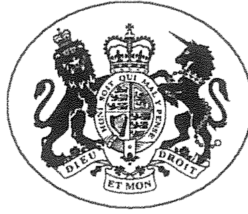


[2018] UKFTT 0721 (PC)

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2017/0330
BETWEEN

MATTHEW SOUL

Applicant

and

CHRISTOPHER JAMES SOUL

Respondent

Property: Land on the west side of Orchard House, High Street, Olney MK46 4EF

Title numbers: BM401908 and BM96470

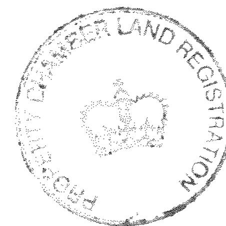
ORDER

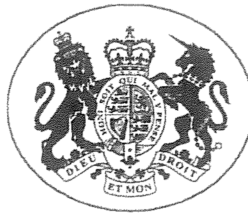
The Chief Land Registrar is ordered to cancel the application dated 4 December 2015

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 17th day of October 2018





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MATTHEW SOUL

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Respondent

Property: Land on the west side of Orchard House, High Street, Olney MK46 4EF

Title number: BM401908
Before: Judge McAllister
Alfred Place, London
28 August 2018
25 September 2018

Representation: Mr Faisal Sadiq of Counsel instructed by J. Garrard & Allen appeared for the Applicant; Mr Gaurang Naik of Counsel instructed by Sharman Law LLP appeared for the Respondent.

DECISION

Introduction

1. The Applicant and the Respondent are first cousins. They are the sons, respectively, of David and Andrew Soul. David and Andrew are two of six siblings whose parents, Robert and Dorothy, owned a substantial property known as Orchard House in on the

High Street, Olney. Orchard House is Grade II listed building. For ease of reference I will refer to the various members of the Soul family by their first names.

2. Robert owned a number of properties and various business, including a garage and coach business, and a farm. In the course of time, David, Andrew and another brother, Bernard became involved in running the various business. The other three siblings took no part, or at best a very small part, in the business. It is clear that there is (or at least has been) considerable friction between members of the Soul family arising, in part, from the distribution of assets following Robert and Dorothy's death.

3. On 6 May 1987 Orchard House was transferred to Scoperight Limited ('the Company'). David and Andrew were directors of the Company and the shares were held between the six siblings. Bernard then transferred his interest to his brother, John. Matthew was appointed Company Secretary on 29 February 2008.

4. The Company granted a tenancy to Robert and Dorothy who continued to live at Orchard House until Robert's death in 2006. Dorothy moved to Devon.

5. Orchard House had a substantial garden running down to West Street. At the bottom of the garden is the Coach House. On 4 May 2004 the freehold to the Coach House was sold to Matthew's brother, David. David sold the Coach House to Matthew on 30 March 2006 for the sum of £250,000. On 16 March 2009 Matthew purchased an additional strip of garden land adjacent to the Coach House from the Company. Andrew's evidence is that this was done without the knowledge of himself or the other siblings, but that in the event they were content to accept the situation. The purchase of this strip allowed for off street parking for the Coach House. The titles to the Coach House and the additional strip are registered.

6. It is Matthew's case that on 3 January 2010 the Company granted him a lease for a term of 75 years of further garden land adjacent to the Coach House and to the garden land purchased by him. Title to the lease has not been registered. The dispute between Matthew and Christopher is as to whether the lease was granted as alleged and the effect, in the events which have happened (and on the assumption that it was granted) of the failure to register the lease. Until shortly before the hearing it was their case that

neither the original of the 2010 lease nor the counterpart nor any copies could be found.

7. Sometime between September 2012 and 9 July 2013 the Company and Matthew purported to 're-create' the lease by printing a further document in, they said, identical terms to the lease, dating it 3 January 2010, and obtaining a witness to Matthew's signature, Jonathan Cook. This was not the same witness who, on their evidence, witnessed the original, missing, lease. This version of the lease consists of one document only, signed by David as Company director and Matthew as secretary (but without the Company seal) and signed by Matthew as tenant. The word 'Counterpart' has been written on the front page.

8. It was this version which was sent to Land Registry with the application for registration. No attempt was made to explain to Land Registry that this document was not the original lease.

9. As will be explained further below Christopher first knew of the existence of the lease in July 2015 and it was not until he received a copy of Mr Cook's witness statement in late December 2015, attesting to the veracity of his signature on the documents created in 2013, that it became apparent that the document now relied upon by Matthew was neither the original of nor a copy of the 2010 lease. The reason for this is that Mr Cook was not employed by or known to either David or Matthew in 2010. I should add that Mr Cook did not give evidence, and his statement that he signed the 2013 version of the Lease could not be tested in cross examination.

10. On 10 August 2011 the Company executed a deed of trust stating that Orchard House was held on trust for, and that no part of Orchard House would be disposed without the consent of, 5 of the siblings (Jean Mary, David, Peter, Andrew and John). The deed of trust was protected by a restriction entered on the title register of Orchard House on the same day. It is Christopher's case that the deed merely recorded what was already agreed between the siblings and the Company at the time of the 1987 transfer, namely that the Company held Orchard House on trust in equal shares for the siblings (John only holding his own share and that of his brother Bernard) and that no part of the property could be disposed without their consent.

11. On 29 August 2013 the Company conveyed the building and the greater part of the garden of Orchard House to a Mr and Mrs Katz. The property conveyed is registered with title BM383131. On the following day, the remainder of the garden was transferred to Peter Soul. It is important to note that this land was not transferred for money or anything of monetary value. This land is registered with title number BM96470. It was transferred (again, not for valuable consideration) to Christopher on 12 February 2015. The land apparently demised by the Lease includes the land transferred to Peter and subsequently to Christopher. I will refer to this land as the Disputed Land. The land demised by the lease also included a very small triangle of land conveyed to Mr and Mrs Katz.

12. By an application dated 4 December 2015 Matthew applied to register the 2010 lease in so far as it relates to the Disputed Land. In the letter accompanying the application sent by Matthew's solicitors on 11 November 2015 it was said that, although the lease affected the adjoining title (BM383131) Matthew had agreed to surrender that part of the demised land within that title, although no formal deed was ever executed. Christopher objected and the matter was referred to the Tribunal on 28 March 2017.

13. The application was accompanied by what was described as a certified true copy of the original counterpart lease. The certificate was signed by the solicitors and dated 12 November 2015 (in spite of a number of requests by the Land Registry, the original of the document relied on was never produced).

14. For the reasons set out below I will order the Chief Land Registrar to cancel the application to register the lease. In my judgment, no lease was entered into on 3 January 2010. The two versions of the lease I have seen (the document sent to the Land Registry, and the document produced for the first time at the hearing, purporting to be the original 2010 lease) were both created very much later, but before 9 July 2013.

Did the Company grant Matthew the lease in January 2010?

15. This is the issue at the heart of the case. The lease purportedly granted in 2010 (and 're-created' in 2012/3) is for a term of 75 years granted in consideration of £1. The annual

rent for the first ten years was £100, increasing to £200 for the next 20 years, and thereafter to be assessed at the open market value. The demised premises were marked in red on the plan. The lease also granted a right of way from Coach House onto West Street over an area hatched green (the area closest to the next door property, Garden Cottage) and a right to park on the area hatched black (which in any event formed part of the demised premises).

16. The background to the grant of the lease, on Matthew and David's evidence, was that Matthew was anxious to purchase the demised land, but the price sought by the Company was too high. It was agreed between the Company (acting through its director, David) that if Matthew had access to (or retained an interest in) the demised land he would not object to the further application to be made by the Company to convert Orchard House into a hotel. There were also discussions involving the possibility of developing the garden into a number of houses.

17. Matthew's written evidence regarding the creation of the lease is as follows. On Sunday 3 January 2010 the lease was printed, signed by himself 'on his own behalf' and as secretary of the Company. David signed as director of the Company. The lease was retained by the Company. It was then realised that the lease needed to be witnessed so it was 're-printed, re-signed and witnessed' by Robin Reed (now deceased). David's written evidence was more or less to the same effect: he gave Matthew an old sample lease which he, Matthew, adapted to meet the terms agreed. This copy was kept by David in his office. A further copy was printed off, and witnessed by Mr Reed. David believed Matthew would register the lease. In effect therefore, and contrary to usual practice, David kept the lease and Matthew the counterpart.

18. In giving evidence, Matthew seemed nervous and unsure. My impression, having heard both Matthew and David, is that Matthew is very much led by and under the influence of his father. As he tellingly said, his father was always impatient, and anxious to resolve matters quickly, and, that he, Matthew, is 'cowardly when it comes to confrontation'. It seems to me clear that David is the driving force behind the present application, albeit that in cross examination Matthew stated that he asked his father if 'he could sort something out' to give Matthew and his family some protection in respect of the Disputed Land, ie his garden.

19. Matthew explained that he put the counterpart (the document executed by him) in his office and that it was misplaced when he moved offices. Neither the original nor any copy of this document has been found. He accepted that it made no sense to say that he signed the lease (rather than the counterpart) 'on his own behalf' (ie the landlord's copy). David confirmed that he kept the document executed by the Company but that it had been lost. In short , the 're-creation' of the lease was needed, it is said, because neither the lease nor the counterpart could be found.

20. At the hearing, for the first time, David produced a copy of the 2010 lease. This is not witnessed, but, by common accord, and by virtue of section 44 of the Companies Act 2006 the document was validly executed. It bears the seal of the Company.The original, I was told, was in David's car in the car park at Milton Keynes.

21. On 18 September 2018, before the adjourned hearing, David made a further witness statement. He stated that the original had not been in his car, but in a drawer in his office. He also stated that he had given Matthew's solicitor a copy of this document (believing, as I understand it, that this was the original). It appears that the solicitor advised Matthew that as it was in fact a copy, and the time for disclosure had passed, there was no need to disclose this. If this advice was given, I find it very surprising.In any event David further deposed to the fact that he had in fact found the original of the lease over the August bank holiday.

22. Both Matthew and David were recalled to give further evidence on the second day of the hearing. Matthew was cross examined about the plan attached to the 2010 lease This plan is identical, in every detailed respect, to the plan attached to the 2012/3 version. Matthew could not remember whether the plan allegedly attached to the lease in 2010 was scanned into the computer or whether a new plan was re-drawn in 2013. It was pointed out to him that unless the plan was scanned in 2010, it simply beggared belief that a new plan drawn some years later would be identical in every detailed respect. There is the further fact that the Plan shows the gate in its present position, but the evidence suggests that the gate was not moved until after January 2010.

23. Matthew also stated that his solicitor told him that the version given to him in the summer of 2018 was a copy. Surprisingly, he did not ask Matthew where the original was.

24. David further explained that when he found the original of the lease some two months before the first day of the hearing, he made a copy of this. He gave the solicitor the copy believing it was the original. He only realised it was a copy when it was handed to me. The original was produced at the hearing.

25. In short:
    a) The application to register the lease was made with a document purporting to be the counterpart 2010 lease (certified as a copy of the original) which was in fact 're-created' in 2012/2013.
    b) The original of the lease (apparently executed on 3 January 2010) but not the counterpart was found in the course of the summer of 2018 but not produced until the last day of the hearing.

26. The entire explanation of the grant and subsequent 're-creation' of the lease is confused to the point of incoherence. Mr Sadiq valiantly tried to argue that it was a measure of Matthew and David's honesty that their account was as confused as it was. However, I am satisfied, having regard also to the events which occurred after January 2010, that no lease was entered into on 3 January 2010. This event simply did not happen. In my judgment, neither David nor Matthew gave credible evidence.

27. It is accepted on Matthew's behalf that if this is the case his application must fail: the case stands or falls on whether or not a lease of the Disputed Land (and other land) was granted in 2010.

28. It follows therefore that the 're-created' lease in 2012/3 is a nullity and of no effect. In any event a lease, or any other deed, cannot simply be re-created or duplicated years after the event. It may of course be created on a particular day to take effect on an earlier date. If the original is lost, a statutory declaration attesting to its existence and providing a copy is the usual way of proving a missing document.

29. Matthew did not apply to register the Lease within 2 months of the grant as required by section 4(1)(c) and section 6(3) of the Land Registration Act 2002 ('the Act'). Section 7 (2)(b) provides that the effect of non-compliance with the requirement for registration is that the grant of the lease has effect as a contract made for valuable consideration to grant

the lease. Section 27(1) further provides that if a disposition of a registered estate is required to be completed by registration, it does not operate at law until the relevant registration requirements are met. The disposition, in other words, becomes void as regards the creation of the legal estate until it is registered.

30. Matthew's answer to the question why it was that he did not register the lease was that he did not realise that this was necessary. David's written evidence was that he told him to do so: in oral evidence, he stated that he meant that the lease should be stamped for tax purposes. This was not done either. The rent under the lease was not paid. There is no reference to the existence of the lease until negotiations were well underway for the sale of Orchard House. It appears that a copy of the lease was sent (by David) to the prospective purchasers on 9 July 2013 with a request that the 'lease not be disclosed to the rest of my siblings.' Both Matthew and David stated in evidence that they were anxious that the rest of the family should not know about the lease. Matthew stated that David told him that the lease should be held as a backstop, and should not be disclosed to the rest of the family until all the other issues between the family were sorted. This is not a convincing answer. It seems to me that both David and Matthew were aware that the lease might not stand up to scrutiny as it was not, plainly, executed in 2010.

Events after January 2010

31. On 15 March 2010 the Company executed a Deed of Easement in favour of the Coach House creating a right of way over a four metre strip forming part of the Disputed Land and a further strip leading to West Street for both pedestrian and vehicular access. The deed was signed by David as director and Matthew as secretary. The deed was registered against title BM96470 (Christopher's land) on 8 April 2010. To the obvious question why this deed was needed the answer given both by Matthew and David is that they were anxious that the Coach House should continue to have rights of access on the termination of the lease. This answer is, frankly, barely credible. The term of the lease was for 75 years. Neither David nor Matthew could have seriously been concerned as to what would happen thereafter.

32. Following the grant of the deed, work was done in July 2010 to create a new access onto West Street and to block off the existing access. David informed Andrew of the right of

way in December 2012 in the course of email exchanges regarding the sale of Orchard House. No mention was made of the lease.

33. In 2011 Christopher sought planning permission to build a house on part of the garden land. Matthew and David both objected. On 30 January 2013 David asked the agent acting for the Company to ask the prospective purchasers how much they would be prepared to pay for the land to be retained by Matthew as his garden. The agent valued the land at some £10,000 to £15,000. It is clear that the idea of retaining part of garden land on the sale of Orchard House was taking hold. It was about this time, on Matthew and David's evidence, that the 2010 lease was re-created. Christopher believes that the decision was taken shortly before 9 July 2013, when the lease was disclosed to the purchaser's solicitors (but not to the remainder of the family).

34. In 2013 negotiations took place between Matthew and Andrew (acting on behalf of the Company) as to the purchase of the freehold by Matthew of the Disputed Land. Andrew valued the land at £100,000 but was prepared to accept £50,000. Matthew was willing to pay between £5,000 and £10,000. On 3 February 2013 Matthew wrote an email to his aunt and uncles stating, in terms, that he was prepared to pay a fair market price for the 'garden land' and would be pleased to obtain some valuations. Tellingly, no reference was made by Matthew or David about the existence of the lease, which, had it existed, would have clearly strengthened Matthew's negotiating hand.

35. These negotiations continued after Christopher purchased the Disputed Land. In April 2015 Christopher offered to sell Matthew the land. Matthew was prepared to open negotiations at £5,000. Christopher was holding out for a sum closer to £100,000. In the alternative he was prepared to let the land on an annual lease at a rent of £6,000 per annum. If this was not acceptable, Christopher was proposing to fence off the land and renting it out elsewhere. Again, no mention was made by Matthew of the existence of the Lease (although clearly Christopher was aware of the right of way granted by the March 2010 deed). It is again in my judgment almost inconceivable that the existence of the Lease would not have been raised. A meeting took place on site on 9 May 2015 and again no mention was made of the lease.

36. In some senses the failure to mention the lease at this stage is odd: as it appears that a copy of the lease was shown to the solicitors acting for the purchasers of Orchard House

on 9 July 2013, why was the lease not referred to by Matthew or David after this date? The answer to this question given by Matthew was that the existence of the lease would upset his aunt and uncles. He hoped to be able to buy the freehold and thereby, as he put it, get rid of the lease. He believed that the Company was owned by his father at the date of the grant in 2010, and was not held on trust for the siblings. David's evidence was that the lease was 'kept under the counter' because Andrew and his wife were being difficult, and confirmed that he told Matthew not to disclose it. Even allowing for the desire to maintain peace in the family, I cannot accept this explanation. It seems to me far more likely that both Matthew and David were uncomfortable about relying on the lease. They did so, eventually, when it became clear that Christopher was intent on re-taking the Disputed Land.

37. On 26 May 2015 Christopher demanded that the Disputed Land be cleared by 7 June 2015. He was then proposing to erect a fence. A further letter was sent by him on 29 June 2015, again stating that Christopher intended to clear the land and fence it off.

38. On 26 June 2015 Matthew applied to register the Lease. This application was rejected by the Land Registry on 20 October 2015 because the lease did not contain the prescribed clauses required by Rule 58A of and Schedule 1 to the Land Registration Rules 2013.The same letter asked for the original lease when the application was re-lodged.

39. A further application was made on 11 November 2015. The document lodged was the re-created counterpart lease witnessed by Jonathan Cook. As stated above, it was described as 'certified copy lease 3 January 2010'.

40. In the meanwhile, following the earlier exchange of emails and Christopher's request that the Disputed Land be vacated, Matthew's solicitor wrote to Christopher on 6 July 2015. The letter, at paragraph 2, reads: '*There seems to be some misunderstanding on your part. Matthew is in occupation of this land by virtue of a lease granted to him by Scoperight Limited on 3rd January 2010. I attach a copy*'. The letter also stated that the price to be paid for the land would have to reflect the existence of a 75 year lease. This was the first time the lease was mentioned.

41. Christopher replied on 21 July, asking for further information. Notwithstanding a number of chasing emails, he only received a substantive reply on 17 December 2015 and it was

not until 14 July 2016 (effectively a year later) that any kind of explanation was given as to why a duplicate lease was executed at some point before 9 July 2013. The events described above are difficult to reconcile with the grant of the lease in 2010, and fortify my conclusion that no such lease was granted.

42. Finally, a valuation report obtained on Christopher's behalf values the Disputed Land with no lease at £80,000, and at £10,800 subject to a valid lease. The value of the Coach House and additional strip is put at £400,000: if the Disputed Land is included, the value of all three parcels is £500,000. Valuations obtained by Matthew's solicitor put the value of the Disputed Land between £12,000 and £15,000.

43. In the light of my findings, it is not strictly necessary to consider the effect of the non-registration of the lease, and other issues which were raised. However, in the event that this matter goes further, and in view of the fact that the points (or some of them) were argued at the hearing, I will deal with the various points which arise.

Sections 28 and 29 of the Land Registration Act 2002.

44. Section 28 provides that: '*Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge*'.

45. Section 29(1) provides that: '*If a registrable disposition of a registered estate is made for valuable consideration completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affected the estate immediately before the disposition whose priority is not protected at the time of registration*'.

46. The effect of these provisions is as follows. The basic rule is that the first of the competing interests (including an equitable interest) to be created has priority. But this basic rule is subject to an important exception. If the registrable disposition of the registered estate is made for valuable consideration and then completed by registration, the prior interest is postponed to that interest. In other words, the interest created or transferred by the registered disposition takes priority over the unprotected interest.

47. There is a further important qualification. The special priority rule for registered dispositions has no application at all to registered dispositions made otherwise than for valuable consideration. Valuable consideration is defined in section 132 (1) as not including marriage consideration or nominal consideration in money. Since, in this case neither Peter nor Christopher provided any value for the Disputed Land, the 'basic rule' applies and therefore they would have both taken the land subject to the equitable lease in Matthew's favour.

48. Matthew's interest, had it been created, was not dependent on specific performance. He would have held an equitable lease which did not need to be 'perfected' in order for it to bind Peter and then Christopher. Had an equitable lease been granted, he would, it seems to me, have been entitled to seek to register the lease at any time.

If the lease was granted, was it granted in breach of trust? If so, what was the effect?

49. It is Christopher's case, as stated above, that Orchard House was held on trust for the siblings by the Company from the date of the transfer to the Company, and that no disposition could take place without the consent of the siblings. It is therefore said that the Company had no power to grant the lease. Matthew's case is that, as the lease was not registered, if the lease was granted in breach of trust he would not be entitled to specific performance of the lease and the contract to grant the lease would fall away. As explained above this argument misunderstands the nature of Matthew's equitable interest.

50. The position is set out in section 26(1) of the Act. This provides as follows: '*Subject to subsection (2) a person's right to exercise owner's in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of disposition'*. The exceptions provided for by subsection (2) are limitations (a) reflected by an entry in the register or (b) imposed by, or under, the Act. Subsection (3) further provides that section 26 has effect only for the purpose of preventing the title of the dispone being questioned (and so does not affect the lawfulness of a disposition).

51. It follows therefore that, if, (and again on the assumption that the lease was granted in 2010) the Company granted a lease without the consent of the beneficiaries Matthew's leasehold title could not be challenged, even if he knew the position. It may be the case

that Matthew might have been implicated in the breach of trust and accountable in equity for knowing receipt or might otherwise be liable. But the lease itself would be unimpeachable.

52. In the light of this, it is again not strictly necessary to make findings as to whether or not Orchard House was held on trust as stated above. However, having regard to all the documentary and oral evidence, I am satisfied that in January 2010 Orchard House was held on a common intention trust for the siblings, for the following reasons.

53. On a date before the transfer of Orchard House to the Company in May 1987, David and Andrew signed a document which stated that, in consideration of the sale by Robert and Dorothy to the Company, David and Andrew '*hereby undertake not to exercise those voting rights vested in them by virtue of their shareholding in the Company so far as they relate to the disposal management operation or any use of Orchard House; meaning that any decision on the future use or disposal of Orchard House shall be decided by all the Shareholders of the Company as if they each had equal voting rights and should Orchard House be sold the whole of the proceeds of sale shall be divided equally amongst all six....It is understood the Agreement relates expressly only to Orchard House and no other property owned by the Company*'.

54. By an amendment to the last Will of Robert made on 28 July 2001 it was noted that Orchard House was owned in equal parts by Jean-Mary, David, Peter, Andrew and John (who held a one third share including Bernard's share).

55. On the second day of the hearing I was handed a number of emails sent between the siblings between February 2009 and February 2010. It is clear that Orchard House needed extensive repairs. It was also proposed that the house be sold as a hotel. Planning permission had been applied for in January 2008 and was withdrawn in March 2008. The potential for the garden to be developed as housing was recognised. David initiated the correspondence asking his siblings at what price they would be prepared to sell their share. The correspondence is clearly based on the assumption that the shares in Orchard House were held equally.

56. On 11 August 2009 a meeting was held at Orchard House between David, Peter and Andrew. This dealt with the need for repairs at Orchard House and proposed

developments of the garden. It is interesting to note that it was noted that as Bernard did not own any of Orchard House accounts would be kept separately *'so that he would not lose out'*

57. At the conclusion of the meeting Peter asked David if he would sign the declaration of trust for Orchard House and another property at Midland Road. David said he would not as it would weaken his position. He also added that *' it didn't matter as the piece of paper we all hold shows that we are the legal owners anyway'*. David agreed to sign.

58. On 10 August 2011 the Company executed a deed of trust declaring that Orchard House was held on trust for 5 of the siblings (the beneficiaries) in the shares there set out. The declaration recites that the transfer to the Company on 6 May 1987 was as trustee for the siblings. This document lead to the restriction being entered on the title.

59. Andrew's evidence on this point is that there was no doubt in his mind, or that of the other siblings, that Orchard House was held on trust for the siblings, and that beneficial ownership was not dependent on shareholding. He referred to the August 2009 meeting as confirmation that David accepted this position. However, as he did not entirely trust him, he and the other siblings were keen to ensure that a deed was entered into to confirm the position. The 2011 deed merely evidenced what had already been agreed. It was precisely because the shareholding in the Company was not equal that there had always been an agreement that the shareholding in Orchard House was equal. I found Andrew to be an honest and straightforward witness. I do not accept that by January 2010 the beneficiaries of the trust were the shareholders of the Company (then apparently held only by David and his companies, Matthew and his siblings).

60. It seems to me that the relevance of the trust point is that, in deciding to execute a document in 2013 which was meant to replicate the 2010 lease, David (and probably Matthew) were well aware that the lease had to predate the 2011 deed of trust and the entry of the restriction on the freehold title of the Disputed Land.

Paragraph 2 of Schedule 3 to the Act

61. Under the special priority rule set out in section 29 of the Act a registered disposition of a registered estate takes effect subject to certain unregistered interests which 'over-ride' the

disposition. It is Matthew's case that his equitable leasehold interest, coupled with his actual occupation of the Disputed land, is such an interest. To qualify it must fulfil the test set out in paragraph 2 of Schedule 3. His interest would over-ride unless his occupation was neither reasonably discoverable nor his interest actually known to Christopher.

62. I do not need to consider this point further in view of the fact that:
   a) Had he been granted a lease in 2010 this lease, even if not registered, would have taken priority over the disposition to Christopher and Peter, neither of which were for valuable consideration and
   b) Even though I have found that the Company held the Disputed Land on trust for the siblings, the grant of the lease would have been protected by section 26.

63. In short, if the lease had been granted in 2010, Matthew would not have needed to rely on paragraph 2 of Schedule 3.

Conclusion

64. The case stands or falls on whether or not a lease was granted by the Company to Matthew, as alleged, on 3 January 2010. For the reasons given, I am satisfied that it was not. I will accordingly order the Chief Land Registrar to cancel the application to register the lease.

65. This leaves the question of costs. In principle, Christopher, as the successful party, is entitled to his costs since the date of the reference. A schedule in Form N260 or the like is to be filed and served within 14 days of receipt of this decision. Matthew may raise such objections as he deems appropriate within a further 14 days. I will then consider what order to make.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 17th day of October 2018.