

[2018] UKFTT 166 (PC)

**PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF/2015/0573

REF/2015/0910

BETWEEN

(1) Stephen Hadley

(2) Heather Hadley

Applicants

and

Crisps Farm Limited

Respondent

**Property Address: Land at Church Lane, Austrey and Land on the South Side of The
Crisp, Church lane, Austrey
Title Number: WK477567 & WK477991**

Judge Colin Green

ORDER

It is ordered that

- (1) in respect of title WK477991, the Chief Land Registrar give effect to the Applicants' application on the basis of a freehold title absolute as if the Respondent's objection of 10 September 2015 had not been made;

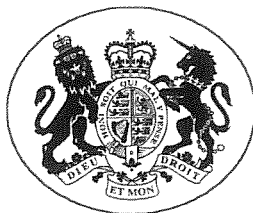
(2) in respect of title WK477567, the Chief Land Registrar give effect to the Applicants' application as if the Respondent's objection of 11 May 2015 had not been made.

Dated this 28 day of February 2018

Colin Green

By order of the Tribunal





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Respondent

**Property Address: Land at Church Lane, Austrey and Land on the South Side of The
Crisp, Church lane, Austrey
Title Number: WK477567 & WK477991**

Judge Colin Green

At: Birmingham Tribunal Centre

On: 5-7 September 2017

Applicants Representation: Nathaniel Duckworth of counsel

Respondent Representation: Jane Talbot of counsel

DECISION

Introduction

1. This matter arises from two contested applications where the references from the Land Registry have been consolidated. The first, an application by the Applicants, Mr. and

Mrs. Hadley, made under the transitional provisions of paragraph 18(1) of Schedule 12 of the Land Registration Act 2002, is to be registered as proprietors of part of title WK323900 (“Crisp Farm”), of which the Respondent company is registered proprietor, on the basis of more than 12 years adverse possession prior to the coming into force of the 2002 Act on 13 October 2003. The land claimed (“the Blue Land”) has been allocated the provisional title number WK477567. The second application by the Applicants is for first registration of unregistered land with possessory title, which land adjoins Crisp Farm, and has been allocated the provisional title number WK477991 (“The Pink Land”). The Respondent objects to the application because it maintains that it had and retains paper title to the Pink Land.

2. I attended a site view on the afternoon prior to the hearing and have had the benefit of detailed skeleton arguments and written outlines from counsel, both of whom presented their respective cases in a diligent and comprehensive fashion. I am grateful to them in assisting me with the matters I must decide.

History and issues

3. In order to provide the appropriate context, it will assist if I give a brief chronological conveyancing history, identifying the issues which arise where appropriate.
4. In 1971, Melville Anthony Yates – known as “Tony Yates” – owned the following properties (all unregistered).
 - 4.1. Property known as “The Crisp”, which was eventually sold to the Applicants, of which they are the current joint proprietors under title number WK476538.
 - 4.2. The Pink Land, which remains unregistered.
 - 4.3. The Blue Land, which forms part of Crisp Farm under the above title.
5. Topographically, the Pink Land is bordered by The Crisp to the north and Crisp Farm and the Blue Land to the south. The Blue Land adjoins the south eastern boundary of the Pink Land, and the Blue Land’s eastern, southern and western boundaries are with Crisp Farm.

6. By a conveyance dated 18 February 1977 (“the 1977 Conveyance”), The Crisp was sold by Mr. Yates to Thomas Day and Patricia Day (née Rice). The Applicant’s case is that on the true construction of the 1977 Conveyance, having regard to the layout of the land and certain physical features at the time, the Pink Land was incorporated within the land conveyed, so that Applicants now have paper title to the same.
7. The Respondent’s case is that the Pink Land was not included in the 1977 Conveyance and the Respondent has paper title under a rule 72 Transfer of Crisp Farm to the Respondent (under its then name of “M. Yates Company Limited”) of 29 March 1989 (“the 1989 Transfer”), the occasion for the first registration of Crisp Farm.
8. The Applicants contend that if the Pink Land had been conveyed to the Days by the 1977 Conveyance, it cannot have been conveyed by Mr. Yates to the Respondent by the 1989 Transfer. If it was not included in the 1977 Conveyance of The Crisp however, and did pass under the 1989 Transfer to the Respondent, the Applicant’s alternative case is that such title has been extinguished under the provisions of the Limitation Act 1980. It is only this alternative case which was raised on the Applicant’s application for first registration of the Pink Land with possessory title, but since consideration of that issue will require me to make a finding as to paper title, I consider that I can properly address the Applicants’ primary case: that they have paper title through the 1977 Conveyance.
9. In addition, in his closing submissions, Mr. Duckworth on behalf of the Applicants sought to raise an issue concerning estoppel by convention in respect of the Pink Land. I allowed him to do so, even though it was not in the Applicant’s Consolidated Statement of Case, as Mrs. Talbot had sufficient time to prepare a response, and quite naturally, reserved her position on costs.
10. One point which requires clarification is whether the current title to the Pink Land is registered or unregistered, as this would make a potential difference to the treatment of the issue of adverse possession – if the title to the Pink Land is registered, different considerations apply. The Land Registry have proceeded on the basis that title to the Pink Land is unregistered – otherwise, how could there be a first registration? – which is confirmed by the current filed plans for both The Crisp and Crisp Farm: the Pink

Land is not included in either title. There is however, an earlier filed plan from the time of first registration of Crisp Farm that appears to show the Pink Land as included in that title. The filed plan was changed in 2015 however, so that the whole of the Pink Land lies outside the registered title of Crisp Farm. I was told that the Respondent might make an application for alteration of the register under Schedule 4 to the 2002 Act and seek compensation from the Land Registry in the light of this, but that is not a matter before me on either of the two current references from the Land Registry.

11. It is not disputed that The Crisp and buildings on Crisp Farm were served by a common electricity meter located in the stables on Crisp Farm. It is the Applicant's case that about a year after the purchase by the Days in 1977, an agreement was reached with Mr. Yates concerning the separation of the supply: that in return for the Days arranging for and bearing the cost of the separation works, he would transfer the Blue Land to them. ("the Blue Land Agreement") The work was carried out and paid for by the Days, but no conveyance of the Blue Land was made, although Mrs. Day claims to have believed that Mr. Yates had done this until after she put the Crisp up for sale in 2014, when she first became aware that it formed part of the registered title of Crisp Farm.

12. Concerning the Blue Land, the Applicants' case is as follows.

12.1. Prior to 13 October 2013, there was more than 12 years adverse possession of the Blue Land, so that under the provisions of the Limitation Act 1980 and paragraphs 18(1) and 10 of Schedule 12 to the 2002 Act, the Applicants are entitled to be registered as the proprietors of the Blue land in substitution for the Respondent. The Respondent denies that there has been adverse possession, and that the use made by the Days of the Blue Land was by way of licence, it being common ground that possession with permission is not adverse. Such licence arose under the Blue Land Agreement (which in the first instance, the Respondent denies) or under permission granted by Mr. Yates to the Days to have use of the Blue Land, which was revoked in 2014, alternatively permission which was given in 1989.

- 12.2. Alternatively, the Applicant relies on the Blue Land Agreement and the detriment to the Days in carrying out their side of that agreement as giving rise to an equity under the doctrine of proprietary estoppel; alternatively, a constructive trust. The last matter was not expressly raised in the Applicants' Consolidated Statement of Case, but during the course of the hearing I granted the Applicants permission to argue this as I was satisfied that Mrs. Talbot would be able to deal with it given sufficient time for preparation. This she was able to do. There was also a jurisdictional issue which I raised, with which I will deal below.
13. To conclude the relevant conveyancing history: in May 2014 Mrs. Day, who had survived Mr. Day, put The Crisp up for sale, including the Pink and Blue Land. Eaton Walker, a director of the Respondent, learnt of this he told Mrs. Day that he believed the Respondent was the owner of the Blue Land. The Blue Land forms part of its registered title and as a result, in August 2014 Mrs. Day applied to be registered as the proprietor of the Blue Land by reason of adverse possession. On 15 October 2014 Mrs. Day sold The Crisp (which on the Applicants' case will have included the Pink Land) to the Applicants, and under the contract agreed to prosecute her application for registration in respect of the Blue Land and if successful, transfer it to the Applicants. The contract completed on 12 January 2015, without the application having been determined, and soon thereafter the Applicants applied for first registration of The Crisp and the Pink Land, but not the Blue Land.
14. The Applicants sought to take over Mrs. Day's application in respect of the Blue Land, but were advised by the Land Registry that her application would have to be cancelled and a fresh application made by the Applicants. This they did – the first of the two applications mentioned above – after Mrs. Day had executed a deed dated 10 April 2015 assigning her interest in the Blue Land to the Applicants, and cancellation of her application.
15. The Land Registry declined to process the Applicant's application in respect of The Crisp as it was unclear from the documents that they were entitled to be registered in respect of the Pink Land. Accordingly, the Applicants made their second application,

for first registration of such land. Apart from the Pink Land, the remainder of The Crisp has now been registered.

16. I shall now turn to consider in more detail the issues arising in respect of the Pink Land and the Blue Land, and make findings on those issues.

The Pink Land

17. The first issue is whether the Pink Land was included within the 1977 Conveyance. The parcels clause is of

“ALL THAT piece or parcel of land situate in Austrey in the County of Warwick TOGETHER WITH the detached bungalow erected thereon or some part thereof and known as “The Crisp” (formerly called “Crisps Farm”) which said property is for the purpose of identification only delineated on the plan annexed hereto and thereon shown edged red the Northern part of the boundary on the West side being three feet from the wall of the stables erected on the Vendor’s adjoining land”

Clause 3 provides:

“The vendor hereby covenants with the Purchasers that he the Vendor will maintain fences between the points marked A – B – C on the said plan in a stock proof condition.”

The line A – B is along part of the western boundary of The Crisps and B – C is along the southern boundary, the position of which is in dispute.

18. In terms of the relevant law and principles of construction, there was no real dispute between the parties. The plan to the 1977 Conveyance shows the southern boundary to be at right-angles to the western and eastern boundaries, rather than the more angled line contended for by the Applicant. The plan is for identification purposes only however, for the general identification of the land rather than the precise plotting of boundaries. Of greater significance is the covenant to “maintain” a fence along the southern boundary – not erect – which suggests a fence was in place at the time of the 1977 Conveyance. The evidence of both parties was that there was a fence in place at that time, and they were broadly in agreement that the location of such fence should be regarded as determinative of the correct boundary B – C, the southern boundary of the land conveyed. The nub of the dispute was where exactly that fence lay: -- the Applicants’ case is that it was along the southern boundary of the Pink Land, so that

the Pink Land was included in the 1977 Conveyance and has passed to the Applicants; the Respondent's case that it was along the northern boundary of the Pink Land, so that it was not included in the 1977 Conveyance, remained in Mr. Yates' ownership, and passed to the Respondent under the 1989 Transfer.

19. I heard evidence from Mrs. Day, who was able to provide a detailed history of the Pink and Blue Land. She was a keen gardener, as is apparent from a memento photograph album prepared by a friend to commemorate her leaving The Crisp, as well as photographs in the estate agents sales particulars. The garden was well-maintained, and Mrs. Day did a great deal of work in the garden. Focussing on the Pink Land, her evidence was that in 1977, prior to purchase, Mr. Day negotiated with Mr. Yates over the area of land to be sold out of common ownership, and once agreed, Mr. Yates caused to be erected a metal post and wire fence to mark the boundary. A bundle of photographs was prepared for the hearing, and photograph 1 shows such fence in a photograph taken shortly after purchase. It was constructed along a small ridge – the same ridge I was able to see on the site view. Over the years, the Days planted a hedge along this boundary, to which they later added a number of trees. An arch was created in the south eastern corner to provide access onto the Blue Land, over which roses were trained.
20. At some point after the purchase, and before the plants and trees mentioned above had grown to a substantial height, Mr. Day complained of livestock breaking through into the garden of The Crisp. In order to prevent this, Mr. Yates, or his farm manager, constructed a fence consisting of a single run of barbed wire and wooden posts about a yard to the south of the existing fence, in the field forming part of Crisp Farm, which remained until eventually it fell down. The posts from the fence erected in 1977 and this later fence can be seen in a photograph from the rear of the house, looking out onto the garden, taken in about the winter of 2001. Mrs. Day confirmed that the fence on the southern boundary and the various plants and trees, all remained in position until the sale in 2015.
21. No other witness was able to contradict Mrs. Day's evidence. It was suggested by Mr. Walker in cross-examination that there had been two fences, which had marked the northerly and southern boundaries of the Pink Land, and that it was the northern fence,

since removed, which marked the true southern boundary of The Crisps. There was no mention of this in his witness statement other than an oblique reference to an “inner stock fence” and he accepted that he had no personal knowledge concerning the Pink Land in 1977. He did not become a director of the Respondent until 2003 and his only source of information concerning matters before that was his co-director, Martin Yates (the son of Tony Yates) who has since passed away. Indeed, the location of a fence put up in 1977 along the northern boundary of the Pink Land would make no sense having regard to the location of the entrance from the Pink Land onto the Blue Land, which would not adjoin the Pink Land but be several feet distant from it.

22. I prefer the account of Mrs. Day, and the evidence of a witness who was cross-examined in some detail to the hearsay of others. I am satisfied that at the date of the 1977 Conveyance, the boundary fence between points B and C was located along the southern boundary of the Pink Land, not the northern boundary, so that paper title to the Pink Land has now have passed to the Applicants.
23. Having found for the Applicants on the basis that they have paper title to the Pink Land, strictly there is no need for me to consider the alternative arguments presented. Although the application for first registration of the Pink Land is for possessory title, in my view the class of title is not fundamental to the nature of the application, which is for first registration, and I can direct the Chief Land Registrar to give effect to the application on the basis of a freehold title absolute.
24. I will, nevertheless go on and consider the alternative arguments in case I am wrong on the issue of whether the Pink Land was included in the 1977 Conveyance. The first alternative argument is estoppel by convention, which I will consider below. The second alternative argument is on the footing that the Respondent does have paper title to the Pink Land, but that title has been extinguished in favour of the Applicants’ possessory title under the 1980 Act.
25. Again, there was no dispute over the relevant test of possession for these purposes. As a matter of law, the Applicants must establish, for at least the requisite period of 12 years, that (1) The Days were in possession of the Pink Land, that is: that they had a sufficient degree of single and exclusive physical custody and control of the Pink

Land, and (2) that they had an intention to exercise such custody and control on their own behalf and for their own benefit, see: *Pye v. Graham* [2002] UKHL 30.

26. What acts constitute a sufficient degree of exclusive physical control will depend on the circumstances of the case, the nature of the land and the manner in which land of that kind is commonly used or enjoyed.

“...what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.”¹

27. The intention that must be shown is:

“the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.”²

As to the evidence required to establish the intention, as Lord Hope put it in *Pye* at paragraph 71:

“The important point for present purposes is that it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor...The only intention which has to be demonstrated is an intention to occupy and use the land as one’s own... So I would hold that, if the evidence shows that the person was using the land in the way one would expect him to use it if he were the true owner, that is enough.”

28. In the present case, Mrs. Day’s evidence was that the Pink Land was treated and used as part of the back garden to The Crisp. The lawn was cut and maintained, and trees and shrubs were planted within it. As noted above, the boundary itself was subject to extensive planting to reinforce what was a simple post and wire structure. The contrary factual case presented by the Respondent was that the Pink land was allowed to become densely vegetated by trees and shrubs and did not in reality form part of the garden but was an area of land left uncultivated and not maintained by the Days. This

¹ per Slade J in *Powell v. McFarlane* (1977) 38 P & C R 452, at p. 471, cited with approval in *Pye* at paragraph 42

² *Powell* at pp. 471-472, approved in *Pye* at paragraph 43

is contradicted by Mrs. Day's evidence, and the photographs taken from within or looking out onto the garden. The Respondent relies on some aerial photographs from 2014 which show The Crisp from a distance. The tops of the trees give the impression that the whole garden is heavily wooded, but photographs taken on the ground at about the same time, within the sales particulars, reveal that this is misleading and that the garden was largely lawn. Subsequent aerial photographs, taken after the Applicants' purchase, show the garden to be a clear space, but this is because the garden up to the southern boundary of the Pink Land was excavated as part of the work in building a new house on The Crisp and laying a new lawn. Such a comparison reveals nothing more than that extensive work was carried out after the purchase.

29. On this alternative case, I am satisfied that from 1977 until the sale to the Applicants in 2015, The Yates' (and Mrs. Yates alone) were in adverse possession of the Pink Land

The Blue Land

30. The primary case in respect of the Blue Land is that under the transitional provisions of the 2002 Act, relying on adverse possession. On the evidence I heard from Mrs. Day, I am satisfied that from the time the Days started making use of the Blue Land, they were in possession of it. Mrs. Day described it as a vegetable plot which was used as the name suggests, with the full extent of the land laid out in plots with walkways. The Days developed a herb bed, strawberry bed and a soft fruit bed. A tunnel green house was erected and a plum tree planted. The remnants of the walkways and various plots could be seen on the site view.
31. Nevertheless, the possession of Mr. and Mrs. Day cannot have been adverse if it was by licence, and I must make a finding as to the existence of the Blue Land Agreement. As mentioned above, the Agreement was said by Mrs. Day to have arisen out of the severance of the electrical supply from Crisp Farm which served both properties under a single electricity account, charged to Crisp Farm. To create an independent supply a trench had to be dug and a separate meter installed at The Crisp. Mr. Yates had recognised that he was responsible for dealing with the problem which had been overlooked at the time of purchase but took no steps to do so. At the same time, Mr. Day was negotiating with him to acquire the Blue Land and a further adjoining parcel

of land to “square-off” the plot. Mr. Day was reluctant to agree to this, but eventually agreed that he would transfer the Blue Land in return for the Days arranging and paying for the separation works, which they did. They assumed that Mr. Yates had arranged for the transfer of ownership and they had no further discussions about such matters with Mr. Yates, or anyone else, and saw no reason to do so.

32. There was no evidence to contradict this account other than Mr. Walker’s evidence that he had been told by Martin Yates that his father, Tony Yates, had told him that he had allowed the Days to use the Blue Land until any planning permission was obtained or development commenced. I also heard evidence from Carol Withorn, a director of the Respondent, who was married to Martin Yates. She stated that she had never heard about any agreement regarding the Blue Land, and that had Mr. Yates agreed to sell it to the Days, she was sure that he would have kept a record of this.
33. Again, I prefer the evidence of a witness to third-hand hearsay, and my finding is that there was such an agreement between Mr. Yates and Mr. and Mrs. Day. Nor do I find anything implausible about the Blue Land Agreement. It was suggested that Mr. Yates was under no obligation to pay for the severance works, but I do not consider this casts doubt on him having entered into the Agreement. There is no reason why he must have considered himself under a compulsion in order to do so. Indeed, the severance of the supply from his meter was of benefit to him as he was being billed in part for power which Crisp Farm was not using, and having to apportion part of that cost to the Days. After the severance works, The Crisp would be charged separately by the electricity supplier for its own consumption. It was also submitted that there was a significant difference between the value of the Blue Land at the time and the few hundred pounds spent on the severance works. Without any valuation evidence, I do not know if this is correct, but even if it is, that is not necessarily a reflection of the value which Mr. Yates put on the Blue Land and the benefit to him of the severance, and is insufficient to undermine the veracity of Mrs. Day’s evidence.
34. Mrs. Day’s professed belief that the Blue Land had been acquired in 1978 or so by reason of the Blue Land Agreement was called into question by her knowing of a planning application made by the Respondent in 1989 The associated plan, which Mrs. Day had seen in the newspaper and kept, showed that the Blue Land was included

within the proposed development, but at no time did she mention that this was wrong, or claimed to own the Blue Land. Her explanation is that she did not look at the plans in any detail. This strikes me as quite plausible. Indeed, her continuing belief that the Blue Land had been “assigned” to she and Mr. Day by Mr. Yates in consequence of the Blue Land Agreement is supported by the fact that the Blue Land is part of what was advertised for sale in 2014, and the First Applicant, Mr. Hadley, gave evidence that on he and his wife viewing the property, Mrs. Day clearly indicated that the Blue Land was included, and gave him Mr. Walker’s telephone number as the Applicants were interested in acquiring some land at the rear for tennis courts. When speaking to Mr. Walker, Mr. Hadley was told the Blue Land belonged to the Respondent. Mr. Hadley reported back to the agent, who informed Mrs. Day, who was shocked and upset to learn this. In my view, if Mrs. Day was aware, or had reason to doubt, that the Blue Land had not been acquired some years previously and could not be sold by her, I do not consider she would have acted as she did, or allowed her estate agent to believe it was part of The Crisp.

35. It is the Respondent’s case that if I find for the Blue Land Agreement, it will have amounted to an agreement for the disposal of land, and although the agreement has never been completed, possession by the buyer of such land cannot amount to adverse possession, see: *Hyde v. Pearce* [1982] 1 All E R 1029.
36. Was there an enforceable contract? This is governed by the provisions of s. 40 of the Law of Property Act 1925, and not s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which now governs such matters but is not retrospective, see: s. 2(7). Section 40 provides:

“40 Contracts for sale, &c, of land to be in writing

(1) *No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.*

(2) *This section applies to contracts whether made before or after the commencement of this Act and does not affect*

the law relating to part performance, or sales by the court.”

37. There is no written memorandum or note in this case. Therefore, there was no enforceable contract other than by reason of the doctrine of part performance. Prima facie, there was part performance by the Days in performing their side of the bargain and arranging and paying for the severance works, so that the Blue Land Agreement would have been legally enforceable. Mrs. Talbot submitted that the Days would have done this anyway even if there had been no agreement, so their having paid for the work is not referable to the Agreement. It is possible that the Days would have paid for the necessary work if they had not reached agreement with Mr. Yates, but this is not what actually happened.
38. I should say that even if there was no valid contract under the law applicable in 1977, I still consider that the Blue Land Agreement meant that the possession of such land by the Days must have been consensual in nature, even absent an enforceable contract, and cannot have been adverse. But that will have changed in 1989 when Mr. Yates conveyed Crisp Farm, including the Blue Land, to the Respondent. There was no suggestion that the Respondent became bound by the terms of the Blue Land Agreement, even though Mr. Yates was a director of the Respondent. Therefore, the licence arising in consequence of the Blue Land Agreement must have ended with the ownership of Mr. Yates, who could no longer give any permission in respect of the Blue Land other than through the Respondent company. Thereafter, the Days' possession will have been adverse, so that they will have had 12 years adverse possession before 3 October 2003.
39. That is not an end of the matter. The Respondent's primary case in respect of the Blue Land as originally pleaded, was that Mr. Yates had given the Days permission to use the Blue Land in 1977/78, and on the footing that at some point it was likely that he would be developing the land of which the Blue Land formed part and would require the land back. Having found in favour of the existence of the Blue Land Agreement however, I do not see how I can reasonably find that Mr. Yates also granted some kind of limited permission in respect of the Blue Land. Realistically, they are mutually exclusive factual scenarios, and as I have said, I prefer Mrs. Day's account of what went on in 1977/78.

40. Were I to find there was such permission from Mr. Yates to the Days however, any such licence suffers the same fate as the Blue Land Agreement – the permission does not survive the change in ownership in 1989, and no fresh licence will be implied from the mere fact of continued occupation after the change in ownership. In short, whether under the Blue Land Agreement, or permission granted by Mr. Yates, the outcome is the same: the Days' possession of the Blue Land cannot have been consensual after the 1989 Transfer unless some fresh permission was expressly granted.
41. This turned out to be Mr. Walker's evidence which only fully surfaced in cross-examination. He said he was told by Martin Yates that that in 1998/89, he and Tony Yates had discussions with the Days about the ongoing use of the Blue Land. Mr. Walker was rather vague about what he had been told, and given that any conversations he had with Martin Yates were quite some time after 1989 (he became a director in 2003) this is not surprising. Mrs. Withorn was unable to give any direct evidence concerning a licence at this time, and said that she just assumed permission had been granted as there was no dispute over the Days' use of the Blue Land. On this matter also, I prefer the first-hand evidence of Mrs. Day, particularly since the grant of further permission to she and Mr. Day in 1989 was not put to her in cross-examination. Therefore, I find that no permission in respect of the Blue Land was granted by the Respondent after its purchase in 1989.
42. As with the Pink Land, having found in the Applicant's favour in respect of adverse possession of the Blue Land, it is unnecessary for me to go on and consider the two alternative arguments presented on their behalf in respect of the Blue Land. I shall do so however, for the sake of completeness and in case I am incorrect in respect of the issue of adverse possession.
43. The two alternative arguments are based on the doctrines of proprietary estoppel and constructive trusts. An issue which I raised at the outset of the hearing was whether the Tribunal was able to direct the Chief Land Registrar to give effect to an application for registration based on adverse possession under the transitional provisions on the basis of such matters. Mrs. Talbot submitted that I was not able to do so, but Mr. Duckworth advanced the following argument. What the Tribunal must determine is the matter the subject of the reference, which is not limited to determining issues that

have been raised in the application or objection, but any issue necessary for the appropriate disposal of the underlying matter, in this case, the registration of the Applicants as proprietors of the Blue Land. He relied on the decision of Judge Thorowgood in *William Davis Limited v. Lowe* (REF/2014/0573). In that case, the Judge cited the following observations of Rimmer L.J. in *Silkstone v Tatnall* [2012] 1 WLR 400:

“I would summarise the position in my own words as follows. A reference to an adjudicator of a “matter” under section 73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application. If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself. In the case of an application under section 36 to which an objection has been raised, the relevant issue will be the underlying merits of the claim to register the unilateral notice.” (My emphasis)

In the light of this, Judge Thorowgood stated in paragraph 2.16 of his decision:

“It seems to me that Rimer LJ’s observations are of general application to the definition of the scope of ‘matters’ referred by the Land Registry to the Tribunal pursuant to section 73(7), as this matter was, and that it is clear from his observations that the scope of ‘the matter’ is not limited by the scope of the objection. Certainly, I cannot see that it should be limited by the scope of the objection as it is originally expressed as Ms Tozer submitted. Why else would the Tribunal’s rules of procedure make provision for the filing by the parties of Statements of Case or require that those Statements of Case should identify the applicant’s reasons for making or objecting to the application and/or enable the amendment of those Statements of Case if not to enable the objector to supplement the reasons initially given for objecting to the application so as to ensure (so far as possible) that the whole of the matter giving rise to the dispute of which the application is evidence is laid before the Tribunal and determined as part of a single application ?:

What applies to an objection to an application should extend to the application also, so that the Tribunal will not be able to perform its function if it is unable to resolve all issues, properly raised by either party, which go to the underlying matter – in this instance the first registration of the Blue Land.

44. I was persuaded by this argument, albeit with some reservations, and therefore I will proceed to consider the Applicants' two alternative cases in respect of the Blue Land. First, proprietary estoppel contains the following ingredient (see: Megarry & Wade, *The Law of Real Property* (Eight Edition) at paragraph 16-001. An equity arises where
- 44.1. the owner of land (O) induces, encourages or allows the Claimant (C) to believe that he has or will enjoy some rights or benefit over O's property;
 - 44.2. in reliance upon this belief, C acts to his detriment to the knowledge of O; and
 - 44.3. O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.
45. It was not disputed that if there was an equity, it would be binding on the Respondent as the successor to Mr. Yates. Similarly, with a constructive trust and estoppel by representation.
46. There is a wide discretion in considering how to satisfy the equity having regard to the expectation and detriment, and to avoid an unconscionable result. In this case, I have found in favour of the Blue Land Agreement, and that the Days acted to their detriment by paying for the separation works. They maintained and improved the Blue Land for the next 39 years, although against this must be weighed the benefit of having had the use of the land and the produce it produced. Mrs. Talbot submitted that there would be a disproportionate benefit if the equity was satisfied by recognising the Days, and through them the Applicants, as the owners of the Blue Land. Absent any valuation evidence, it is impossible to reach any firm conclusion as to this – and one has to consider this by reference to values in 1978 – but in my view any discrepancy is not so great for me to decline satisfaction of the equity.
47. Mrs. Talbot also relied on the decisions in *Yaxley v. Gotts* [1999] EWCA Civ 3006 and *Yeomans' Row Management Limited v. Cobbe* [2008] UKHL 55, concerning the use of proprietary estoppel to circumvent the statutory requirements of s. 2 of the 1989 Act. As noted above, the Act has no application in the present case, and in any event I have found that the Blue Land Agreement did satisfy the law applicable in 1978.

48. In cases such as the present, the principles concerning a constructive trust are similar to those of proprietary estoppel. There must be a common intention, acted on to a party's detriment such that it would be inequitable to deny that property is held on constructive trust for that party, in its entirety or for some lesser beneficial interest. The Blue Land Agreement represents such a common intention, and in the context of this matter, I see no reason why the Blue Land should not be regarded as being held on constructive trust for the Days. Mrs. Talbot relied on Lord Scott's comments in *Yeoman* regarding the use of constructive trusts to avoid the requirements of s. 2 of the 1989 Act, but for the reasons that have been given, it has no application here.

49. There is also the issue of estoppel by convention in respect of the Pink Land, consideration of which I have deferred to this stage as it is subject to the same jurisdictional issue I have considered above. On the basis that I am entitled to give effect to the application in respect of the Pink Land by reference to an estoppel, I would be minded to do so. No issue was taken with the relevant legal principles: that there has been a representation of fact, made with the intention of inducing the other party to alter their position, on which that party has relied to their detriment. The representation here was that of Mr. Yates in confirming that The Crisp, the land he was proposing to sell to the Days, extended as far as the fence which had been constructed, in reliance on which they went ahead and purchased the Crisp. As I have found, that fence incorporated the whole of the Pink Land.

Conclusion

50. Accordingly, I will direct that effect be given to both the Applicant's applications. I should make it clear that in respect of the Pink Land, this is by reason of my finding that the Applicants can establish paper title (I have also found possessory title in the alternative), and in respect of the Blue Land, by reason of adverse possession and under the transitional provisions of the 2002 Act.

Costs

51. At present, I can see no reason why I should not order that the Respondent pay the Applicants' costs, as they have been the successful party. I direct that by 4.00 pm on 12 March, the Applicants' solicitors should send to the Tribunal and the Respondent details of their legal fees and counsel's fees since the date of the reference from the

Land Registry, (14 December 2015 in respect of the Blue Land; I do not have the date to hand in respect of the Pink Land) together with copies of supporting invoices and counsel's fee notes. The Respondent will then have the opportunity to provide written submissions in response, presenting any reasons on which it relies as to why the Respondent should not pay the Applicants' costs, and any issues with the details provided by the Applicants' solicitors. Such submissions should be sent to the Tribunal and Applicant's solicitors by 4.00 pm on 26 March. Should the Applicants' solicitors wish to serve a short reply, they may do so by 4.00 pm on 9 April. I will then deal with a final determination on the issue of costs and the amount to be paid should I remain of the view that the Respondent should make payment.

Dated this 28 day of February 2018

Colin Green

By order of the Tribunal

