FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
LAND REGISTRATION

CASE NUMBER: REF 2023/0557

BETWEEN:

(1) GRAHAM MICHAEL BOULDEN (2) SUSAN BOULDEN

Applicants

-and-

(1) VANESSA BOLER (2) MICHAEL BOLER

Respondents

Title Number: **TT132357 (provisional)**

Property: **The Pinn, Bonnington, Ashford**, **Kent**

Before Judge Ewan Paton, sitting at 10 Alfred Place, London on 10th and 11th December 2024 (site visit 9th December 2024)

For the Applicants: Mr. Edward Denehan (counsel, instructed by Excello Law, London)

For the Respondent: Mr. Paul Wilmshurst (counsel, instructed by Richard Buxton Solicitors, Cambridge)

DECISION

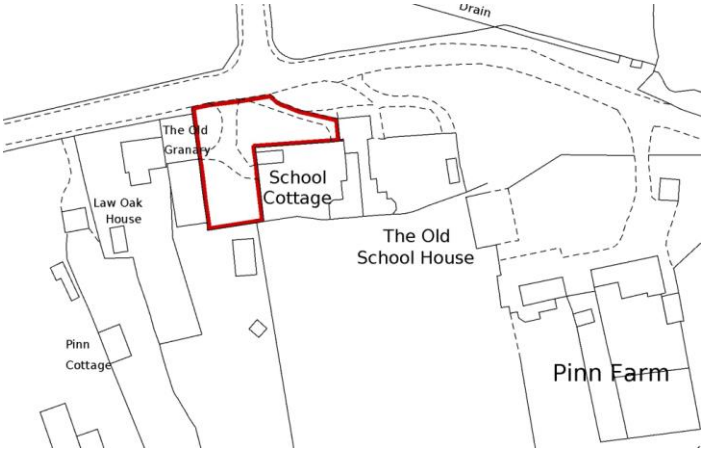
Key words: *First registration with absolute title – sections 9(2) and (3) Land Registration Act*

2002 – sufficiency of title – good root of title in unregistered land – section 44 Law of Property Act 1925- issue estoppel – decision of Commons Registration Authority

Introduction: background

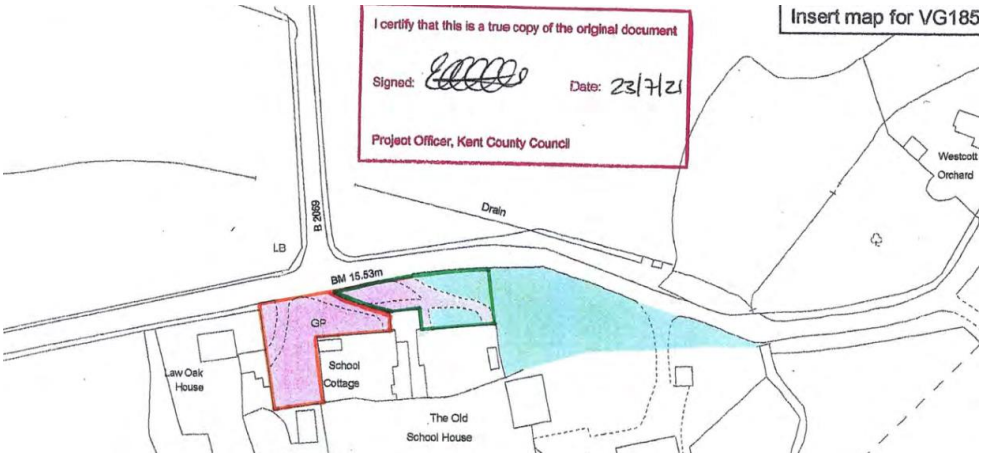
1. By an application made on form FR1 dated 11th November 2021, the Applicants applied under section 9 Land Registration Act 2002 for first registration of freehold absolute title to an area of land at the above location, described by the Applicants as "Bonnington Pinn" and by the Respondents as "Bonnington Village Green". Despite the apparent dispute over nomenclature, it is not in dispute that the subject land is part of the land registered as a village green under the Commons Registration Act 1965. That registration under number VG 230 (and the name "The Pinn") by Kent County Council was made final on 20th December 1991.

2. The land in dispute is an approximately L-shaped area, estimated to be around some 650 square metres. The first extract below is from the filed plan of a title to a caution against first registration of that land lodged by the Respondents in 2021 (now caution title TT 132357).



3. There is another registered village green, VG 185, to the east of VG 230, which was so registered in 1972. These greens, and the issue of whether the then owners of another property enjoyed a right of way over parts of them, were also the subject of the case of *Massey v. Boulden* [2002] EWCA Civ. 1634, although that is not of direct relevance to the present case. Reference has, however, been to (and arguments based on) the registration process in relation to both greens.

4. The two greens VG 230 and VG 185, and their relationship to the application land now in dispute, are depicted in the Kent County Council plan below, which was filed with the Applicants' evidence but is not disputed as a general depiction. VG 230 comprises the totality of the land coloured pink, while VG 185 is coloured green. The current application land is shown edged red.



5. It can be seen that the portion of land immediately to the east of the application land, edged green and in something of an "anvil" shape, contains parts of both VG 230 and VG 185. Title to that portion of land is already registered to the Applicants, under title K 737730, and has been since 18th April 1994.

6. In physical terms, the land subject to the present application consists mostly of sloping grassed areas adjacent to the verge of the B2067 road. It also includes some surfaced track and driveway areas leading to both i) the properties known as School Cottage and Old School House, which have not featured in these proceedings and ii) the property now known as "The Old Granary", but formerly known as "Law Oak Folly", which is registered under title K 67134 and has been owned by the Respondents since October 2014. The application land therefore includes the track or driveway leading up the Respondents' house, and extends all the way up to its flank wall.

7. Aside from the grassed and surfaced areas, the chief feature of interest on the application land is an ancient tree known as "The Law Oak", which is reputed to have been the venue for sittings of the Leet Court in mediaeval times. Although it has been severely damaged by lightning, it still stands in the grassed section furthest from the road, adjacent to the Respondents' house, and is the subject of a Tree Preservation Order.

8. A general idea of the land can be gleaned from the photographs below. One was attached to the statement of the Second Respondent, and looks down from the Respondents' property, with the Law Oak in the foreground. The other, taken by me (with the parties' permission) on the site visit, shows the view looking up from the road.

The basis of the application

9. This is not a case brought or defended by either party on the basis of adverse possession. It is, on the Applicants' application, a "paper title" case. The Applicants

seek to register a freehold title to the land shown above, to add to (and abut) their existing registered title K 737730. They do so on the basis that they have a good enough unregistered paper title to that land to permit its registration under the Land Registration Act 2002.

10. Section 9 of the 2002 Act provides as follows:-

"**Titles to freehold estates**

(1) In the case of an application for registration under this Chapter of a freehold estate, the classes of title with which the applicant may be registered as proprietor are—

(a) absolute title,
(b) qualified title, and
(c) possessory title;

and the following provisions deal with when each of the classes of title is available.

(2) A person may be registered with absolute title if the registrar is of the opinion that the person's title to the estate is such as a willing buyer could properly be advised by a competent professional adviser to accept.

(3) In applying subsection (2), the registrar may disregard the fact that a person's title appears to him to be open to objection if he is of the opinion that the defect will not cause the holding under the title to be disturbed.

(4) A person may be registered with qualified title if the registrar is of the opinion that the person's title to the estate has been established only for a limited period or subject to certain reservations which cannot be disregarded under subsection (3).

(5) A person may be registered with possessory title if the registrar is of the opinion—

(a) that the person is in actual possession of the land, or in receipt of the rents and profits of the land, by virtue of the estate, and

(b) that there is no other class of title with which he may be registered."

11. The Applicants applied for absolute title. As this Tribunal has observed before, with a few exceptions any person can object to any application made to HM Land Registry, for whatever reasons they see fit. The objector does not need to have "standing" in the sense of asserting a proprietary or title claim of their own. The Respondents in this case, Mr. and Mrs. Boler, objected to the application on 30th March 2023. While the specific grounds and arguments have changed and reduced somewhat since that original objection, the gist of the objection is that the Applicants do not have a sufficient paper title to the land to satisfy the test for registration in section 9 of the 2002 Act.

12. The Respondents do not, as do objectors in many first registration disputes, claim to own the land themselves; whether by a rival paper title claim or on the basis of adverse possession. They do, however, assert that they have a right of way over part of the land, and other related rights. This was the basis of their application for a caution against first registration, which resulted in the caution title whose plan was shown above. Their claim for a right of way was based on a Deed of Grant dated 8th January 1979. They also claim prescriptive rights of access to a gate, to enter the land to carry out repairs, and also to park vehicles on part of the land. None of those claims of rights are the subject of these proceedings, although the Applicants accept (and to some extent rely upon as part of their title application) the existence of the right way as purported to be granted in the 1979 Deed.

13. Parties' motives for either making or opposing an application are generally irrelevant once a disputed matter has been referred to this Tribunal under section 73(7) of the 2002 Act. It could not escape my attention, however, that the immediate background to these proceedings appears to be a neighbour dispute, over the Respondents' uses of the land in issue (including some of the uses claimed as easements). The Respondents clearly do not wish the Applicants to obtain a registered title to the land, since they seem to fear that this will strengthen the Applicants' hand against them. There may therefore (sadly) be other issues and disputes between the parties which, if not agreed, could be the subject of further proceedings.

14. I nevertheless put that to one side. The only issue before me in these proceedings is whether the Applicants can satisfy the tests for registration of title under section 9 of the 2002 Act. As the parties agreed, upon the disputed matter being referred to this Tribunal, the Tribunal effectively stands in the shoes of the Registrar for that purpose in determining the sufficiency or otherwise of the Applicants' title. It is common ground that the relevant date for determining that issue is the date of the application, which was 11th November 2021 (dated by HM Land Registry for priority purposes as 12th November 2021).

Deeds and documents relied upon by the Applicants

15. Looked at in isolation, and without reference to certain matters now highlighted and relied upon by the Respondents, the Applicants' application is on one view relatively straightforward: both as to the documents of title relied upon, and the application of the relevant statutory provisions to them.

16. The immediate transfer to the Applicants upon which the application is based is one of 18th October 2021, made to them by John Adrian Boulden and Sandra Carole Body, for a stated consideration of £5000. By that transfer, the transferors purported to transfer:

"Land at Bonnington Pinn, Pinn Farm, Bonnington, Ashford, Kent TN25 7BN more particularly referred to, together with other land, in a Deed of Exchange made between Peter Gorham Boulden and John Loftus Boulden (1) and Clive George Boulden (2) dated 30th January 1984."

The property, which is now the application land, is shown edged red on the plan

attached to the transfer.

17. The 1984 Deed of Exchange was therefore, in unregistered conveyancing terms, the root of title being provided in this transfer. The First Applicant, Graham Boulden, gave evidence (on which he was not significantly challenged) that this Deed was the culmination of an occasionally bitter and protracted partnership dispute between the parties to it, each of whom was represented by solicitors. He could recall the negotiations which resulted in the deed, in which the parties (his uncles Peter and John Boulden, and his father Clive Boulden) were represented by separate solicitors. Peter and John Boulden were parties to the deed both personally and as beneficiaries of the estate of the late Eyton Miles Boulden (who died in 1973). By this deed, a large number of properties and parcels of land were distributed and exchanged between the parties. Three main properties or parcels set out in the First Schedule parts 1 and 2 were to be conveyed to Clive Boulden, with as many as 38 parcels to be conveyed to Peter and John Boulden (in parts 3 and 4 of that Schedule).

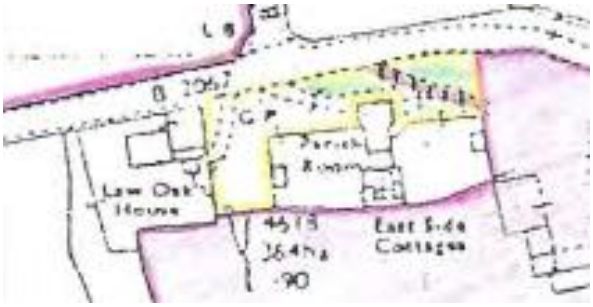
18. Of interest and relevance to the present proceedings were item 3 in part 1 of the Schedule, and item 1 in part 4. These were both the subject of initialled handwritten amendments in the deed, but the Respondents did not take any point in that regard as to their validity or authenticity. By the handwritten item 3 of part 1 of the First Schedule, there was to be transferred to Clive Boulden:

    "Land part of Bonnington Pinn edged yellow and shaded green and brown on plan no. 2 annexed hereto."

    By item 1 of part 4 of that Schedule, there was to be transferred to Peter and John Boulden:

    "Land and buildings comprising the remainder of Pinn Farm including that part of Bonnington Pinn shown edged yellow on the Plan Number 2 attached not comprised as item 3 of Part I of the First Schedule hereto."

    An extract from that plan is attached below. In essence, the western part, which is now the application land, was to go to Peter and John Boulden, and the eastern part – the 'anvil' shape – to Clive Boulden. That eastern part was later conveyed by him to the Applicants, by a conveyance dated 13th April 1994, which resulted in the registered title number K737730 referred to above.



19. By an assent executed shortly afterwards, on 24th February 1984, the executors of the estate of Eyton Miles Boulden – who were, jointly, John Loftus Boulden and a

solicitor called Mervyn Ainslie Bompas – assented to the vesting in John and Peter Boulden of six separate parcels of land, including (as "sixthly" in the Schedule attached to it) "land known as Bonnington Pinn edged yellow on the plan attached hereto". An extract from that plan is also attached, below.

20. No separate issue is now taken by the Respondents by the subsequent devolution, of such title as the above deeds conveyed, to the Applicants; which was as follows:-

    i) Peter Boulden died on 1st November 2005. A grant of probate of his estate, dated 8th December 2006, was in evidence; but by the operation of survivorship to the jointly owned legal title, John Loftus Boulden would have become the sole legal owner of such title.

    ii) John Loftus Boulden died on 10th August 2013. Probate of his last will was granted on 3rd April 2014, to John Adrian Boulden and Sandra Carole Body, to whom he devised and bequeathed all his residual real and personal estate. Since there was no specific devise of any title to the above land, this would have fallen into that residual devise.

    iii) it was then from John Adrian Boulden and Sandra Body that the Applicants took a transfer of the land on 18th October 2021, for £5000.

21. A further document of title relied upon by the Applicants, and referred to in the schedule DL of documents attached to their FR1 first registration application, is a Deed of Grant of an easement, dated 8th January 1979. This was made between, of the one part, Mervyn Ainslie Bompas and John Loftus Boulden, as the personal representatives of Eyton Miles Boulden; and of the other part, Midland Bank Trust Company Limited, as the personal representatives of one Henry Arthur Edwards deceased. Mr. Edwards had been, and so the trust company now was, the registered proprietor of "Law Oak House" shown edged red on the attached plan. Mr. Bompas and John Loftus Boulden were stated to be, as personal representatives of Eyton Miles Boulden:

    "..entitled to a property known as Bonnington Pinn of which part is delineated on the plan attached hereto and thereon coloured brown and blue for an estate in fee simple in possession free from encumbrances."

An extract from this plan is attached below.

22. The deed recorded that "the owners and occupiers of Law Oak House have for many years enjoyed a right of way at all times and for all purposes with or without vehicles over the strip of land coloured brown on the said plan…", then recorded that the bank had requested the grantors to make an express grant of such a right; which they then did: a "..full and free right over the roadway at all times and for all purposes for the benefit of the owners and occupiers for the time being of Law Oak House with or without vehicles TO HOLD the rights hereby granted unto the bank in fee simple." The deed also imposed a restrictive covenant "not to fence in or in any way obstruct the roadway".

23. It is common ground that what is now the Respondents' property and title, known by them as "The Old Granary", was formerly known as "Law Oak Folly" and was built in the grounds of Law Oak House shown edged red above. That property is now directly adjacent to the brown coloured roadway. As stated above, in their own 2021 application for a caution against first registration, which resulted in the caution title TT 137822, the Respondents expressly relied upon this Deed of Grant as granting them a right of way over the land.

The Applicants' case in law

24. Mr. Denehan, who appeared for the Applicants, submitted that the only issue for the Registrar – and by this reference, the Tribunal – is whether the opinion can reasonably be formed that a title based on the above sequence of deeds "is such as a willing buyer could properly be advised by a competent professional adviser to accept", for the purposes of section 9(2) LRA 2002. Further, by section 9(3), even if there are any potential defects in that title, the Registrar (and so the Tribunal) "..may disregard the fact that a person's title appears to him to be open to objection if…of the opinion that the defect will not cause the holding under the title to be disturbed."

25. While there is little direct case law authority on the application of this specific statutory test under the 2002 Act, or its approximate predecessor in the 1925 Act ("examination of title" under section 13 LRA 1925), Mr. Denehan submitted that this must to some extent depend on the provisions and principles applicable to making out good title to unregistered land.

26. As discussed in oral argument at the hearing, and as both counsel agreed, it is a fundamental historical feature of English land law that title to land was and (in the

case of unregistered land) still is *relative*. What matters, in any contest between A and B, is whether one or other of them can show they have a better title than the other. If they can, it is no defence for the weaker party to protest that a third party, C or someone else, may have an even better title.

27. Any person may therefore make a claim of title to unregistered land. If challenged, they may rely on as little as the fact of their own current possession to give them a relative title, good against the whole world until someone with a better title dispossesses them. They may also claim to be seised of the land through a sequence of past transactions, evidence by deeds of sale or other instruments.

28. The question of whether any particular claim of title to land based on a series of documents confers a sufficiently "good title" is one which has chiefly arisen in the conveyancing context, in disputes between buyers and sellers. This has usually been in the context of buyers refusing to complete transactions, on the basis that "In the absence of express stipulation to the contrary… a contract for the sale of land in fee simple obliges the vendor to make a good title to the whole legal and equitable interest in the freehold free from encumbrances" (*Leominster Properties Ltd v Broadway Finance Ltd* (1981) 42 P. & C.R. 372 at 380 per Slade J.).

29. Some cases define the concept of a "good title" or "good marketable title" as one which the seller may pass to the buyer without exposing him to "litigation and hazard" (*Pyrke v. Waddington* (1852) 10 Hare 1, 8, per Turner V-C) or "the possibility of dispute or litigation" (*Barclays Bank plc v. Weeks Legg & Dean* [1998] 3 AER 213, p222a per Millett LJ). It was common ground, and is in any event clear from first principles, that a "good" title does not mean a "perfect" title (*Barclays Bank plc*, supra, p324), that this is a question of degree (*London Borough of Lambeth v. Vincent* [2000] EG 145, p149), and that "title" is distinct from and "..says nothing about the nature or extent of the property contracted to be sold to which title must be deduced." (*Barclays Bank plc*, p325F, per Millett LJ).

30. As summarised in Megarry & Wade, The Law of Real Property (10th edition) at paragraph 14-075:

    "Title to unregistered land is deduced by exhibiting to the purchaser the records of past transactions in the land, e.g. sales, mortgages and grants of probate, and by proving other relevant events such as deaths. This procedure has two main purposes: to persuade the purchaser that the vendor owns the land; and to give the purchaser the opportunity to inquire about the existence of equitable interests which are not registrable as land charges and therefore by which, if no inquiries were made, he or she would be bound. For the first purpose the vendor's title deeds are merely evidence; it is possible that owing to fraud, forgery or mistake the vendor is not really the true owner, so that the purchaser will not obtain a good title."

31. For most of the history of English conveyancing, some temporal limit has been imposed on the title the vendor must prove. Vendors have not for many centuries been required to prove, by an unbroken sequence of transactions, a title dating back to the Norman Conquest or the "time immemorial" date of 1189. Few owners of

unregistered land could do so. As Megarry & Wade observe (at 14-076):
"…The period for which title has to be shown has been steadily reduced over the last 120 years", noting that it was 60 years until the Vendor and Purchaser Act 1874, then 40 years under that Act until section 44(1) Law of Property Act 1925 substituted a period of 30 years. To bring matters up to date:

"If there is no agreement to the contrary, the period is now at least 15 years under the Law of Property Act 1969…..The period is "at least" 15 years because the title must start from a document known as a good root of title, and it will only be by chance that such a document amongst the title deeds will be exactly 15 years old. Normally therefore only a document that is more than 15 years old will suffice."

This is the result of the amendment of section 44 of the 1925 by section 23 Law of Property Act 1969, as follows:

"After the commencement of this Act fifteen years shall be substituted for forty years as the period of commencement of title which a purchaser of land may require; nevertheless earlier title than fifteen years may be required in cases similar to those in which earlier title than forty years might immediately before the commencement of this Act be required."

32. "A good root of title is a document which describes the land sufficiently to identify it, which shows a disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title…." (Megarry & Wade, supra, 14-077). Examples of this include conveyances on sale, voluntary conveyances or assents.

33. On "deduction of title" following production of such a root, Megarry & Wade summarise the position as follows (14-078):

"Having established a good root of title of the necessary age, the vendor must then prove all the later steps in the title which lead to the present day. If the land has been in the vendor's ownership for more than 15 years there may be nothing more to prove. But more probably there will have been intervening transfers on sale, death or otherwise, which are necessary links in deducing the title to be proved. Statements in documents 20 years old or more are to be taken as sufficient evidence unless proved to be inaccurate. If the proof is defective at any point, or if the title shown appears to be bad or doubtful, the purchaser is entitled to terminate the contract on the ground that the vendor is unable to perform it."

34. As to matters prior to that root of title:

"By statute, a purchaser may not make any inquiry or objection about matters anterior to the root of title." (14-079)

This is a reference to section 45(1) Law of Property Act 1925, which provides that:

"(1) A purchaser of any property shall not—

(a) require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; or

(b) require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, agreed to be produced, or noticed.."

35. Megarry & Wade add (14-079) that while this provision ".. cannot be relied upon by a vendor to force on the purchase a pre-root defect in title of which the vendor knew or ought to have known….In general, however, the purchaser must be content with a title starting with a good root in accordance with the contract. If the purchaser discovers from some other source (for example, from an accidental disclosure of older documents) that the earlier title is doubtful due to some technical defect, so that it is questionable whether the vendor is really owner at all, the purchaser must nevertheless take the property with the title as it stands. This is consistent with the essential function of conditions of sale, which is "to protect the vendor from inquiries which he himself may be unable to satisfy, and against objections which he cannot explain away".

"If, however, the purchaser can prove that the title is wholly bad, as where the vendor has no title at all to the land or where the property is subject to some undisclosed but irremovable latent incumbrance of a substantial character, then specific performance will not be decreed against the purchaser. This is because the court will not force a purchaser to take a title that will expose him or her to an immediate law suit. However, unless the vendor knew or ought to have known of the defect, the vendor will be able to rely upon the statutory provision that the purchaser is precluded from making any inquiry or objection as to matters before the root of title.."

36. Against this statutory and conveyancing backdrop, Mr. Denehan submits that the Applicants' FR1 application, and the approach to be taken to it by the Registrar or Tribunal, are straightforward. The root of title is at the latest the 1984 Deed of Exchange, over 37 years old at the date of the application, purporting to deal with the whole legal and beneficial interest in the land and clearly identifying it on a plan. The "later steps in the title which lead to the present day" from that deed are all proved, and not disputed.

37. That being so, a buyer would not ordinarily be entitled to go behind that root of title in an inter partes transaction, making enquiries about matters preceding it or demanding an older root. 15 years would have been sufficient. The Applicants therefore submit that on a first registration application the Registrar (and by extension this Tribunal) can easily and safely arrive at the opinion that this is a title "such as a willing buyer could properly be advised by a competent professional adviser to accept" for the

purposes of section 9(2).

38. Although he submitted that it was not necessary to go back this far, Mr. Denehan also placed reliance on the recital of title in the 1979 Deed of Grant of easement as evidence of title. In this regard he relied on section 45(6) Law of Property Act 1925, which provides that:

"Recitals, statements, and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions."

The Respondents' objections and case

39. As stated above, the Respondents do not themselves claim any title to the application land. They nevertheless object to the Applicants registering a title to it. Their submission is that chiefly because of two historical matters and their associated documents– one from 1975, and another from 1991- the Registrar and therefore this Tribunal should reject the application under section 9(2), answering the above question in the negative. To quote a phrase from one of the passages from Megarry & Wade cited above, they submit that the Applicants' purported title to this land is "wholly bad", defective and effectively non-existent. They also argue that the Applicants are estopped, by "issue estoppel", from making this application for first registration of title at all; as a result of the 1991 matter which shall be explored in more detail below.

40. The two matters relied upon arose from the village green applications and registrations referred to above. I consider that they raise somewhat distinct and different factual and legal issues, and so will deal with them in turn.

i) The 1975 statutory declaration, decision and registration

41. On 24th September 1969, one Anne Wilks applied under the Commons Registration Act 1965 to register as a village green what was later registered as VG 185. The provisional registration of 5th January 1970 was made final on 1st August 1972. Under the then section 8 of the 1965 Act, where a village green had been registered but the owner was at the time of registration unknown, a public notice could be given inviting claims or information as to ownership. A Commons Commissioner could then hold an inquiry, and make a decision and direction to the relevant local registration authority as to the ownership details to be entered on the village green register.

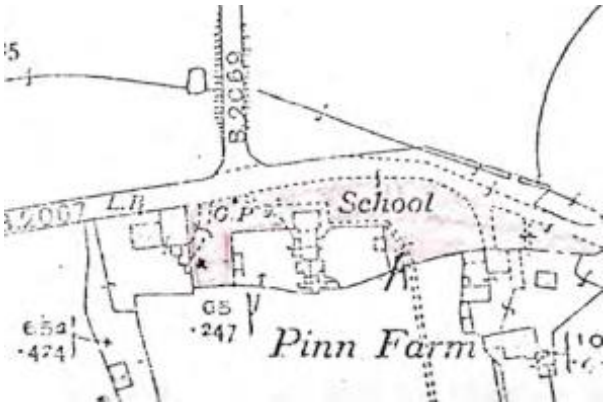
42. That is what happened in relation to VG 185. Following a public notice presumably given earlier in 1975, "..the personal representatives of Eyton Myles Boulden, deceased, claimed to be the freehold owner of the land in question..". That quotation is taken from the eventual decision of the Commissioner dated 14th August 1975, of which a copy was in evidence.

43. The other document in evidence from this time was a statutory declaration sworn by Clive George Boulden, dated 2nd July 1975, made in support of the claim of ownership by the personal representatives of Eyton Myles Boulden, who was his uncle. The relevance of this to the present proceedings is that Clive Boulden gave evidence as to acts of ownership not just of the land which became VG 185, but of the *whole* of the land lying between Pinn Farm and the public road – so including what is now VG 230 and the application land in these proceedings.

44. He first described how his uncle had purchased Pinn Farm by a conveyance in 1924, then said as follows at paragraph 3:

    "I am informed that according to the small scale plan attached to the Conveyance to my Uncle of the farm that part of the open unfenced piece of pasture land lying between the farm and the public road which is delineated and coloured pink on the plan attached hereto (hereinafter called "the said land") does not appear to be specifically included in the title to the farm although ever since my boyhood the said land was treated as part of the farm and there is not and has not within my memory been any boundary fence along the line marked A-B on the said plan."

    An extract from this plan is attached below. It can be seen that the pink land includes all of what are now VG 185 and VG 230, including the application land.



45. He went on, in paragraphs 4 and following, to detail the "acts of ownership" of all of this land carried out by his uncle. These included the grazing of animals, the planting of shrubs, the creation of the roadways and the mowing of the grass. He also referred, at paragraph 7, to his uncle's acquisition of the Lordship of the Manor of Bonnington.

46. The Commissioner held a hearing on 14th July 1975. Mr. Bompas was recorded as appearing for the personal representatives of Eyton Boulden. The decision is brief. The Commissioner recited the evidence set out in the declaration of Clive Boulden, then concluded simply that:

    "On this evidence I am satisfied that Mr. Boulden acquired a possessory title to the land, and I am satisfied that his Personal Representatives are now the owners of the land, and I shall accordingly direct the Kent County Council, as registration authority, to register them as the owners of the land under section 8(2) of the Act of 1965."

Such an entry was then made on the register of VG 185.

47. The Respondents, who were represented by Mr. Wilmhurst, say that this process, and in particular the statutory declaration of Clive Boulden, is relevant to these proceedings for the following reasons. First, they argued that it showed that the personal representatives of Eyton Boulden (Mr. Bompas and John Loftus Boulden), on whose behalf the evidence was given, did not believe in 1975 that they had a "paper title" to what is now the application land. The declaration draws attention to the point (albeit only through Clive Boulden saying "I am informed" of this – he does not say by whom) that the original 1924 conveyance to Eyton Boulden did not appear to include this land. For what it is worth, looking solely at the plan attached to the 7th May 1924 conveyance to Eyton Boulden, a copy of which was in evidence and an extract from which is below, the pink colouring does not appear to extend as far north as the lands in either VG 185 or VG 230.

48. Second, they say, this was why the personal representatives, through Clive Boulden's declaration, sought to base their claim of ownership of the VG 185 land solely on *adverse possession*, not any document of title. Although the inquiry related only to VG 185, the evidence was essentially the same in relation to the whole area of land, indicating that as to what is now the application land, they likewise had no belief in a paper title – only in alleged acts of possession.

49. Third, although no separate "issue estoppel" argument is made in relation to this document and process (as opposed to the 1991 matter discussed below), they say that having effectively admitted and asserted that they had no paper title in 1975, the 1984 Deed of Exchange (as it happens, made between both the personal representatives of Eyton Boulden and the statutory declarant Clive Boulden) could not then generate a paper title from nothing, and so become a root of title for a later conveyance or application.

50. Mr. Wilmshurst submitted that under section 44(8) Law of Property Act 1925, a purchaser who actually does have knowledge, having made enquiry, as to "matters prior to the period of commencement of title" is fixed with knowledge of those matters. In this case, he submitted, as between the parties to the 1984 Deed, and indeed the wider Boulden family including the Applicants "everyone knew" of the existence of this declaration and its contents. He also relied on section 45(6) of that Act, as the Applicants did in relation to the 1979 Deed of Easement, but as to Clive Boulden's 1975 evidence being a "statement, description of fact [or] matter" in a

"statutory declaration".

51. This meant, he submitted, that this title was "wholly bad from the start". This knowledge should therefore be imputed to the hypothetical "willing buyer" and their "competent professional adviser" under section 9(2) of the 2002 Act. This being so, even if provided with the 1984 Deed of Exchange and the documents following from it:-

    a) a willing buyer would be entitled to reject such a title as "wholly bad", even though this apparent defect predated the statutory root of title; and

    b) a "competent professional adviser" would advise rejection of such a title, or at the very least advise "caution" or express "concern" over it.

    c) a further, more general, point was made, which (as I understood it) was that the very fact that this land was part of a registered village green, and of local significance, should in itself invite caution and concern.

52. Mr. Denehan, for the Applicants, submitted that this was a misconceived and over-complicated approach to what was a straightforward statutory issue. A buyer of unregistered land, and more importantly the Registrar under section 9 on a first registration application, was simply not required or even permitted to go back in time to 1975 for the purposes of casting doubt on the title offered. A title going back as far as 2006 was all that was required in a 2021 application. Neither the Registrar, nor a hypothetical buyer and their adviser, could or should conduct a "grand survey" of the history of the land or its title. He made the point, both legal and historical, that in one sense all titles could be said to be "bad from the start", or to have some defect or uncertainty anterior to the root of title being offered. One did not need to go back as far to the era of the "Robber Barons" to make that point. There might be gaps or uncertainties in the pre-history of a title being offered which were far more recent, but the principle was the same. Parliament had progressively reduced the age of the minimum root of a good title which a buyer could be required to accept, and this applied likewise to the Land Registry in granting first registration.

Discussion

53. Although in his skeleton argument (if not his oral submissions) Mr. Wilmshurst attributed to the Applicants "a lack of understanding…as to how unregistered conveyancing works", I consider that his own principal submission on this issue – that the contents of the 1975 statutory declaration undermine or negate the otherwise sufficient root of title (from at least 1984) being provided on first registration – betrays such a misunderstanding on the part of the Respondents. I consider that it neglects the relative and necessarily imperfect nature of title in English law. I also consider that this constitutes something of a "category mistake" in relation to the contents of Clive Boulden's 1975 declaration, attributing to them the status of an immutable matter of fact when they were essentially an opinion and assertion of a relative title at a specific point in time.

54. In 1975, the personal representatives of the estate of Eyton Miles Boulden believed and asserted themselves (in the shoes of the late Eyton Boulden) to be the owners of all of the area of land lying between Pinn Farm and the public highway. The declaration of Clive Boulden, sworn in support of this assertion, notes that while the 1924 conveyance to Eyton Boulden appeared by its plan not to include this area (although a conveyance plan is not always determinative by itself as to what was conveyed), this land was always "treated as part of the farm". His declaration then went on to detail the "acts of ownership" carried out over this land, including what is now the application land.

55. This was and is not a statement of a matter of *fact*. It was merely evidence being provided by way of an opinion and assertion of a relative title. For this reason, I consider that the reliance by both parties on section 45(6) Law of Property Act 1925 (the Applicants in relation to the 1979 deed of easement, and the Respondents in relation to the 1975 statutory declaration) is somewhat misplaced.

56. It might not have been perfect and unimpeachable, but it was still a claim and assertion of title. As with all such claims, it might have been open to challenge and disturbance by someone who could prove a better title. Mr. Wilmshurst made the submission, although accepting that it was now much too late to re-open this, that the acceptance by the Commissioner on this basis of the claim to possessory title of the land in VG 185 might not have been so straightforward had notice been given to others and a contested inquiry ensued. It might have been argued that the acts of possession relied upon were insufficient to amount to exclusive possession. Such an argument would also have applied to the assertion of title, on the same basis, to what is now the application land.

57. More significantly, on an attempted conveyance of what is now the application land in 1975 or 1976, or an application for first registration of it at that time under the then section 13 Land Registration Act 1925, a buyer or the Chief Registrar might not have been satisfied that a sufficiently good rood of title had been shown. At that point in time, it is therefore quite possible that a buyer would have been entitled to reject a title being offered to that land, and that the Registrar could have declined first registration of it.

58. By 1979, when the easement was granted by deed to the Respondent's predecessors in title, then in 1984 – when a title to this land was included as part of the consideration in the multi-faceted Deed of Exchange resolving the partnership dispute with the very same Clive Boulden – that relative title was still being asserted, and was now being made the subject of dispositions. That too is inherent in the nature of a relative and potentially defeasible fee simple. However 'weak' or uncertain it might be if examined in absolute terms at the outset, it is from its inception and initial assertion (colloquially) a 'thing' and (legally) a piece of property in its own right, capable of being disposed of to others, by e.g. sale, exchange or other dispositions (such as the grant of incorporeal rights over it).

59. That is what the executors of Eyton Boulden, and Clive Boulden, did with it. They disposed of and dealt with such title as they claimed, in 1979 then 1984, as a piece of property. It appears, from the handwritten amendments made to the 1984 Deed, that

the division between them of what is now the application land was in fact a significant item in their negotiated settlement.

60. The Respondents did not at the hearing suggest that the treatment of this land in this manner in the 1984 Deed was some sort of intra-family contrivance or sham (although in a somewhat curious passage of his skeleton argument, Mr. Wilmshurst submitted that the fact of the amendments being handwritten would be another factor which "would be of concern" to a professional adviser "when set in the wider context"; while emphatically denying, in a footnote, that the Respondents had ever alleged that the deed had been fraudulently altered.)

61. The entire historical basis of unregistered title, and Mr. Denehan's submission that all titles were 'bad' once, is that over time an initially weak, defeasible or doubtful title may through time, and by successive dispositions, harden into a good and practically indefeasible title. That is potentially true of virtually every title in England and Wales. If one went back far enough in any case, one would probably find a gap in the chain, or an initially weak or uncertain claim of title (whether by a feudal lord, or a more modern opportunist) on which subsequent dispositions were then based.

62. The point of the "modern" (from at least 1874 onwards) system of unregistered conveyancing is that it recognises this, and thus prevents dispositions of title being hindered by enquiries into their ultimate origins beyond a certain point in time, since 1969 fixed as 15 years. This means that the answer to the question of what is a "good title" will necessarily vary and evolve over time. When asking whether a buyer can and should accept a particular title, or whether the Registrar should register it, it depends when that question is being asked.

63. If that question is being asked in 2021, 37 years after the execution of a bona fide deed conveying a title to that land (along with other parcels of land), then the answer may – and in my judgement will – be very different to the answer given in 1975, 1984 or 1991.

64. In relation to this aspect of the objection, I do not therefore consider that the contents of a 1975 statutory declaration, sworn in support of the title *then* being asserted, could be a matter which would cause a competent professional adviser to advise a 2021 buyer not to accept a 37 year old root of title in the 1984 Deed.

    I therefore conclude that this first aspect of the Respondents' objection to the application, based on the 1975 declaration, fails.

65. This is, however, subject to consideration of their second objection and submission based on certain events in 1991 and thereafter, to which I now turn.

ii) 1991 village green application

I here borrow gratefully from the summary of these matters set out in Mr. Wilmshurst's skeleton argument.

66. On 5th June 1991, Mrs. Denise Bailey, a local resident, made an application to Kent County Council to register land, including the application land, as a village green. The land was described as "The Pinn" or "Bonnington Village Green." It was stated that the land had become a village green on 1st August 1990 after "use by the local people for their recreation as of right since January 1970." This fell within the "class c" definition in the Commons Registration Act 1965. In an accompanying written submission she set out the basis of the application, referring to such matters as the holding of village events and even the grazing of goats on the land. In Part 6 of the application form she stated that she believed that there was no owner of the land.

67. Various members of the Boulden family, including the First Applicant, learned of this application and objected to it. First, by letter of 16th August 1991, the First Applicant himself (Graham Boulden), objected, also on behalf of his father, Clive Boulden. He then said as follows:-

"The area of land to which the application relates is within two separate ownerships. The upper part around the Law Oak is owned by P.G. and J.L. Boulden, the lower part is owned by my father, C.G. Boulden. It was owned previously by my great uncle, Mr. E.M. Boulden for a considerable number of years until his death in 1973."

"The application is misleading both in terms of the matter of ownership and also as to what has actually been carried out on the land as any use has been very infrequent since 1970 and always with the tacit agreement of the owners. The use has neither been continuous nor of right."

Second, by a letter of 23rd August 1991 [p. 302], Peter Boulden and John Loftus Boulden objected to the application through their solicitors (Hallett & Co.)

68. The First Applicant developed his objections in more detail in a further letter of 18th September 1991. He now said, and argued, as follows:

"As regards the question of ownership, this is integrally linked with the application. As far as the registered Village Green is concerned, Mrs Bailey suggests there is only possessory title. In the decision made by the Commons Commissioner in November 1975, it clearly states: "On this evidence I am satisfied that Mr Boulden acquired a possessory title to the land and that his Personal Representatives are now the owners of the land.

Whilst the Commons Commissioner only gave his decision in relation to the land that was registered as Village Green, the papers submitted to him included a plan relating not only to the Village Green but also to the land that is currently the subject of this application. It is reasonable to presume that if this was acceptable for the part that was registered it is also acceptable for the remainder, as there has been no change in circumstances since that time."

69. So pausing there, these objection letters contained three main points:-

i) first, that it was not correct for the village green applicant Mrs. Bailey to have said that there were no known owners of the land. The First Applicant (Graham Boulden), and by inference Clive, Peter and John Boulden in support, were re-iterating the claim and assertion of title as conveyed in the 1984 Deed of Exchange – by which it will be recalled that following the handwritten amendments Clive Boulden obtained title to the "lower part" (including what I earlier called the 'anvil' shape), while Peter and John Boulden obtained the "upper part around the Law Oak".

ii) second, it was being argued that the acts alleged and relied upon were insufficient and infrequent so far as establishing village green status was concerned.

iii) third, it was being argued that such acts as had taken place were with the "tacit agreement of the owners", and so were not "as of right". I have not seen any document or objection in which any evidence of specific permissions or agreements was given.

70. Under the 1965 Act and the procedure under it at that time, following the advertisement of the application, it was not necessary for there to be a public hearing. A County Planning Officer, Mr. Martin King, of the local registration authority (Kent County Council) considered all the written evidence and objections submitted, then produced a report for the Environment Sub-Committee of the authority on 20th December 1991. He recommended that the committee approve the application.

71. The report was brief (some two and half sides of A4), but the key points in it were as follows:

i) at paragraph (3) it recorded the fact of the application, and the evidence in support of it, including "14 sworn affidavits" and photographs.

ii) at (4), the officer said that "a search to the Land Registry in May 1991 revealed that the site has no known owner, which bears out the applicant's statement."

This can of course only mean, as was true, that there was no *registered* title to any of the land. I presume that the officer did not think that title to land in England could only be registered title.

iii) (5) and (6) recorded the objections of Graham, Clive, Peter and John Boulden, noting the claims of ownership and of use by "tacit agreement".

iv) at (7), it summarised the applicant's comments on the objections, which included the following:

"She also maintains that there is no proof of ownership among the papers submitted by the objectors and expresses concern that the application does not seek to become involved in a discussion of ownership claims but with registering the land in the interests of its preservation."

v) at (8), it quotes from Graham Boulden's letter of 18th September 1991 as set out above.

vi) at (9), the officer notes that the applicant's comments on the objectors' evidence included that "she has seen no documentary evidence as to the title of the land, but only assertions by the objector".

vii) at (10), he states that:

"If the Registration Authority is satisfied that the land has become a village green as claimed, it will so register the land and any such registration would be conclusive evidence of the status of the land at the date of registration. The ownership point is not an issue so far as the Registration Authority is concerned."

viii) the conclusion, and the only reasoning in the report, comes in (11), which states as follows:

"**In my view the applicant has made a convincing case demonstrating 20 years' use of the application site for lawful sports and pastimes. As there is some doubt about the ownership of the site, permission could not have been obtained to partake in these activities, although it is conceded that the Bouldens have been notified of major events there. The activities have therefore occurred 'as of right'. The criteria for village green registration appear therefore to have been fulfilled.**"

72. The Report was considered at a meeting of the Environmental Sub-Committee on 20th December 1991. A letter of 23rd December 1991 to Graham Boulden states simply that they resolved that the application be accepted. The resulting village green was entered on the register as VG230 on 17th January 1992. On 15th January 1992, the Council wrote to the Commons Commissioners seeking advice on how it could find the owner of VG230 since many villagers felt that the Parish Council should be the owner. The Commissioners declined to offer advice but noted that s.8 of the CRA 1965 does not apply to land registered as a class c green (under s.13 CRA 1965). This generated further internal consideration, and a memorandum of 11th March 1992, in which a legal officer of the Council concluded that:

"There does not appear to be any requirement for the registration authority to actively seek to discover the owner of the land and if there is no claim for ownership I suggest that a pencil entry be inserted to indicate that as at the date of registration of the land as a village green by the registration authority no application for ownership had been made by any person or persons."

The Respondents' submission: issue estoppel

73. The Respondents' submission, as developed by Mr. Wilmshurst, is that the above matters generate an issue estoppel against the Applicants, through which:

"The Applicants should not be permitted to argue that they are the owners of the land in circumstances where that argument was not accepted by the CRA in the 1990s."

74. Expressed by reference to the matter which is before this Tribunal, the argument is therefore that the Applicants are and were barred from making their FR1 application for registration on title under section 9 Land Registration Act 2002 on 11th November 2021, and that to do so is effectively an abuse of process. It is said that the decision of the local Council in 1991 to approve the application, based on the report of the officer, was a final and binding (either "in rem", or in any event on the Applicants) determination, under a self-contained statutory jurisdiction by a body of competent authority – not of the issue of the title to this land *per se*, but of the issue of whether the objectors to the village green application had title to it. The submission is that there was a conclusive determination, necessary for disposal of the village green application, that they did *not* have such title. It is therefore said that this now precludes the Applicants from applying to register a title to the land, some 30 years later.

75. The essential legal elements in this argument, developed in some detail by Mr. Wilmshurst, were as follows:-

    i) Issue estoppel can arise from the decisions of public authorities given jurisdiction to determine matters in a "self-contained statutory code". This includes "the determination of any issue which establishes the existence of a legal right". Such a determination will have finality, and generate an issue estoppel against re-litigating it in a different forum or jurisdiction, unless an intention to exclude that principle can be inferred from the relevant provisions.

    (see *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273, p289 per Lord Bridge; *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 at |25 – 27, 31], per Lord Clarke JSC)

    ii) Determinations under the Commons Registration Act 1965 as to village green status are made under such a self-contained statutory code: see *McLaren v. Kubiak* [2007] EWHC 1065 (Ch., HHJ Pelling QC), in which it was held that this precluded a private landowner from seeking declaratory relief from the Court in relation to village green status.

    iii) the Court of Appeal decision of *Crown Estate Commissioners v Dorset County Council* [1990] 1 Ch 297, especially at p305-306 per Millett J. (as he then was), demonstrates both that a Commons Registration Act 1965 decision by a Commons Commissioner (and so, by implication, a commons registration authority) can generate an issue estoppel, and that this can extend to a negative finding or determination.

76. In that last case, a Commons Commissioner had held in 1977, upon the objection made by the local authority (the defendant) to a commons registration application, that certain road verges formed part of the public highway. They were therefore excluded from the commons registration. A hearing had been held, at which the Commissioner heard from representatives from both the defendants and the plaintiffs. When the plaintiffs (the Crown Estate) later, in 1988, sought a declaration in court proceedings

that the verges were not part of the public highway, it was held that they were estopped from doing so, and that all the elements of issue estoppel were made out.

77. At p305G Millett J. approved the summary of issue estoppel given by Lord Brandon of Oakbrook in *The Sennar (No. 2)* [1985] 1WLR 490, at p499, as follows:-

"in order to create [an issue estoppel], three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

78. It was conceded that the Commissioner had made a final determination of an issue on the merits between the same parties. The plaintiffs argued, however, that he did not have jurisdiction to determine the issue of "highway or no highway?" as between these parties for all purposes, but only for the purpose of the commons application before him. Millett J. rejected that submission, holding at p312D that:

"All the requirements of issue estoppel are satisfied in the present case. The Chief Commons Commissioner had a statutory jurisdiction to decide whether or not the road verges should be registered as common land. For that purpose he had to determine whether or not they formed part of a highway. He therefore had jurisdiction to determine that question also."

79. The Respondents' submission in the present case was therefore as follows. The Commons Registration Authority in 1991 (the Council, via the report of the officer) clearly had jurisdiction to determine whether or not the land was a village green. As part of that determination, within that jurisdiction, it had before it an objection - by Graham, Clive, John and Peter Boulden - that such use as there had been was with the "tacit agreement" of the owners, and so had not been "as of right". The First Applicant himself, in his objection letters, had said that the issue of ownership was "integrally linked" with the application. It was therefore necessary, on the way to determining the village green application, to determine the issue of ownership, so far as it would render the use "as of right".

80. The Respondents then say that the officer, and so the authority upon adopting his report, determined that issue negatively against the objectors. They say that his findings and determination on that issue therefore generate an issue estoppel, against what Mr. Wilmshurst at times referred to as "the Bouldens" (presumably meaning the immediate objectors to the applications, and their 'privies' such as spouses), or else *in rem*, for all time. The officer's reasons or reasoning were simply those at paragraph (11) of the report, quoted above ("As there is some doubt about the ownership of the site, permission could not have been obtained to partake in these activities, although it is conceded that the Bouldens have been notified of major events there. The activities have therefore occurred 'as of right'.") Somewhat thin as those reasons might have been, or whatever else one thinks of them, once they were adopted by the authority,

they amounted to a final determination of that issue, not appealed or subjected to judicial review.

81. No issue was taken by Mr. Denehan with the above statement of the general legal principles. His submission, however, was that they had no application to the present case. This 2021 application for first registration of title, between the Applicants and Respondents, involved different parties and a different issue to that before the registration authority in 1991. Moreover, he submitted, the authority did not have any jurisdiction to determine the ownership of the land in 1991 in any event, and did not do so. All that they actually determined, in relation to the objection made, was that because there was then "some doubt" about the ownership, they could not find that the use relied upon had been with permission (and not 'as of right'). The officer even said, at paragraph (10) of his report, that "The ownership point is not an issue so far as the Registration Authority is concerned." Further, the 1992 follow-up correspondence referred to above confirmed that the issue of ownership of the land remained undetermined.

Discussion

82. Skilfully and patiently as Mr. Wilmshurst's argument was constructed, I have little hesitation in rejecting it.

83. First, there is the somewhat obvious point that the second requirement for issue estoppel as set out in *The Sennar (No.2)* - that "the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same" – is clearly lacking here. The present Respondents, the Bolers, were not "parties" to the 1991 village green application. Nor were their predecessors in title, the then owners of Law Oak House and/or Law Oak Folly (if it had been built by then). It can be argued that the present Applicants were parties (the First Applicant as an objector, the Second Applicant as his 'privy'). Further, since the Applicants' current title application is based on the title derived from Peter and John Boulden, who were also objectors in 1991, the Applicants could now be said to privies in title to those objectors. But nothing in the Respondents' submissions addressed the absence of the Bolers, or anyone remotely privy to them, from the 1991 application.

84. Second, much as the analogy was pressed, I do not consider that the officer's treatment of the "permission/as of right" issue in his report is in any way analogous to the determination of "highway or no highway?" in the *Crown Estates Commissioners* case. In that latter case, the issue of whether or not the verges were part of the public highway went directly to the extent of land to be registered as a common. Both parties – the highway authority and the private owner of the verges – were heard on that issue, and it was positively determined in favour of the highway authority.

85. In the present case, the officer was merely unable to find that permission had been given for the activities on the land. He did <u>not</u> actually say, and affirmatively find, that this was because the objectors before him had no title to the land. All he said was that the "doubt" about ownership prevented him from making a finding of permission. The issue he decided was therefore that the applicant, and those others whose evidence had

been relied upon, had not engaged in activities on the land with either the "permission" or "tacit agreement" of the owners, because of this "doubt". Contrary to the Respondents' submissions, he did not say or find that "the Bouldens are not the owners of this land."

86. The third, and in my view most fundamental reason to reject this submission relates back to my reasoning on the 1975 statutory declaration argument. It is as follows. Title to unregistered land is both relative and time-sensitive. I do not therefore consider it possible, or meaningful, to speak of there being a final determination *in rem*, for all time, in 1991 that a certain person or persons has no title to land – so that they may *never again assert that they do*, even in a fresh title application made 30 years later in 2021.

87. I repeat that in 1975, then again in 1979 and 1984, first the personal representatives of Eyton Boulden then Clive Boulden had an assertion or claim of title. The question of whether such title as they then claimed would have passed muster as "good title" in a conveyance, or an application for first registration under the 1925 Act, might have had a different answer then from the answer to the same question made on an application in 2021.

88. In 1991, the title being asserted by Clive, Peter and John Boulden (with the support and assistance of the First Applicant) was essentially that which had been asserted and disposed of in the 1984 Deed of Exchange. Again, had one or more of them applied for first registration of title in 1991, under section 13 of the 1925 Act, the Registrar would have at least to have been satisfied as far back as 1976. The 1984 Deed would not have been a good root of title for that purpose, being then only seven years old. So the answer given by the Registrar might very well have been negative at that time.

89. *Even if*, which I do not consider he did, the officer who compiled the 1991 report had actually engaged in an assessment and determination that the above Bouldens did not have a "good title" to the land (e.g. because of the absence of a good root), that would *still* not have precluded or prevented them from 'going again' in the future, when more time had passed and they were able to present a stronger root of title going back over 15 years.

90. With the substitution of the Applicants for (specifically, as the previous purported owners of what is now the application land) Peter and John Boulden, that is essentially what the present application is. The Registrar, and therefore this Tribunal, has to examine the title position, and ask the section 9 questions, as at 11th November 2021. When it does so, an expression of "doubt" as to ownership, made by a commons registration authority in a 1991 decision, has little or no relevance.

91. For these reasons, I therefore conclude that the Applicants are not estopped from making this title application by reason of that 1991 decision.

92. Nor do I consider that the existence and disclosure of that 1991 decision, and the available documents relating to it, would be a matter which would cause a competent professional adviser to advise a 2021 buyer not to accept a 37 year old root of title in

the 1984 Deed, for the purposes of section 9(2) of the 2002 Act.

93. The Respondents, through Mr. Wilmshurst, protested that the Applicants had not included either the 1975 declaration or the 1991 village green decision in their documents accompanying the 2021 FR1 application, claiming that this was contrary to the requirements of Land Registration Rules 2003 r. 24(1)(c). I do not consider that it was. The Applicants are simply not required to go back beyond the root of title required by statute. In any event, however, all the relevant documents and evidence are now before this Tribunal in these proceedings. I have already stated my reasons for rejecting the submission that the 1975 declaration affects the merits of the application. As stated, I reach the same conclusion in relation to the 1991 decision and its accompanying documents.

Conclusion: disposal

94. To answer the specific question posed by section 9(2) of the 2002 Act, and standing in the shoes of the Registrar for this purpose, I consider that a 2021 application for first registration based on a 1984 Deed of Exchange of the land, followed by a sequence of assents and conveyances vesting that 1984-conveyed title in the Applicants, is a title:

"..such as a willing buyer could properly be advised by a competent professional adviser to accept."

I do not accept that either i) the contents of a 1975 statutory declaration, sworn in support of the title *then* being asserted or ii) the finding or expression of "doubt" as to title in a 1991 village green application are matters which would cause a competent professional adviser to advise a 2021 buyer not to accept a 37 year old root of title in the 1984 Deed.

95. Alternatively, even if either or both of those matters could in some way be regarded as a "defect" in the title of which registration is sought, which might make that title potentially "open to objection", I consider that under section 9(3) any such defect "will not cause the holding under the title to be disturbed." If the unregistered land formulation is used of a *title* which might expose the buyer to "dispute or litigation", I consider this likewise implausible, bordering on fanciful. The prospects of an unregistered title with a 37 year old root being disturbed or litigated over by another title claimant would be slim to none. As Mr. Denehan pointed out, this test applies only to the *title* to the land, not other aspects such as its nature or extent.

96. In that regard, the fact of this land being a registered village green is ultimately irrelevant to the issue of private title to it. Those two aspects of its nature co-exist. The Applicants accept and understand that any title they have to the land – whether their present unregistered title, or the registered title for which they have applied – is subject to the village green registration, and therefore to the public rights to use the land for that purpose.

97. Mr. Wilmshurst appeared at one point to make a submission (which Mr. Denehan characterised as made *in terrorem* to the Tribunal) that I should not accept the Applicants' title application because it might result in the eventual re-opening and loss of the village green status of the land (under section 19 of the Commons Act 2006, through the "correction" of an alleged "mistake"). While I consider that such a submission had little basis in law, evidence or reality, any such consequences (or the parties' motives or intentions) are utterly irrelevant to the jurisdiction of this Tribunal on this application.

98. The same applies to any potential future disputes between the parties, over precise boundaries, easements or any other matters. As to those, I can only express my hope that they are willing to resolve any such matters and co-exist amicably as village neighbours.

99. I will therefore direct the Chief Land Registrar to give effect in full to the Applicants' application. The order accompanying this decision makes such a direction. I have also given directions for any applications or representations on the issue of liability for the costs of these proceedings. The Applicants have clearly been the successful party. The usual order would therefore be an order that the Respondents pay their costs of these proceedings, but the Tribunal may in some cases make a different order. Any representation on that issue should be made by the date stated in the order.

Judge Ewan Paton

Dated this 29th day of January 2025

BY ORDER OF THE TRIBUNAL