession aspect of the proceedings, acknowledging that the matter referred related to documentary title and not the Applicant having adversely possessed the Disputed Land. Adverse possession had only arisen, rather fleetingly, at the foot of the Applicant's Statement of Case where it was pleaded that the Applicant had been in adverse possession since July 2000. Further, none of the procedure required in respect of a new law adverse possession had been followed. [4]

13. After clarifying with counsel what was and was not in issue in respect of Schedule 4, the issues to be decided were as follows:

13.1 Was the Disputed Land included within No. 2's title by mistake?[5] Counsel agreed that there is no statutory definition of 'mistake' and that if the Disputed Land should not have been included in No. 2's title, that would constitute a 'mistake'.

13.2 Was the Respondent in possession of the Disputed Land on the date of the Application (1 July 2019)?[6]

13.3 Has the Respondent by lack of proper care caused or substantially contributed to the mistake?[7]

13.4 Would it for any other reason be unjust for the alteration not to be made?[8]

13.5 Are there exceptional circumstances which justify not altering the register?[9]

14. For completeness's sake, I add that Mr Dilworth confirmed that the Respondent most certainly does not consent to alteration of the register and Mr Feldman accepted that:

14.1 If I find that the Disputed Land was included within No.2's title by mistake, correcting it (by removing it from his title) will prejudicially affect the Respondent's title and, therefore, constitute rectification for the purposes of Schedule 4.

14.2 There was no basis for alleging that the Respondent had by fraud caused or substantially contributed to the mistake. He reserved his position on lack of proper care.

15. Since the Applicant has brought these proceedings, he bears the burden of proof on the balance of probabilities.

[4] See Rule 188 Land Registration Rules 2003.
[5] Paragraph 5(a) Schedule 4.
[6] Paragraph 6(2) Schedule 4.
[7] Paragraph 6(2)(a) Schedule 4.
[8] Paragraph 6(2)(b) Schedule 4.
[9] Paragraph 6(3) Schedule 4.

The evidence

Chronology

16. Counsel helpfully provided me with an agreed chronology to which I have added a few dates which arose on account of late disclosure of two conveyances by the Respondent at trial:

1903	Auction notice and subsequent conveyance of No. 4.
30 July 1929	Conveyance of No. 4 by Arthur Dell to Anna Maria Keat
18 Aug 1944	Conveyance of No. 4 by Sarah Jane Keech to Henry Victor Hillson
27 July 1946	Conveyance of No. 4 by Henry Hillson to Charles Linford
13 Jan 1971	Deed made between the Trustees of the Marston Moreteyne Methodist Church & Others and Shell-Mex & BP Ltd granting a right of way for the benefit of No. 2
9 April 1973	Conveyance of No. 2 made between Anton Packheiser and Philip James Golder & Barbara Lynne Hardy
21 July 2000	Applicant registered as proprietor of No. 4
6 Feb 2007	Ms Ruffhead acquires No. 2
March 2011	Zoopla marketing for No. 2 with no mention of the Disputed Land
7 Jan 2019	Respondent registered as proprietor of No. 2
1 July 2019	Date of the Application to HMLR

17. The Applicant only disclosed the 1903 and 1946 conveyances at trial rather than in accordance with the deadline set by the Tribunal's directions dated 25 May 2023 which provided that evidence not submitted in time will only be admitted with the Tribunal's permission. The 1946 conveyance was produced on the first day with Mr Feldman informing me that the Applicant had found it in a box of papers. After hearing submissions from counsel as to whether relief from sanctions should be granted and the conveyance put in evidence, I gave permission but required the Applicant's solicitor, Mr Reilly, to review the box of papers with his client's disclosure obligations in mind and overnight prepare a witness statement confirming that he had done so. Mr Reilly's review brought to light the 1903 conveyance and this too was admitted, it adding little if anything to the 1946 conveyance.

The witnesses and their evidence

18. The Applicant confirmed on oath his Statutory Declaration, Statement of Case and Witness Statement and was cross-examined. Although he filed and served a Witness Statement by a Ms Forsyth, who had used to live across the road from the parties' properties, she did not attend to be cross-examined.

19. The Respondent also confirmed on oath his Statement of Case and Witness Statement and was cross-examined. He also filed and served Witness Statements by Ms Ruffhead (his predecessor in title) and Mr Kerins (a friend who attempted to intercede between the parties). However, although they attended the hearing to give evidence, the Applicant's dropping of the adverse possession arguments meant that they were not called or tendered for cross-examination. Mr Feldman confirmed that their evidence was not accepted.

20. Much of the parties' written evidence, like that of their witnesses, was not relevant to the issues that remained live at trial (see paragraph 12 above). The Applicant's relevant written, oral and documentary evidence of mistake amounted to this:

    20.1 A notice advertising the auction on 22 May 1903 of a 'valuable freehold property consisting of a convenient dwelling house… together with the builder's workshops offices and outbuildings situate with a frontage of 66 feet, or thereabouts, to the Road leading from Millbrook Station to Cranfield at Church End'. The resulting conveyance was disclosed on the second day of trial and contained the words '… having a frontage of sixty six feet, or thereabouts, to the public road…'.

    20.2 A conveyance dated 30 July 1929 between Arthur Dell (and others) and William Sutton (and another) conveyed 'all that cottage or tenement with the outbuildings and yard situate at Church End…delineated for the purpose of identification but not of accurate definition with the abuttals thereof in the plan drawn on these presents and thereon coloured pink'.

    20.3 A conveyance of No. 4 dated 18 August 1944 '… having a frontage to the public road leading from Marston Moretaine to Cranfield of sixty six feet or thereabouts…'.

    20.4 A conveyance of No. 4 dated 27 July 1946 containing the words '… having a frontage to the public road… of sixty six feet or thereabouts…'.

    20.5 A copy of the estate agent's sales particulars for No. 4 when the Applicant bought in 2000 which make express reference to a 'driveway & garage' and stated 'Front Garden: Driveway for one car leading to a detached garage with up and over door. Remainer paved and shingled. Side gate.'

    20.6 In his oral evidence he said that at the time of his purchase in 2000, the land between No.s 2 and 4 had looked much like it is shown in an undated aerial photograph in the trial bundle. With reference to the photograph, he pointed out (a) a low brick wall and wooden five-bar gate along the road frontage, (b) how what is now a parking space adjacent to No. 4 was, back then, separated from the road by the low brick wall, (c) how there was a cherry tree situated in what is now the parking space adjacent to No. 4. He had removed the low wall and tree so as to give extra access for parking. The Applicant accepted that he would have received a report on title from his conveyancing solicitors but it was too long ago for him to remember it or have kept a copy.

20.7 A print-out of a Zoopla 'property history' for No. 2 in which the property description for a 2011 listing makes no mention of the Disputed Land. It does, however, state 'An attractive, shallow frontage enclosed by timber picket fencing and providing latched gated access to a tiles pathway to the front door.'

20.8 A photograph of what the Applicant says is No. 4's frontage (including the Disputed Land) with measurements marked up to show what he says is a 65 foot frontage. The Applicant says that this 65 foot measurement is consistent with the auction particulars and various conveyances which refer to No. 4's frontage being '66 feet or thereabouts'.

20.9 He had used the garage for storage and the drive for parking throughout his ownership of No. 4 save more recently when the Respondent parked his car on the drive when the Applicant's car was not there and then put removable security posts in the ground in an attempt to reclaim the drive for No. 2.

21. The Respondent's relevant written, oral and documentary evidence was somewhat more limited than the Applicant's but then he had only bought No. 2 in March 2019 and readily accepted at the start of his oral evidence that he had no knowledge of the site prior to then. In his witness statement he recounts how following his purchase of No. 2 he had parked on the drive believing it to be his as per his title plan. However, later when he returned to No. 2 he found the Applicant's car parked there. The rest of his witness statement deals with his efforts to engage with the Applicant through a friend, Mr Kerins, and escalation of the dispute plus his own discussions with his predecessor in title Ms Ruffhead.

22. In his oral evidence the Respondent told me that although he had lived around the corner and occasionally stayed in No. 2 when he had no tenants, he and his family lived in Cambridge where his children went to school. He also told me that prior to installing the security posts he had taped two signs on the front of the garage – these are visible in the photographs exhibited to his witness statement. He had never been into the garage and, I think, had not been aware of the side door until the site view. He explained to me how in December 2019 he had gone to clear the garage and found the up and over door unlocked but that when he tried to lift it there was something behind it that prevented him from doing so. This was, I note, in marked contrast to his written evidence that he had opened the garage and gone in and seen that it was full of 'lots of old useless discarded materials'.[10]

Analysis of the evidence and discussion

Was the Disputed Land included within No. 2's title by mistake?

23. Mr Feldman submitted that all the evidence – see paragraph 20 above - pointed to there having been a mistake. Further, that the 1929 conveyance plan and the 1971 deed plan – both relating to No. 2 – are consistent with the Applicant's case as they show the Disputed Land not within No. 2's title.

[10] Paragraph 14 of his witness statement.

24. Mr Dilworth submitted that there was no evidence as to how the alleged mistake occurred, no conveyancing evidence relevant to ownership of the Disputed Land after the 1971 conveyance and that it was inherently improbable for both current titles to contain mistakes that were consistent with each. He also criticised the quality of the Applicant's evidence: (a) there are conveyances missing (such as the one dated 9 April 1973 at entry 3 of the property register for No. 2 in edition date 8 March 2019[11]), (b) none of the documentary evidence relied upon contains a plan save for the 30 July 1929 conveyance which he says is consistent with the Respondent's case, (c) the Applicant has not disclosed a report on title or survey, and (d) the photograph with the 65 foot measurement was unsatisfactory with it not being clear where the measurement was taken from. Lastly, Mr Dilworth submitted that I could take judicial notice of the fact that car ownership has proliferated since the 1970s and that having a parking space in a rural area such as this would have become a necessity.

25. This is difficult. We do not have any evidence going back to a time when the two properties were in common ownership (if they ever were) and the most recent conveyance that we have for No. 4 is from 1946. The evidence up until 1946 – the four conveyances and the 1903 auction notice – all points to No. 4 having a 66 foot or thereabouts frontage onto the road from Marston Moretaine to Cranfield. I accept the Applicant's evidence that he measured what he considers to be No. 4's present frontage to the Cranfield road and found it to be 65 feet. This is a question of fact that does not necessarily need a surveyor's input. The Applicant has gone to the trouble of marking up a photograph to indicate where he had measured to and from and whilst it is not perfect, I am persuaded that the frontage he measured is the same frontage, or thereabouts, that the conveyances and the 1903 auction notice all refer to. The Applicant has not tailored his evidence by saying the frontage was 66 feet (this being the figure mentioned in the conveyances and auction notice) and he would surely have been aware that his measurement might be subject to verification.

26. As for No. 2, we have the 1929 conveyance and the 1971 deed of grant both of which have plans. There was no expert evidence on whether or not the Disputed Land is shown as being within No. 2's title but, doing the best I can from the plans and what I saw at the sight view, I consider it more likely than not that the Disputed Land is not shown within No. 2's title on either plan. This is because both plans appear to depict the dwelling on No. 2 quite distinctly as a solid block whilst the Disputed Land is part-building (i.e. the garage), part-parking space and the garage has a narrow but distinct gap between it and the dwelling itself. Further, the front of the garage is slightly set back from No. 2's façade but no such set-back is depicted on either plan.

27. Having made these findings it seems to me that, on the best evidence we have, No. 2 did not include the Disputed Land in 1971 (or 1929) and No. 4 did include the Disputed Land in 1946 (and 1903, 1929 and 1944). The evidence as to what happened to both titles since 1971 and 1946 respectively seems to be as follows:

    27.1 The sales particulars for No. 4 in 2000 indicate that the vendor and estate agents believed that the Disputed Land belonged to No. 4.

[11] At page 123 of the trial bundle.

27.2 The Zoopla property history for No. 2 when marketed in March 2011 indicates that the person listing No. 2 for sale did not believe that the Disputed Land belonged to No. 2. I consider it improbable that a vendor of No. 2 would omit mention of a parking space given that No. 2 has no other private parking.

27.3 The Applicant's oral evidence, all of which I accept, that when he bought No. 4 in 2000, the lay of the land (including the Disputed Land) was as summarised in paragraph 20.6 above. He then created the parking space nearest to No. 4 (i.e. not part of the Disputed Land) by removing the front garden wall and tree and laying a hard-standing parking space in their place.

27.4 The contemporaneous evidence 'on the ground' indicates that the Disputed Land belongs to No. 4. This is because the Applicant has, I so find, used the Disputed Land for some 24 years now and has direct access to the garage from No. 4's private garden through the side door which was mentioned in the 2000 sales particulars.

28. This analysis does not, of course, provide the answer to when or how the mistake was made but these are not questions that I have to answer. I have considered whether at some unknown point the owner of No. 2 bought the Disputed Land from the owner of No. 4 but there is nothing that remotely suggests such a transaction took place and the Applicant's evidence from 2000 is to the contrary. Mr Dilworth submitted that car ownership has grown exponentially since the 1970s and that No. 2 needs off-street parking given its rural location. I am not persuaded by this as what is good for No. 2 would also be good for No. 4. Remember, No. 4 did not have an immediately adjacent parking space in 2000 when the Applicant bought. As an aside, I note that the Respondent did not adduce evidence of how No. 2 was marketed in 2019 or anything from the conveyancing process other than the contract but that did not assist.

29. On this analysis of the somewhat limited evidence put before me I am, just, persuaded that on the balance of probabilities the Disputed Land was included within No. 2's title by mistake.

Was the Respondent in possession of the Disputed Land on 1 July 2019?

30. Paragraph 6(2) Schedule 4 only comes into play if the Respondent was in possession of the Disputed Land on 1 July 2019. As was stated in *Paton v Todd*, the reference in paragraph 6(2) to the land being 'in his possession' brings in the definition of 'proprietor in possession' with the result that the Respondent must establish that he had a sufficient degree of exclusive and physical custody and control.[12] Section 131(1) of the 2002 Act provides that 'For the purposes of this Act, land is in the possession of the proprietor of a registered estate in land if it is physically in his possession, or in that of a person who is entitled to be registered as the proprietor of the registered estate.' If the Respondent was not in possession on 1 July 2019, then it is not necessary to consider whether he caused or substantially contributed to the mistake by fraud or lack of proper care or whether it would be unjust not to rectify the register. Rather, I would simply proceed to consider paragraph 6(3).

[12] See paragraphs 58-60.

31. Since it is the Respondent who wishes to take the benefit of Section 131(1), the onus is on him to establish that he had a sufficient degree of exclusive and physical custody and control of the Disputed Land on 1 July 2019. His evidence on this, which I accept – partly because I think it is not disputed and partly because it is evidenced by the photographs exhibited to his witness statement - is that prior to 1 July 2019 he had attached two notices to the face of the garage and installed retractable posts to secure the drive. Mr Feldman argued that the Respondent could not claim to be in possession of the Disputed Land because he had never been inside the garage,[13] which was full of the Applicant's belongings, and was accessible from the Applicant's garden through the side door. Mr Dilworth riposte to this was that the Respondent's notices constituted his taking possession of the garage.

32. I am firmly of the conclusion that the Respondent did not have the required sufficient degree of exclusive and physical custody and control and reject the Respondent's submission that his two notices on the front of the garage evidenced his being in possession. There are two parts to the Disputed Land to be considered. First, the parking space which he was in possession of by virtue of his car and the posts that he had installed. Secondly, the garage which he most certainly was not in possession of. He had never been inside it and, indeed, found himself unable to open the up and over door. Further, only the Applicant had access to the garage from No. 4's garden through the side door and it was only he who was storing many possessions inside the garage - although I heard no evidence as to what was inside it on 1 July 2019, from what I saw on the site view it looked as though it had been used long-term for general storage with items stored right up against the up and over door which would explain why the Respondent could not open it.[14] The simple act of putting up the notices is far from sufficient for establishing exclusive and physical custody and control.

33. Although this finding means that I do not need to consider paragraph 6(2) Schedule 4, I will address (a) and (b) briefly in paragraphs 34 and 35 below in case I am found to have been wrong about the Respondent not being in possession.

Has the Respondent by lack of proper care caused or substantially contributed to the mistake?

34. Although Mr Feldman had reserved his position on this at the start of the trial when I sought to narrow the issues, he conceded the point in his closing submissions.

Would it be unjust for the alteration not to be made?

35. The onus is on the Applicant, who is seeking rectification, to prove that it would be unjust for any other reason not to alter the register. Whether there would be an injustice is an assessment that I have to make in light of the relevant facts.

36. Mr Feldman argued that it would be unjust for the alteration not to be made because the Applicant thought he was buying the Disputed Land in 2000 and has lived in No. 4 and used the Disputed Land since then. In contrast, the Respondent had only bought No. 2 in 2019 and had never lived there but, rather, rented it out from time to time.

37. Mr Dilworth referred me to *Rees v 82 Portland Place Investments LLP* in which it was held that the financial consequences of a failure to register were irrelevant. He also

[13] At least not until the site view.
[14] Bicycles, car roof box, boxes, old doors, weights, shelving units, et cetera.

referred me to Snowden J's observation that it is implicit from paragraph 3(2)(a)[15] that if a registered proprietor in possession has been faultless in relation to the making of the mistake, then something more than the fact that a mistake has been made is needed to justify ordering rectification. It must be positively unjust not to rectify, so the hurdle is high. On the back of this, Mr Dilworth submitted that it would be unjust were the Respondent to lose the parking space and garage that he thought he had bought, especially since there is nowhere else for the owner of No. 2 to park.

38. I do not think it would be unjust for the alteration not to be made. When the Applicant bought No. 4 in 2000, he and his conveyancer had the opportunity to ensure that the title he was buying included all that was advertised and as he expected. Further, the Applicant would not be left without somewhere to park as he has the parking space that he created early in the 2000s.

Are there exceptional circumstances which justify not altering the register?

39. In *Paton v Todd*, Morgan J described 'exceptional circumstances' as 'out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered'[16] and set out the correct approach in his judgment:

> '66. … in a case within paragraph 6(3), the court must ask itself two questions: (1) are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not making the alteration? The first of these questions requires one to know what is meant by "exceptional circumstances" and then to establish whether such circumstances exist as a matter of fact…
>
> 67. "Exceptional" is an ordinary, familiar English adjective. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered: see *R v Kelly* [2000] 1 QB 198 at 208 C-D (a decision from a very different context but nonetheless helpful as to the ordinary meaning of "exceptional circumstances"). Further, the search is not for exceptional circumstances in the abstract but those which have a bearing on the ultimate question whether such circumstances justify not rectifying the register.
>
> 79. In my judgment, the first thing which ought to have been considered in this case, as to whether the exceptional circumstances justified a refusal to alter Mr Todd's registered title, was the effect on both parties of (1) an alteration of that title and (2) a refusal to alter that title. That was the choice which the Deputy Adjudicator had to make and, accordingly, the starting point should have been to consider the consequences of altering or not altering the title before considering whether a refusal to alter the title was justified.'

[15] Identical to paragraph 6(2)(a).
[16] At paragraph 67.

40. What constitutes 'exceptional circumstances' is a question of fact which is to be decided based upon the facts and circumstances of each specific case with the burden of proof on the Respondents.

41. Mr Dilworth argues that the circumstances are exceptional because No. 2 is a rural property and will be left with no off-street parking and limited on-street parking. This will impact the practicality of living at No. 2 and reduce its value and rentability.

42. Mr Feldman countered that the Applicant had thought he was buying the Disputed Land as part of No. 4 and had gone to the trouble and expense of altering the landscape. Further, the Applicant had lived at No. 4 and used the Disputed Land as if it was his since 2000 whereas the Respondent had only bought No. 2 in 2019 and did not live there. Lastly, there was no proper evidence as to the lack of on-street parking in the vicinity of No. 2.

43. The Respondent has not satisfied me that the circumstances in this matter are exceptional. This is a pretty standard case of an applicant for alteration seeking to divest the registered proprietor so that the applicant can be registered as the proprietor of it. These properties are likely to have been in common ownership at some point (when we do not know) but whenever it was, they were most likely separated by the early twentieth century and so before car ownership proliferated. Given the Applicant's use of the Disputed Land since 2000, the occupant(s) of No. 2 appears to have made do without it. And, as Mr Feldman submitted, there was no evidence as to the availability of on-street parking locally. At the site view on-street parking was plainly not abundant but that does not mean that there was none available, plus the parties' legal representatives found parking.

44. If I am wrong and the circumstances relied upon by the Respondent are exceptional, then I must consider the second stage of the test: whether they justify my refusing to alter the register. The effect of altering the titles will return both parties and their titles to the pre-mistake position and be consistent with the use of the Disputed Land since 2000. Whether or not there is a reduction in No. 2's value is a moot point given the absence of evidence – I do not know whether the £150,000 paid by the Respondent in 2019 was for No. 2 with or without the Disputed Land. Refusing to alter will result in the Applicant having to give up the drive and garage that he has used for about 24 years and result in a windfall for the Respondent in that his title would be enlarged because of the mistaken incorporation of the Disputed Land.

Conclusion and disposal

45. Accordingly, I shall direct the Chief Land Registrar to give effect to the Applicant's original application dated 1 July 2019 (made on a Form AP1 signed on 26 June 2019) for alteration of the register based on documentary title so as to remove land from the HM Land Registry title to 2 Beancroft Road, Marston Moretaine (BD256408), and include it within the title for 4 Beancroft Road, Marston Moretaine (BD215296), as if the Respondent's objection dated 25 July 2019 (made by letter dated 23 July 2019) had not been made.

Costs

46. As regards costs, paragraph 9.1(b)(i) of the Land Registration Division's Practice Direction provides that if the Tribunal decides to make an order about costs, ordinarily the unsuccessful party will be ordered to pay the successful party's costs.

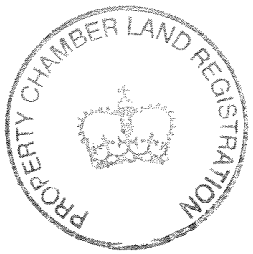
47. My preliminary view is that the Applicant, having succeeded on the Application, is entitled to payment by the Respondent of his reasonable and proportionate costs since referral by HM Land Registry to the Tribunal on 10 June 2022.

48. Any party who wishes to make an application for costs should serve by email (a) written submissions on the principle of who should pay costs, the basis upon which those costs should be paid and why (not on the amount of costs claimed), and (b) an estimate (not a bill or schedule of costs) of the total costs claimed, on the Tribunal and on the other party by 5 pm on 14 March 2024.

49. Any party on whom an application for costs is served must file and serve written submissions in reply by no later than 5 pm 28 March 2024. The applicant for costs may then file and serve a brief written response by 5 pm 4 April 2024. I will then decide liability for costs and upon what basis and give directions for assessment.

Dated this 29th day of February 2024

Judge Alexander Bastin



BY ORDER OF THE TRIBUNAL