

[2019] UKFTT 0160 (PC)

PROPERTY CHAMBER

FIRST-TIER

TRIBUNAL

LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

2017/0314 and 2018/0283

BETWEEN:

JAMES ANTHONY DALE

APPLICANT

and

JOHN GLYNN JONES

RESPONDENT

Property Address: Land lying to the North East and South West of White House,
Binweston Lane, Worthen, Shrewsbury SY5 9JG

Title Number: SL181889

Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the
First-tier Tribunal

The Chief Land Registrar is directed:

1. To give effect to both the Applicant's original applications as if the objections had not been made.
2. Pursuant to rule 40(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber Rules 2013:

(1) to enter the benefit of a right of way on foot and by vehicle for all agricultural purposes over the land the subject of these proceedings by virtue of s.6 Conveyancing Act 1881 (“the right of way”) on titles SL181888 and SL181889.

(2) to enter the burden of the right of way on title SL235146.

Dated 12 February 2019

Senior Brindley

**BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST –
TIER TRIBUNAL**

Land Registry Notice plan

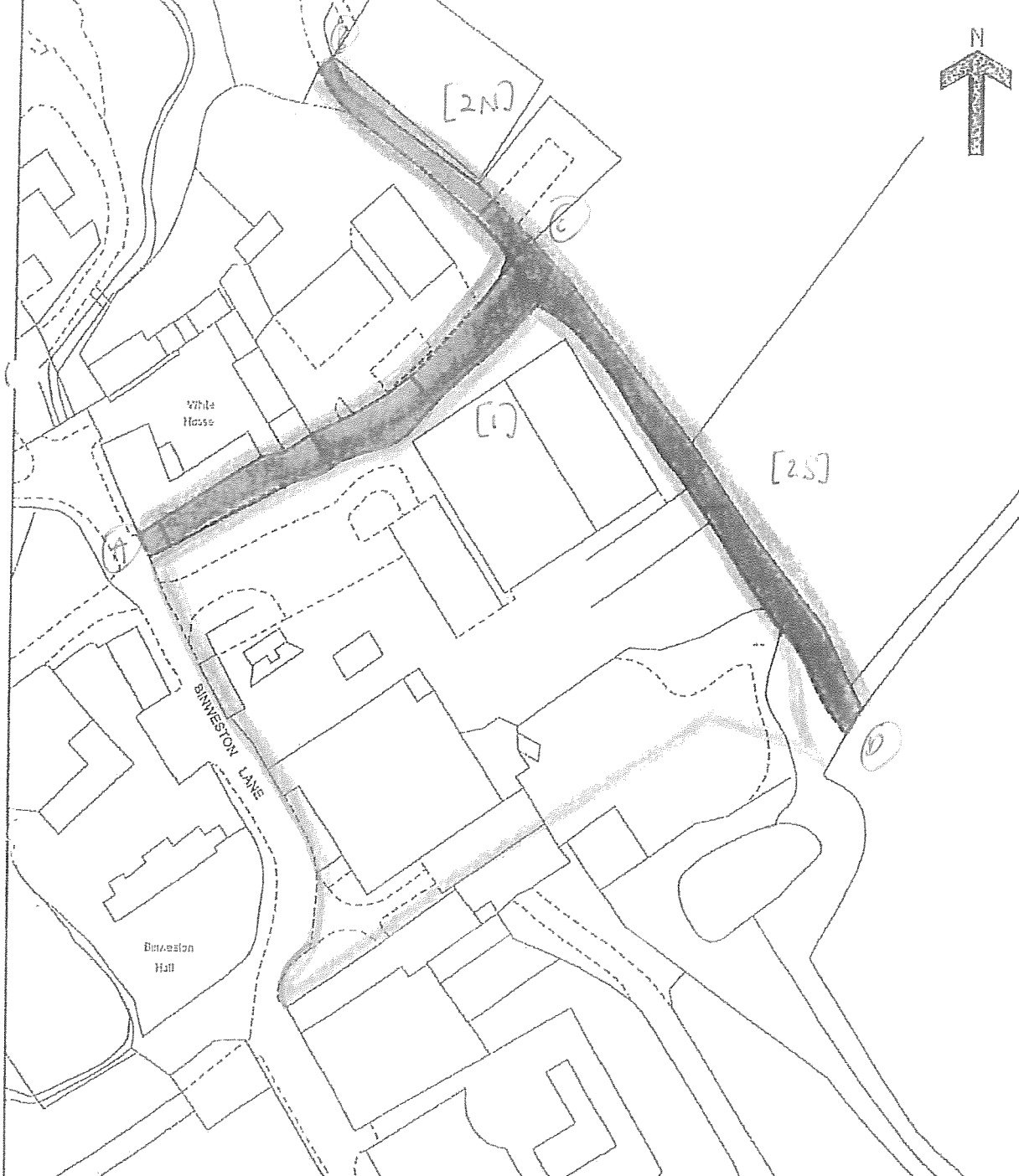
Title number SL181889
Ordnance Survey map reference SJ30045W
Scale 1:1250 enlarged from 1:2500
Administrative area Shropshire



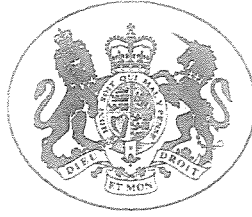
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This is the plan referred to in the accompanying notice dated 25/05/2016 Title no. SL181889



This plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground.



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Title Number: SL181889

Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the
First-tier Tribunal

Sitting at: Employment Tribunal, Alexandra House, 14-22 The Parsonage,
Manchester M3 2JA.

On: 23 November 2018

Site view: 22 November 2018

Alteration of the register - rectification - T shaped track abutting two adjacent farms - respondent registered as the proprietor of the track - issue as to whether the applicant or the respondent has a paper title to the track – if the applicant has a paper title issues as to whether the respondent is a proprietor in possession or whether there are exceptional circumstances not to make an order for rectification

Wheeldon v Burrows (1879) 12 Ch D 31; JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419; R (on the application of Smith) v The Land Registry [2009] EWHC 328 (Admin); R (on the application of Best) v The Land Registry [2015] EWCA Civ 17

Introduction

1. These proceedings concern title to a T shaped track ("the track") abutting two adjacent farms near to the village of Worthen, which lies 30 miles to the west of Shrewsbury.
2. The plan annexed hereto shows the track coloured red. The vertical section of the T shape will be referred to as "track [1]" and the longer horizontal section of the T shape will be referred to as "track [2]". Track [2] will itself be divided into "track [2N]" between points B and C, and "track [2S]" between points C and D.
3. Track [1] runs from point A in the south west to a point just south west of point C. Track [2] runs from point B in the north west, through point C, to point D in the south east.
4. Mr Dale, the applicant, is the registered proprietor of Binweston Hall, Worthen, Shrewsbury SYS 9JG ("Binweston Hall"), which is registered at Land Registry under title number SL235146.
5. This title includes a house, yard and silage pit. Mr Dale was registered as the first proprietor of Binweston Hall on 26 August 2015, although the property has been in his family since 1965.
6. Binweston Hall is bounded on its north west side by track [1], and on its north east

side by track [2S].

7. Mr Jones, the respondent, is the registered proprietor of two relevant titles:

(1) White House, Binweston Lane, Worthen, Shrewsbury SYS 9JG, which is registered at Land Registry under title number SL181888.

(2) Land lying to the North East and South West of White House, which is registered at Land Registry under title number SL181889.

8. These titles ("the White House land") include a house and yard, together with a large area of farmland to the north east and south east. Mr Jones was registered as the proprietor of both titles on 15 December 2006, although these properties have been in his family for three generations.

9. Track [1] abuts the south east side of part of the White House land, and the north west side of Binweston Hall. Track [2N] runs between parts of the White House land. Track [2S] abuts the south west side of part of the White House land and the north east side of Binweston Hall.

10. The plan annexed shows, for illustrative purposes, Binweston Hall edged in green, and the relevant part of the White House edged in blue.

11. The whole of the track is registered within the titles of the White House land.

The applications

12. On 2 February 2016, Mr Dale made an application to alter the title plan of one of the White House land titles, number SL181889, by removing part only of the track and having that part of the track included within the title plan of Binweston Hall ("the first original application").

13. On 10 June 2016, Mr Jones objected to the first original application on the grounds that

he had a good paper title to this part of the track, alternatively that he was a proprietor in possession of that part of the track and rectification of the register should be refused under paragraph 6(2) of schedule 4 to the Land Registration Act 2002 ("the Act").

14. On 20 March 2017, the dispute was referred to the tribunal under the provisions of 73(7) of the Act and became reference 2017/0314.

15. On 11 December 2017, Mr Dale made a further application to alter the title plan of both the White House land titles by removing the remaining part of the track and have that part of the track included within the title plan of Binweston Hall ("the second original application").

16. On 18 January 2018, Mr Jones objected to the second original application. Again, this was on the grounds that he had a good paper title to the remaining part of the track, alternatively that he was a proprietor in possession of the remaining part of the track and rectification of the register should be refused under paragraph 6(2) of schedule 4 to the Act.

17. On 29 March 2018, the dispute was referred to the tribunal under the provisions of 73(7) of the Act and became reference 2018/0283. Both references have been case managed heard together.

18. There are, accordingly, two issues in these proceedings:

(1) Which of the parties has a good paper title to the track?

(2) If Mr Dale does have a good paper title, should alteration of the register nevertheless be refused because Mr Jones is a proprietor in possession or there are exceptional circumstances which justify not making the alteration?¹

¹ Paragraph 1 of schedule 4 to the Act provides that references to rectification, in relation to alteration of the register, are to alteration which involves the correction of a mistake and prejudicially affects the title of a registered proprietor. Paragraph 5(a) provides that the registrar may alter the register for the purpose of correcting a mistake. Paragraph 6(1) applies paragraph 6 to such a power, so far as relating to rectification. Paragraph 6(2) provides no alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor's consent in relation to land in his possession unless (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or (b) it would for any other reason be unjust for the alteration not to be made. Paragraph 6(3) provides that if on an application under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are

The first issue

19. The parties' relevant titles first became divided on 29 September 1920. The same vendors conveyed on that day:

(1) certain land to John Jones, William Edgar Jones and Margaret Jones whose address was given as Binweston Hall ("the first 1920 conveyance");

(2) certain land to John Thomas Jones and Thomas Percy Jones whose address was given as the White House ("the second 1920 conveyance").

20. The parcels clause in the first 1920 conveyance is as follows:

All that messuage or tenement farm buildings and land known as Binweston Hall containing 321.765 acres or thereabouts situated in the Parish of Worthen in the said County of Salop formerly in the occupation of Jane Brown and now of the Purchasers which said premises are more particularly described in the First schedule hereto and are for the purpose of identification only shown on the plan drawn on the back of these presents and are thereon coloured pink

21. The First schedule contains the following:

OS Map No	Description	Acreage
2025	Road	.191
2085	do	.310

22. It is clear from the plan to the first 1920 conveyance that:

- (1) area 2025 is track [1] and
- (2) area 2085 is track [2].

exceptional circumstances which justify not making the alteration. In these proceedings the tribunal is exercising the powers of the registrar.

Both the numbering and the measurements correspond.

23. The parcels clause in the second 1920 conveyance is as follows:

All that messuage or tenement farm buildings and land known as The White House situate at Binweston Lane in the Parish of Worthen in the County of Salop containing 137 acres three roods and thirty five perches or thereabouts now in the occupation of the purchasers the particulars [illegible] in the First schedule hereto and which said hereditaments by way of identification are delineated and coloured pink on the plan annexed hereto

24. The First schedule contains no reference to areas OS 2025 or OS 2085. The plan to the second 1920 conveyance identifies area OS 2025, but track [1] is uncoloured. On the other hand, it does not refer to area OS 2085, but track [2] is coloured pink.

25. Mr Dale has a good root of title to Binweston Hall from the first 1920 conveyance. The deed of partition, dated 30 April 1988, made between Mr Dale Senior and his siblings does include a conveyance of the track. Mr Jones has a good root of title to the White House land (or at least part of it) from the second 1920 conveyance. In his closing submissions Mr Evans, on behalf Mr Jones, argued that, on the plan to the second 1920 conveyance, (1) areas OS 2027, OS 2028 and OS 2029 included area OS 2085, and (2) areas OS 2026 and OS 2046 possibly included area OS 2025.

26. I am unable to accept this submission. The above summary shows that there is overwhelming evidence that the first 1920 conveyance conveyed the track to Mr Dale's predecessors in title, the then occupants of Binweston Hall.

The second issue

27. Unlike the first issue, the second issue involves considering the geography of the track and evidence of fact. The question is was Mr Jones in possession of the track at the date of the original applications?

A brief outline of the conveyancing history of Binweston Hall and Mr Dale's witnesses

28. In 1965, Binweston Hall and other land, including the track, came into the Dale family when it was purchased by Mr JH Dale. In 1974, Mr JH Dale conveyed this land to Mr Dale's father, Mr JC Dale ("Mr Dale Senior") and three other family members. In 1988, Binweston Hall, including the track, was conveyed to Mr Dale Senior by a deed of partition. In 2015, Mr Dale Senior transferred this land to Mr Dale.

29. Mr Dale gave oral evidence. He called:

(1) Mr Dale Senior.

(2) Mr Gittins, who has worked as a tractor driver and general farm worker at Binweston Hall since 1993.

A brief outline of the conveyancing history of the White House and Mr Jones' witnesses

30. As I have said, the White House land has been in Mr Jones' family for three generations. This was since the second 1920 conveyance. Mr Jones' immediate predecessor in title had been his father ("Mr Jones Senior") who died in 2005. He had owned the White House land since 1965. The White House land was transferred to Mr Jones in 2006, which prompted first registration.

31. Mr Jones gave oral evidence. He called Ms Sargeant, his partner of 18 years. He also put in evidence a letter from Mr Ryder who worked for Mr Jones Senior on White House farm. He recalls concreting a silage pit floor and the track down to the road (this must be track [1]) in Spring 1982.

What is possession?

32. As Lord Browne-Wilkinson pointed out in the different context of adverse possession in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 [40]: there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control (factual possession);

and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess). Both elements need to be present.

33. It is to be noted that exercising a right of way over land is entirely different from having possession of the land. A right of way is a right which burdens land in the possession of another.

The geography

34. I have had the benefit of a site view, numerous photographs in the hearing bundle and the photographs taken by the Land Registry surveyor during the course of his survey on 12 October 2015 ("the Land Registry survey").

35. The Land Registry survey plan shows three points of access from the White House land onto track [1]. There is only one point of access onto the track from Binweston Hall. This is from Binweston Lane onto track [1] at point A.

36. Looking from Binweston Lane, Mr Jones' milking barn is on the left hand side of track [1] immediately behind point A. Mr Jones has installed a gate across track [1] at the side of the milking barn, close to point A.

37. Mr Jones' predecessor in title, Mr Jones Senior, laid tarmac on track [1] near to his milking barn and further up the track.

38. There is a public bridleway running along track [1] from point A to point C, which then runs left along track [2N] to point B and beyond.

39. Just past Mr Jones' milking barn, there is an old gatepost where a gate had once been situated across track [1].

40. Immediately past this old gatepost, there are situated on the left hand side of track [1] Mr Jones' Dutch Barn, which is used for the storage of hay, and his cowshed.

41. Mr Jones Senior laid a further area of tarmac on track [1] near to his hay barn. The Land Registry survey describes track [1] as a metalled concrete driveway.

42. Opposite Mr Jones' Dutch Barn and cowshed, there is second gate which Mr Jones has installed across track [1]. This gate is not locked.

43. Turning left at the top of track [1] onto track [2N], there is a ménage built by Mr Jones on the right hand side. There is a gate at point B leading on to further land belonging to Mr Jones.

44. Turning right at the top of track [1] onto track [2S], just past point C there is on the right a third gate which Mr Jones has installed across track [2S].

45. Further down, on the right hand side of track [2S], is situated Mr Dale's silage pit ("the silage pit"). The silage pit is covered over and protected by large areas of plastic upon which there have been placed a large number of tyres. The site of the silage pit used to be a field. It was excavated in 1973/4, since when it has had its present use.

46. Mr Jones has erected a wire fence along the right hand side of track [2S], and there is a barbed wire fence and hedge along the left hand side of track [2S]. The Land Registry survey describes Track [2] as an unmade track.

47. There is a gate at point D leading on to further land belonging to Mr Jones.

48. At some point during this litigation one of the gates along the track was locked, but it is no longer locked.

49. Mr Dale only uses the track for one purpose. That purpose is to gain access to the silage pit. The grass which is to be turned into silage is placed in the silage pit from Binweston Hall, not from the track.

50. However, the tyres must be removed from the silage pit each time new grass is placed in it. They are taken from the silage pit and placed on track [2S] for a short while until the work on the silage pit is completed and they can be replaced on top of the silage pit.

51. In order to gain access for this work, those working for Mr Dale have to use track [1] and track [2S]. This same route is used when new tyres are needed.

Mr Jones' case

52. Mr Jones' case is as follows:

(1) Not only is there no access from Binweston Hall to the track, but there is a considerable height difference between the properties.

(2) Access to the track for Mr Dale and his predecessors in title to move the tyres from the silage pit onto track [2S] and to deliver new tyres has always been by consent. On the other hand, Mr Jones and his predecessors in title have always used the track without the consent of Mr Dale or his predecessors in title.

(3) The following activities have been carried out on the track by Mr Jones and his predecessors in title:

(a) Erecting gates.

(b) Installing security lighting.

(c) Putting down concrete along track [1]. Mr Jones has produced a diary of Mr Jones Senior dated 13 April 1996 where he records that he has put 30 tons of stone on the track. He has also produced diaries between 1980 and 1983 showing concreting of the track. There is no mention of any consent being given by Mr Dale Senior.

(d) Putting up fencing along track [2S].

(e) Cutting the hedge along track [2S].

(f) Locking a gate on the track.

(4) Mr Jones has submitted a number of planning applications which show the track as part of the White House land. Mr Dale has never taken a point on this. Mr Dale is only claiming ownership of the track to thwart planning permission Mr Jones has been granted.

(5) Mr Jones' predecessors in title granted rights in respect of a water pipe to a neighbouring farmer, Mr Payne, by a deed dated 3 January 1985. The plan to the deed showed the track coloured pink as part of the White House Land.

(6) The track is the only means of access to some of the fields within the White House land.

(7) A cropping agreement with Mr Dale made in 2013.

Mr Dale's case

53. Mr Dale's case is as follows (using the same paragraph numbers):

(1) It is accepted that there is no access directly from Binweston Hall to the track, but access is gained via Binweston Lane to point A. Mr Dale uses a track to enable him to remove tyres from the silage pit, keep them for a short time on the track, and then replace them once the fresh-cut grass has been covered in plastic. Sometimes new tyres are taken down the track to the silage pit. There is no difficulty in moving the tyres over the fence along track [2S], so any difference in levels between the two properties is of no consequence.

(2) Mr Dale denies that consent has ever been given for him to access the silage pit. He accepts that he has never given permission to Mr Jones to use the track for his purposes.

(3)(a)-(c) Mr Dale accepts that Mr Jones has erected gates, installed security lighting and put down concrete along track [1]. However, all these activities must be seen in their context. When Mr Jones takes a significant number of cattle down to the milking shed from his fields or cattle shed, many of the animals have to be left standing outside the milking shed on the track for some time before they return to graze. The amount of mess made by the cattle on the unmade compacted soil surface of the track when this happened had a very adverse effect on the drainage. The mess was very difficult to clean up and created a run off which would have blocked the drains. Accordingly, the concrete was put down, not as an assertion of possession, but to better enable the carrying out of the milking of the cattle.

(3)(d) Mr Dale accepts that Mr Jones put fencing along track [2S]. However, this was done for the purpose of protecting his livestock from entering the silage pit. Originally, Mr Jones had fixed barbed wire the top of the fence. But Mr Dale removed it, without any protest from Mr Jones, and it remains rolled up at the side of the silage pit and not in use. Moreover, the fence has had no effect on the operations carried on by Mr Dale at the silage pit. Mr Dale's employees and contractors simply pass the tyres over it. This is been done without any protest prior to this litigation.

(3)(e) Mr Dale said that after Binweston Hall was transferred to him, he began cutting the hedges on track [2S]. He travelled along the track regularly, so he simply trimmed the hedge back to allow ease of access. Mr Jones chipped in with that task and occasionally cut the hedges, as he himself was using the track regularly. There came a time when they stopped cutting the hedges, but the track still remained accessible. Mr Jones only started cutting the hedge again after this dispute had begun, and this work has been invoiced to Mr Dale who paid for it to be done.

(3)(f) Mr Dale accepts that Mr Jones has erected gates to the track. This was not done to prevent entry by anyone, but to keep the cattle under control whilst they were being milked. The gates have not been locked, at least until this dispute arose, and there is no gate which is locked any more.

(4) Mr Dell accepts that a number of planning applications have been made by Mr Jones. He had no reason to object to them. Until the application made in 2015, this was because none of them sought to use the track as a means of access. Although Mr Dale did not object to the application is made in 2015, this threw up the dispute about access and the first original application was made shortly afterwards.

(6) The cropping agreement did not relate to any part of the disputed land.

(7) There is a public right of way running across track [1] and track [2N].

Discussion

54. The burden of proof on the second issue is on Mr Jones. There is no presumption that as the registered proprietor, he is in possession until this is rebutted.

55. One point can be disposed of quickly. The presence of a public right of way over part of the track does not assist Mr Dale. There was a right of way across some of the disputed land in Pye. R (on the application of Smith) v The Land Registry [2009] EWHC 328 (Admin), referred to in Mr Byrne's skeleton argument, has to be read in the light of the subsequent decision of the Court of Appeal in R (on the application of Best) v The Land Registry [2015] EWCA Civ 17.

56. One striking feature of the case is that it is common ground Mr Jones is allowed to use the track to take his cattle to and from the milking shed and to stand some of the cattle on the track whilst others are being milked. He also has full use of the track to gain access to his land.

57. There was little analysis of this activity at the hearing, save that Mr Jones relied upon it as part of his claim to have possession of the track.

58. In my judgment the use made of the track by Mr Jones amounts to an easement. Mr Jones uses the whole of the track for agricultural purposes. He needs to use both limbs of track [2] to gain access to his fields at points B and D. Indeed, in his oral evidence he

described the track as the artery of his farm. I agree with that description.

59. It seems to me that there are sound reasons why the owners of the White House Land have the benefit of an easement for agricultural purposes over the track.

60. It is apparent from both the 1920 conveyances that the respective purchasers were in occupation of their respective properties. The likelihood is that the occupiers of both properties were making use of the track for agricultural purposes.

61. In the circumstances, the owners of the White House Land acquired an easement over the track under s.6 Conveyancing Act 1881 (now s.62 Law of Property Act 1925). It does not matter that at the date of the conveyance, the quasi-servient tenement is occupied by another tenant of the same landlord (see Gray Elements of Land Law at paragraphs 5.2.42³).

62. If I am wrong on that, plainly prescriptive rights in favour of the White House land over the track have arisen.

63. The activities of Mr Jones and his predecessors in title, namely (1) erecting gates, (2) putting down concrete along track [1], putting up fencing along track [2S], and (3) cutting the hedge along track [2S] are all referable to the use of the right of way over the track and are not in my judgment, on the particular facts of this case, acts of possession.

64. The putting up of security lighting is equivocal because the lights protect the White House land as well as the track. The locking of a gate along the track only occurred after this litigation arose and therefore carries little if any weight. Mr Dale has explained why he has never objected to any of the planning applications, and that the cropping agreement relates to different land.

65. On the issue as to whether or not Mr Dale or Mr Dale Senior ever asked Mr Jones or Mr Jones Senior permission to use the track for the purpose of moving tyres to and from the silage pit, I prefer the evidence of Mr Dale, Mr Dale Senior and Mr Gittins to that of Mr Jones and Ms Sargeant.

66. Mr Jones has convinced himself that permission was given. I do not believe he is trying to mislead me. However, I consider it highly unlikely that, as he suggests, access has always been allowed with permission and that Mr Gittins has approached him on several occasions to request access (see paragraph 7(1) of Mr Jones' second statement of case and paragraph 14 of his second witness statement).

67. This leaves the evidence of the 1985 grant of rights in respect of the water pipe. At the most this is evidence of an intention to possess, it is not evidence of factual possession.

68. The issue of possession of the track is best summed up by the Land Registry survey:

There are no signs to indicate the obvious owner of the track. It is obviously used by both farmers to access their farms and the general public to use the public footpath

69. Mr Jones is not therefore a proprietor in possession of the track. Nor, do I consider there is there any other reason why it would be unjust for the alteration of the register not to be made.

Conclusion

70. I shall therefore direct Land Registry to give effect to both original applications as if the objections had not been made. I will also direct Land Registry to enter the burden and benefit of a right of way over the track in the respective registers.

71. Mr Dale is entitled to his costs. He must within 14 days of receipt of this decision provide to Mr Jones and the tribunal a schedule of costs in form N260. Mr Jones must within 14 days of receipt of the schedule of costs provide to Mr Dale and to the tribunal any representations about or objections to the schedule of costs. I will then decide whether to carry out a summary assessment or to direct a detailed assessment.

Dated this 12th day of February 2019

Simon Brillant



BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE
FIRST-TIER TRIBUNAL