



[2017] UKFTT 0759 (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: 2016/1008

BETWEEN

John Henry Lloyd (1) and Sheila Mary Lloyd (2)

Applicants

and

Bairn Investments Limited (1)

Robert Kynaston Owen (2)

and

Henry Knott (3)

Respondents

Property address: Land at Winwoods Farm, Kinlet, Bewdley DY12 3HQ

Title numbers: SL138805 and WR156985

Before: Judge John Hewitt

ORDER

Is Ordered that:

1. The Chief Land Registrar shall cancel the original application dated 25 June 2015 to alter the register; and
2. Any application for costs shall be made in accordance with the directions set out in paragraph 62 of the decision dated 22 September 2017.

Dated this 22 September 2017

John Hewitt

By Order of the Tribunal





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Title numbers: SL138805 and WR156985

Before: Judge John Hewitt

Sitting at: Birmingham Employment Tribunal

On: Tuesday 12 September 2017

DECISION

Representation:

Applicants:	Mr Brett Wilson	Counsel
1st Respondent:	Ms D Harris	Lay Representative
2nd Respondent:	None	
3rd Respondent:	None	

KEYWORDS Rectification of the register – mistake – registered proprietor in possession- unjust not to alter – exceptional circumstances

Cases referred to

Balevents Limited (1) and The Rocket Club Restaurant Limited v Allan James Sartori [2014] EWHC 1164 (Ch) (Morgan J)

The issue before the tribunal and its decision

1. The issue before the tribunal is whether the register of title number SL138805 should be altered to correct a mistake by removing from the title plan the land coloured pink on an illustrative plan prepared by Land Registry to accompany its letter dated 27/10/2015 [41], such land being a track known as 942 (the 942 track) leading (ultimately) towards Winwoods Farm.

2. The Decision of the Tribunal is that:
 - 2.1 The Chief Land Registrar shall cancel the original application dated 25 June 2015 to alter the register; and
 - 2.2 Any application for costs shall be made in accordance with the directions set out in paragraph 62 below.

3. The reasons for the decisions made are set out below.

NB later reference to a number in square brackets ([]) is a reference to the page number of the trial bundle provided to me for use at the hearing.

Background to the application and the history leading up to it

4. There is a track leading from the public highway, Sturt Lane to Winwoods Farm. Historically, and for Ordnance Survey purposes, the first part of the track was designated 942 and the second part 766. The tracks can be seen on the illustrative plan prepared by Land Registry at [41]. The land tinted pink is the 942 track and the land tinted blue is the 766 track. Winwoods Farm to just off to the east of the eastern end of the 766 track.

5. In all probability, at one time the two tracks would have been in common ownership as part of the Kinlet Estate. At some time, in the early to mid-part of the 1900s it appears they came into separate ownership.

6. For reasons, I shall explain shortly the paper title to the 942 track was vested in the applicants, Mr & Mrs Lloyd, having inherited parcels of farm land from Mr Lloyd's late father, Henry John Lloyd. Unbeknown to Mr & Mrs Lloyd, in 1991 both the 942 track and the 766 track were registered at Land Registry as being part of Winwoods Farm, the title number of which is now SL138805 [83]. On 16 July 2001 the first respondent (Bairn Investments) was registered at Land Registry as proprietor of title number SL138805.

7. By a transfer of part in form TP1 dated 27 February 2014 [25] Mr & Mrs Lloyd sold a parcel of some 14 acres of land to a David Charles Withey and Victoria Rosalind May.

The root of title being a conveyance dated 27 May 1953 Olive Mary Jefferies to Henry John Lloyd. In panel 2 against the question concerning other land affected, the form TP1 records: *“TOGETHER WITH a right of way at all times and for all purposes over and along the strip of land coloured brown on the plan attached”*. A copy of the plan is at [30] and the strip coloured brown is the 942 track and the 766 track together which was said to be unregistered land retained by Mr & Mrs Lloyd.

8. Mr Withey and Ms May sought first registration of their purchase and Land Registry allocated title number SL226509. Land Registry noted that the track coloured brown on the TP1 plan was included (with other land) on the title plan of SL138805. Bairn Investments were notified of the application and objected to the entry of the burden of the right of way in the register of its land. The disputed application was referred to the Land Registration division of the First-tier Tribunal (Property Chamber) and allocated Case Ref: 2015/0563. That application is currently stayed pending the outcome of the application presently before me.
9. On 3 February 2015 Mr & Mrs Lloyd made an application for first registration of a parcel of land and Land Registry allocated title number WR156985. The application included the whole of track 942 and track 766. Land Registry excluded both tracks on the footing that they were already included in Bairn Investments' title number SL138805.
10. On 25 June 2015 Mr & Mrs Lloyd made an application to Land Registry to alter the title plan of SL138805 to remove tracks 942 and 766 from it. (Curiously the application did not provide for those tracks to be included in the title plan of title WR156985). The basis of the application was that there was a mistake in the register that should be corrected under paragraph 5(a) of Schedule 4 to the Land Registration Act 2002 (the Act).
11. The three respondents objected to the application and on 14 November 2016 the Chief Land Registrar referred the disputed application to the tribunal. Directions were duly given and the referred application came on for hearing before me. The second and third respondents have not taken any part in the proceedings and have not filed statements of case. I am satisfied that each of them was notified of the arrangements for the hearing by letters dated 17 July 2017 sent to them by the tribunal's office. Ms Harris, the first respondent's lay representative, told me that she was in touch with both Mr Owen and Mr Knott and that neither of them proposed to attend the hearing.

In these circumstances, I had regard to rule 34. I was satisfied that each of the second and third respondents had been notified of the hearing and I considered it was in the interests of justice to proceed with the hearing in the absence of the second and third respondents and I did so.

12. On the afternoon of 11 September 2017, I had the inestimable benefit of a site visit. Present were Mr & Mrs Lloyd accompanied by a friend, Mr Birch, and their counsel, Mr Brett Wilson, and Ms Harris on behalf of Bairn Investments. We walked the whole length of tracks 942 and 766 and along the way a number of physical features of the tracks and adjoining land and property were drawn to my attention.

The hearing

13. At the hearing:

Mr & Mrs Lloyd were represented by Mr Brett Wilson of counsel. Mr Wilson called both Mr & Mrs Lloyd to give oral evidence on oath.

Bairn Investments were represented by Ms D Harris. Evidently Bairn Investments is a company incorporated in the Isle of Man which is beneficially owned by members of the Millman family. No witness statements had been filed by or on behalf of Bairn Investments, but Ms Harris wished to call Mr Luke Millman, a son of the owners, to speak, so far as he could, on matters raised by Bairn Investments in its statement of case. In the absence of objections by Mr Wilson I allowed Mr Luke Millman to give oral evidence and he did so on oath.

Matters not in dispute

14. As the hearing developed there were relatively few key facts in dispute. A large amount of the conveyancing background was not in dispute.

15. Inevitably as a result of the two applications made to Land Registry, its officials carried out investigations of a number of paper title documents provided by the parties. Land Registration came to the view that Mr & Mrs Lloyd could show a paper title to track 942 but not to track 766.

16. At the hearing Mr Wilson was able to produce the originals of a 1922 abstract of title, a 1936 abstract of title and the 1953 conveyance. All of those instruments concerned a number of parcels of land and all make express reference to track 942. It was plain to me, and accepted by Ms Harris, that a good root of title for track 942 goes back to 1922, which supports the 1953 conveyance by Olive Mary Jefferies to Henry John Lloyd from whom Mr & Mrs Lloyd inherited the land.

17. Mr Wilson accepted that Mr & Mrs Lloyd are unable to show a paper title to track 766 and they no longer sought to remove that track from the plan of title number SL138805. Mr Wilson accepted that track 766 belongs to someone else but he was not prepared to accept that Bairn Investments can show a historic paper root of title.

18. Also at the hearing Ms Harris was able to produce the original of a 1920s deed which makes reference to track 766. Evidently Bairn Investments had produced to Land Registry documents from which Land Registry drew the following conclusions:

18.1 A conveyance dated 25 March 1929 (Tolley to Wakeman and Wakeman) in which the parcels of land conveyed were set out in a schedule and in which there was express reference to OS 766, but no reference to OS 942; and

18.2 A conveyance dated 28 April 1955 (Wakeman and Wakeman to Smith and Smith) in which the parcels of land conveyed were set out in the Second Schedule and in which there was express reference to OS 766 but no reference to OS 942, but a plan said to be for identification only appeared to show OS 942 included in the colouring of the land conveyed.

Ms Harris was not able to show a paper title trail showing the transmission of tracks 766 or 942 to Bairn Investments.

19. Winwoods Farm was acquired by the Owen family in 1972 who continued to run it as a working agricultural farm.

On 12 December 1991 David Charles Wynn Owen and Robert Kynaston Owen (as Transferors) executed a number of instruments of transfer as follows:

19.1 **‘Winwoods Farm’**

Transferred to ICBT Company Limited (controlled by the Currie family).

The transfer granted a right of way in these terms:

“A right of way for the Transferee [ICBT] and the owners for the time being of the property hereby transferred over and along the track coloured green on the Plan annexed hereto with or without vehicles and animals the transferee as an incident to user contributing a rateable or due proportion to the maintenance of the said track in proportion to user.”

A copy of the plan referred to is said to be at [87]. That plan certainly shows a track coloured green which comprises both tracks 942 and 766, but it also shows edged red a parcel of land which appears to be Winwoods Farmhouse which was conveyed separately.

ICBT made an application for first registration of Winwoods Farm and it was allocated title number SL69725.

19.2 **‘Winwoods Farmhouse’**

Transferred to Ian Jonathan Currie and Julie Currie.

The transfer granted a right of way in these terms:

“The property is transferred TOGETHER WITH a right of way at all times and for all purposes over and along the driveway or roadway leading to the property (the driveway) shown coloured green on the plan attached hereto SUBJECT TO the Transferees as incident to user paying a proportionate part according to such user for the maintenance and repair of the driveway AND TOGETHER ALSO with the right to use and maintain the water supply pipes and all electricity telephone and other cables or wires in under or over the driveway and to the running and passing of water and all other services through such pipes wires or cables or any replacements thereof.”

The transfer contained a covenant in these terms:

“The Transferors hereby jointly and severally covenant for themselves and their successors in title to Winwoods Farm for the benefit of the Transferees and their successors in title to the property hereby transferred that they will at all times hereafter subject to receiving a pro rata contribution from the Transferees ... maintain the driveway coloured green on the plan annexed

hereto and maintain renew and relay all pipes wires and cables so as not to interrupt the supply of electricity water and telephone and/or other services.”

There was also a covenant not to obstruct the driveway coloured green on the plan.

As mentioned above I find it is more likely than not that the plan at [87] is the plan annexed to this transfer.

Mr & Mrs Currie made an application for first registration of Winwoods Farmhouse and it was allocated title number SL69723.

19.3 **‘Tracks 942 and 766’**

Transferred to ICBT.

I have not seen the transfer or extracts from it, but in a letter dated 27 October 2015 [39] Land Registry refers to it being lodged in support of the application for first registration of the tracks, which application was made by ICBT. As I understand it, no supporting paper title deeds were submitted with that application. It was supported only by a statutory declaration made by David Charles Wynn Owen dated 1 November 1991 [22].

That declaration shows that Mr Owen was of the view the family owned the track coloured blue on the plan [24] but not the short stretch at the western end, close to Sturt Lane, coloured red.

Land Registry accepted that evidence and decided to include the whole of tracks 942 and 766 in the title plan of SL69725, that it to say along with Winwoods Farm.

In a letter dated 21 August 2014 [19] reciting the history of registration of tracks 942 and 766 Land Registry said:

“Whether Land Registry’s interpretation of the extent of the land included in SL69725 was correct might be a matter of some debate but that is how the title number SL69725 was registered.”

19.4 **‘Woolaway Bungalow’**

Transferred to Robert Kynaston Owen and Margaret Lillient Owen.

The transfer granted a right of way in these terms:

“TOGETHER WITH a right of way at all times and for all purposes over and along the driveway leading to the same (hereinafter called ‘the Driveway’) shown edged green on the said plan SUBJECT TO the Transferees paying proportionate part according to user for the maintenance of the Driveway. AND TOGETHER WITH the right to use ... [water supply pipes, electricity and telephone cables etc]

So far as I am aware I was not shown a copy of the plan showing the driveway edged green.

As I understand it Mr & Mrs Owen still live in that bungalow, but it is now known as 'The Bungalow' Winwoods Lane, Kinlet. It is accessed off track 766 just past the water tank. Thus, to get to and from Sturt Lane Mr & Mrs Owen will need to travel along a short stretch of part of track 766 and then the whole of track 942.

20. As I understand it part of Winwoods Farm registered within title SL69725 and Winwoods Farmhouse SL69723 were acquired by Donald Robert Alexander Pain and Graham Douglas Pain in 1996 and those parcels of land were consolidated into title number SL138805.
21. Most of the detail mentioned in paragraph 19 above is taken from the current version of the register of title SL138805. It appears that in, at least 3 if not all four, of the transfers referred to in paragraph 19 there is a mention of a track coloured or edged green which appears to run from Sturt Lane to Winwoods Farm. I have only seen the plan at [87], which I think is the plan by which Winwoods Farmhouse was conveyed, but I infer that, as regards the track or driveway 'coloured' or 'edged' green, all of the plans will have shown the same track or driveway and that it denotes tracks 942 and 766. I do so because all four transfers were made by the same transferors, were all made on the same day and recorded in a series of related transactions. I infer that the same solicitors acted for the transferors on all of the transactions and in relation to rights and liabilities attaching to tracks 942 and 766 it is more likely than not that the same basic plan would have been deployed. I make this inference even though some of the language used in the instruments is not identical as regards the driveway.

In cross-examination Mr Millman said that tracks 942 and 766 together were some quarter of a mile in length and this was not disputed.

Factual matters on which there was some difference between the parties.

22. It is against the background that not surprisingly the Millman family have been under the impression that since Bairn Investments acquired the property in 2001, it has been the lawful registered proprietor of the whole of whole of the land included in the title plan for SL138805 and thus legal owner of tracks 942 and 766, subject only to the right of way vested in Mr & Mrs Owen.
23. Mr Wilson, on behalf of Mr & Mrs Lloyd accepted that Bairn Investments was a proprietor in possession of track 942 for the purposes of paragraph 6(2) of Schedule 4 to the Act, and so this point was no longer in issue.

Maintenance of track 942

24. In his oral evidence Mr Lloyd was cross-examined about his maintenance of the tracks. He said that he had carried out occasional maintenance over the years, mainly filling potholes. He said that he owned woodland to the left-hand side of track 942 close to Sturt Lane and on the woodland, he had a stock of planings or aggregates which he used to fill potholes from time to time. He said he did the work himself and did not employ contractors. He could not recall when he last repaired potholes. Mr

Lloyd denied that those planings had requested Mr Oliver Davies (Shoot Manager of Winwoods Farm) to place the planings there.

25. Mr Lloyd said that the successive owners of Winwoods Farm have carried out repairs to the track and they still do. He was happy to let them do so and did not object because they all had the right to use the track and they were the people who use it the most. For the same reason Mr Lloyd said that he had no objection to Winwoods Farm erecting signage at the junction of track 942 with Sturt Lane and further signage along the track itself. He said, and I accept that the signage did in any way denote ownership, it just identified the access to Winwoods Farm and sought to ensure the tracks were used safely.
26. Mr Luke Millman said that since 2001 Bairn Investments, through him and his family have regularly maintained and repaired the whole length of tracks 942 and 766, by laying chippings or planings and cutting the hedges on each side of the track. Mr Millman described the extent and frequency of use of the track by Winwoods Farm and type of agricultural machinery and livestock driven along it. Mr Millman was closely cross-examined about a claim that Bairn Investments has spent tens of thousands of pounds on the upkeep of the tracks. No documents to support that level of expenditure have been disclosed. I am not wholly persuaded about the level of expenditure alleged but I do find that over the years Bairn Investments has spent a substantial amount on the upkeep of the tracks, in the belief that it was the owner of them.
27. Mr Lloyd is aged 86 years and has some trouble with memory. I must therefore treat his evidence with some caution. As regards the upkeep of track 942 I accept his evidence that he has, over the years, occasionally filled pot holes, but that most of the maintenance and repair work has been carried out by the successive owners of Winwoods Farm. Mr Millman said that he had never seen Mr Lloyd carrying out maintenance work and I accept that. That does not mean Mr Lloyd has not done so. The track is quite long and although Mr Millman might travel along it regularly, or even frequently, on the occasional times when Mr Lloyd did carry out works, Mr Millman may well have been elsewhere.

Mr Luke Millman told me, and I accept, that whilst it was his parents who managed the acquisition of Winwoods Farm he was aware of the transaction because it was to be a family investment and he would be involved in it. He said that so far as he was aware due diligence was properly carried out and no issues or concerns or disputes over tracks 942 and 766 were flagged up. He said, and I accept, that the purchase price included tracks 942 and 766 at full value.

Ownership of track 942 and 'alternative means of access'

28. Mr Lloyd said that his parents moved to Pleasant View, Sturt Common, in 1936 and originally rented before buying the property in 1944. The conveyance is at [6]. In 1953 Mr Lloyd senior purchased further parcels of land from Olive Mary Jefferies, the conveyance is at [10] and included track 942. Mr Lloyd said that he inherited the land on the death of his father and that he has never sold, given away or signed any document disposing of the track to anyone.

29. In cross-examination Mr Lloyd appeared to concede that in fact the track was owned by Bairn Investments. In a careful and sensitive (but quite proper) re-examination it emerged that what Mr Lloyd meant was that he owned the track but Bairn Investments owned the right to use the track whenever it wanted to. Mr Lloyd also conceded that there could be no doubt that the track has always been the main track to Winwoods Farm and that it has rights to use the track.
30. Again, assessing the oral evidence carefully, I am satisfied that Mr Lloyd was doing his best to assist me and that he was an honest witness even though a little confused on some occasions. I have no hesitation in finding as a fact that at all material times Mr Lloyd thought that he was legal owner of track 942. Indeed, until relatively recently, he also thought he was the owner of track 766.
31. It may be helpful to record here that although Mr & Mrs Lloyd sold a large parcel of land to Mr Withey and Ms May, they retained a small field, 765, which lies to the north of track 766. I infer that having sold land to Mr Withey and Ms May, Mr & Mrs Lloyd may have contemplated using tracks 942 and 766 to get to and from Sturt Lane and field 765 in the belief that they had ownership of those tracks and thus the right to use them. If it were to turn out that they do not have any rights to use those tracks Mr & Mrs Lloyd may experience some practical difficulty in accessing field 765. I do not know whether any alternative access may be available and no evidence about it was given at the hearing.
32. At the hearing, there was some cross-examination of Mr Luke Millman about an alternative means of access to the agricultural part of Winwoods Farm. Mr Millman denied that there was any other 'legal' means of access but he was a little coy about what he meant by that. In his evidence, he made a passing reference to gates into fields and licences with farmers cooperating with one another.
33. No evidence was adduced by Mr & Mrs Lloyd on this issue and I decline to make any findings of fact that Bairn Investments has a legally enforceable right to an alternative means of access to Winwoods Farm.
34. At this point I wish to record that at:
- 34.1 [97] there is an undated letter evidently sent by the Third Respondent, Mr Knott, to Land Registry. It does not bear a statement of truth. Mr Knott has not filed a statement of case or provided a witness statement in these proceedings. In these circumstances, I am not prepared to take the letter into account, because it has no evidential value.
- 34.2 [99] is a letter dated 15 February 2017 addressed to Winwoods Farm and evidently signed by Ian J Currie. So far as I am aware Mr Currie has not made a witness statement endorsed with a statement of truth and certainly he was not called to give evidence. In these circumstances, I am not prepared to take the letter into account, again because it has no evidential value.
35. At the hearing, there was some cross-examination of Mr Lloyd that he was aware Mr Currie had registered, or was in the process of registering, ownership of tracks 942 and 766 at Land Registry. This was not a point which had been

raised by Bairn Investments in its statement of case. No evidence was adduced by Bairn Investments to support it. It was not mentioned in Mr Currie's letter at [99]. Mr Lloyd accepted that he knew Mr Currie, indeed for a while he worked on Winwoods Farm for him. Despite the difficulties I have mentioned, I accept Mr Lloyd's evidence on this point and that he was not aware of the registration of tracks 942 and 766 until 2014 when Mr Withey and Ms May encountered difficulties in registering the benefit of the right of way granted to them by Mr & Mrs Lloyd.

The law

36. One of the main benefits of the system of land registration is to provide certainty and the state guarantee. Inevitably, and for a wide variety of reasons, from time to time there may be a mistake in the register. Section 65 of the Act provides that Schedule 4 (which makes provision about alteration of the register) has effect.
37. So far as material, Schedule 4 provides:

“Introductory

1.

In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which: -

- (a) involves the correction of a mistake, and*
- (b) prejudicially affects the title of a registered proprietor.*

Alteration otherwise than pursuant to a court order

5.

The registrar may alter the register for the purpose of—

- (a) correcting a mistake,*
- (b) bringing the register up to date,*
- (c) giving effect to any estate, right or interest excepted from the effect of registration,*
- or*
- (d) removing a superfluous entry.*

6.

(1) This paragraph applies to the power under paragraph 5, so far as relating to rectification.

(2) 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.*

(3) If on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration.

(4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land."

38. The above provisions empower the Chief Land Registrar to alter the register to the same extent that paragraph 2 of the Schedule empowers the court to do so.
39. It was not in dispute that registration obtained by a person who does not have a lawful right to be registered as proprietor of land is a mistake in the register and removing such land from the title plan is a correction of that mistake.
40. It was also not in dispute that by paragraph 1 of Schedule 4 references to rectification in relation to alteration of the register, are to an alteration which involves the correction of a mistake, and prejudicially affects the title of a registered proprietor.

Where this is the case paragraph 6 provides that rectification can only be ordered against a registered proprietor of land in possession in limited cases, namely:

40.1 He has by fraud or lack of proper care caused or substantially contributed to the mistake, or

40.2 It would for any other reason be unjust for the alteration not to be made.

Thus, Mr Wilson required to pass through one of these gateways. If he could do so, that would give rise to a power to alter the register.

Where there is a power to alter the register, the application must be approved, unless there are exceptional circumstances which justify not making the alteration. Thus, if the power arose, Ms Harris would need to show 'exceptional circumstances which justify not making the alteration'.

41. In the present case, it was not in dispute that:
 - 41.1 The mistake was the inclusion of track 942 in the title plan at a time when the paper title to the track was vested in Mr & Mrs Lloyd;
 - 41.2 Bairn Investments is and has been a registered proprietor in possession since 2001;
 - 41.3 Alteration of the register to exclude track 942 from the title plan would prejudicially affect the title of Bairn Investments as the registered proprietor, so that alteration would amount to rectification and that paragraph 6 of Schedule 4 is engaged;
 - 41.4 Bairn Investments does not consent to the alteration; and
 - 41.5 Bairn Investments had not by fraud or lack of proper care caused or contributed to the mistake.

In these circumstances, the issues came down to:

- (a) Whether it would for any other reason be unjust for the alteration not to be made (paragraph 6(2)(b)); and
- (b) If there is power for alteration under paragraph 5, the application must be approved, unless there are exceptional circumstances which justify not making the alteration (paragraph 6(3)).

The rival submissions

- 42. Mr Wilson submitted that it would be unjust not to alter the register because Mr & Mrs Lloyd would lose the property through no fault of their own. The mistake was made by the Owens and/or Land Registry and the Lloyds were innocent bystanders.
- 43. Mr Wilson submitted that the criticism of Mr Lloyd not protesting about Bairn Investments use of the track and its repairs and maintenance of it were unfair. So far as the Lloyds were concerned they thought Bairn Investments had every right to use the track and so long as they (the Lloyds) did not object there was nothing wrong or improper in Bairn Investments carrying out basic repairs given that by far the most of the wear and tear on the track was Bairn Investments use of it with heavy agricultural machinery. Whilst Mr Wilson accepted that Bairn Investments had carried out repairs and maintenance he suggested that Mr Millman's description of the extent of that work was exaggerated.
- 44. As regards 'exceptional circumstances' Mr Wilson drew attention to *Balevents Ltd and The Rocket Club Ltd v Allan James Sartori* [2014] EWHC 1164 (Ch) in which Morgan J said at paragraph 163:

"... The court must ask itself two questions: (1) are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not ordering rectification? The word "exceptional" describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional, a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered. The search is for exceptional circumstances which have a bearing on the ultimate conclusion as to whether such circumstances justify not rectifying the register. On that issue, the court will wish to consider the effect on the relevant parties of an order for rectification or of a refusal to order rectification."
- 45. Mr Wilson submitted that there were no 'exceptional circumstances' which justify not making the alteration. He said that if track 942 were removed from the title plan Bairn Investments had the benefit of indemnity and also the possibility of contractual remedies against its vendor. He also submitted that it had the benefit of an alternative means of access to Winwoods Farm. Mr Wilson said that if Mr & Mrs Lloyd were registered as owners of track 942 they were content that it be formally recorded that Bairn Investments, as registered proprietor of Winwoods Farm, had right of way at all times and for all purposes (including agricultural vehicles and livestock) over and along track 942.
- 46. Ms Harris denied that Bairn Investments owned any other land that would provide access to the farm. It was submitted that if the tracks were owned by someone else

they might obstruct them at some future time and that would cause considerable problems for the farm.

47. Ms Harris said that Bairn Investments was a long standing registered proprietor of tracks 942 and 766 and had maintained and repaired the tracks at considerable cost over the years. Ms Harris said that Bairn Investments had always acted in good faith and it would be unjust to deprive the company of ownership of the tracks which it had bought and paid for. She said that the company would not have bought the farm if there had been access issues.
48. Ms Harris also wished me to bear in mind that Bairn Investments had entered into a deed with Severn Trent to give access to its tank and equipment adjacent to track 942, and to allow pipework to be installed beneath the track and it would be at risk of a claim for breach if the track were held to belong to someone else.
49. Ms Harris acknowledged that if alteration were ordered, Bairn Investments would have a claim to indemnity and perhaps contractual rights against its vendor but there were difficulties associated with both remedies which would sound in money terms only and would not deal adequately with the practical issues on the ground.

Consideration and conclusions

50. Both parties are innocent victims of an error in the registration of the tracks. My sympathies are with both. There is no doubt that Mr & Mrs Lloyd had the paper title to track 942. Equally, there is no doubt that Winwoods Farm (including tracks 942 and 766) was first registered in 1991 and the registered title passed through two hands before it was purchased for value by Bairn Investments in 2001.
51. In practical terms Mr & Mrs Lloyd require ownership or rights over both the tracks in order to access their retained field 765. Even if they were to be the owner of track 942 that falls short because the field is further up and just off track 766.
52. I can see the force of the arguments that there is a significant difference to Bairn Investments owning track 942 on the one hand and having (even quite wide) rights over it on the other hand. For example, they would not have the right to maintain the track and if it became in very poor repair it might inhibit its physical use utility.
53. So, whatever the outcome one party or the other will be disadvantaged.
54. It is inevitable that, from time to time, Land Registry will, inadvertently, whether due to human error or because full and accurate information has not been provided to it, register a parcel of land to a party who does not have a lawful title or entitlement to it. It seems to me that that is the case here when track 942 was registered to ICBT Ltd in 1991 at a time when (unknown to Land Registry) the paper title was vested in Mr & Mrs Lloyd.
55. In order to deal with that inevitability, the Act provides for alteration of the register in certain circumstances. Where alteration would amount to rectification the power to alter the register is strictly limited by paragraph 6 of Schedule 4. That provides that no alteration may be made where the registered proprietor is in possession and he does not consent to the alteration unless he has by fraud or lack of proper care caused or

substantially contributed to the mistake, or it would unjust for the alteration not to be made.

56. Here there is no suggestion that Bairn Investments caused or contributed to the mistake. Thus, the question is whether it would for any other reason be unjust for the alteration not to be made. Mr Wilson says it would be unjust to Mr & Mrs Lloyd as owners of the paper title to deprive them of their ownership. But, when a person who does not have a lawful right to title, is registered at Land Registry, it is always going to be unjust that the paper title owner is deprived of the land. It seems to me that paragraph 6(2) properly construed is to the effect that in the circumstances specified, no alteration may be made unless there was some form of adverse conduct on the part of the registered proprietor that would render it unjust for him to continue to be the registered proprietor. In a sense, perhaps where some form of estoppel might arise.
57. In the present case, there is no such conduct alleged against Bairn Investments that might meet the requirement of paragraph 6(2)(b). In those circumstances, I must find that no alteration may be made. I find it is not enough to show that it would be unjust to the paper title owner if the alteration were not made.
58. It follows that the power to make an alteration by virtue of paragraph 5 does not arise, because alteration is effectively prohibited by reason of paragraph 6. In these circumstances, I do not need to make findings in respect of 'exceptional circumstances'. In case this application is reconsidered elsewhere, it may be helpful if I record that I would not have found there to be exceptional circumstances which justify not making the alteration. It was not in dispute that if ownership of track 942 were vested in Mr & Mrs Lloyd, Bairn Investments would have a right of way along it, drawn in very wide terms. Whilst I accept the practical differences between ownership and a widely drawn right of way, there are remedies available to the dominant owner. That issue alone would not, in my judgment, amount to an exceptional circumstance as defined by Morgan J in *Balevent*.
59. For these reasons, I conclude that the power to alter the register has not arisen and therefore I must order the Chief Land Registrar to cancel the original application to alter the register. I have done so.
60. It follows that the application of Mr Withey and Ms May (Case Ref: 2015/0563) should also be cancelled and I will cause a rule 9 notice to be issued in that reference to begin the process to bring that application to a conclusion.

Costs

61. In this jurisdiction, as with the civil courts, costs follow the event save in exceptional circumstances. I am therefore minded to make a costs order in favour of Bairn Investments. I will, however, give careful consideration to any applications for costs that may be made. My jurisdiction as to costs is limited to those costs reasonably and properly incurred since 14 November 2016 when the disputed application was referred to the tribunal.
62. If the parties are unable to reach agreement on costs, any applications for costs shall be made in accordance with the following directions:

- 62.1 Any application for costs shall be made in writing by **5pm Friday 27 October 2017**. The application shall be accompanied by a schedule of the costs and expenses incurred/claimed supported by invoices/fee-notes where appropriate. A breakdown shall be given of any work carried by solicitors and the charge-out rate and grade of the fee-earner(s). A copy of the application and supporting schedule shall be sent to the opposite party at the same time as it sent to the tribunal.
- 62.2 The recipient of an application for costs shall by **5pm Friday 17 November 2017** file with the tribunal and serve on the applicant for costs representations on the application and on the amount of the costs claimed and any points of objection they wish to take.
- 62.3 The applicant for costs shall by **5pm Friday 1 December 2017** file with the tribunal and serve on the opposite party representations in reply, if so advised.
63. In the absence of any objections I propose to make a determination on any application for costs, and if appropriate, to assess any costs ordered to be paid, without a hearing and on the basis of the written representations filed and served pursuant to the directions set out in paragraph 62 above.

Dated this 22 September 2017

John Hewitt

By Order of the Tribunal

