REF/2011/1055

THE ADJUDICATOR TO HER MAJESTY'S LAND REGISTRY
LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) MALCOLM TRELAWNEY HINTON
(2) CHRISTINE ANN HINTON

APPLICANTS

and

(1) NEIL FRASER STALKER
(2) DONNA MARIE STALKER

RESPONDENTS

Property Address: Land at Marsh Farm, Wanborough,

Title Number: WT290725

Before: Mr Owen Rhys sitting as Deputy Adjudicator to HM Land Registry

Sitting at: Swindon Magistrates Court

On: 16th and 17th October 2012

Applicant representation: Mr Peter Riddle of Morrison & Masters Solicitors
Respondent representation: Mr Tim Walsh of Counsel instructed by Bevirs Solicitors

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DECISION

INTRODUCTION

1. The Applicants are the registered proprietors of the house and grounds known as Wansdyke, The Marsh, Wanborough, Swindon SN4 0AR under Title number WT290715. They were first registered with title on 25th November 2011, but the property had originally been the subject of an Assent to Mr Hinton dated 22nd October

1982 ("the Wansdyke Assent") under the terms of the Will of his grandfather, Frederick James Hinton. According to Mr Hinton, his grandfather had already made a gift of the land to them as a wedding present, just before he married the second Applicant, Christine in 1971. At that time the land contained a derelict farm cottage, and over the next few years the Applicants demolished the cottage and built a new bungalow on the site, and generally re-modelled the garden and grounds. This is not controversial. The land is accessed by means of a metalled track ("the Track") that runs north and then north-west from the public road. At the south-western corner of Wansdyke the Track bifurcates. The drive into Wansdyke turns east, and the Track continues northwards. I should say that the present surface of the Track was laid in 2009, and prior to that time the surface was much rougher and not sealed, although there were some chippings embedded in it. The physical boundary of Wansdkye on its western side consists of a stream or watercourse ("the Stream") which runs parallel with the Track and to its east. The western bank of the Stream is quite steep and noticeably higher than the bank on the eastern side, and is overgrown with substantial trees and shrubs which form a more or less impenetrable barrier. Until recently, there was a wire fence within this undergrowth on the western bank. The Applicants' garden lies to the east of the Stream, and a well-tended lawn runs up to the eastern bank of the Stream. About half way up between the entrance to Wansdyke and the northern boundary, the Stream is bridged by two large stone slabs. Before the rebuilding of the house in the 1970s, the only means of access into Wansdyke was on foot and over this little stone bridge. However, as part and parcel of the rebuilding works, a new vehicular entrance was created at the south-western corner, leading off the Track, and the stone bridge has every appearance of being disused. According to the filed plan, the western boundary of the Applicants' registered title coincides with the line of the Stream.

2. The Respondents are the registered proprietors of the land situated to the west and south-west of Wansdyke, under Title number WT274471 ("the Respondents' Title"). The Respondents' Title includes the Track and the land between the Track and the western boundary of Wansdyke. They bought this land in July 2008, from Mr Gerald Arthur Sadler, intending to use it for the purpose of keeping their horses. At that time there was an open barn and some corrugated iron stables on the land, as well as a water supply, and although somewhat run down, the land suited their needs. They

negotiated the sale privately with Mr Sadler – no agents were used – and it appears that the Applicants were also interested in buying this land, but in the event it was sold to the Respondents. The Track lies inside the north-eastern boundary of the Respondents' Title. However, there is (or was when the Stalkers acquired the title) a post and wire stockproof fence along the western edge of the Track, thereby separating the Track from the remainder of the Respondents' Title. I shall describe the recent changes to the appearance of the Track in due course. Essentially, however, the Track runs between two physical features – a fence on the west, and the Stream and associated belt of trees to the east. The land in dispute consists of this area, being the entirety of the Track itself from the Respondents' fence line to the west, and the strip of land to the east of the Track as far as the western bank of the Stream (or probably the fence line on the top of the western bank). I shall call this area "the Disputed Land".

THE CONVEYANCING HISTORY

3. The relevant conveyancing history is as follows. Prior to his death on 25th March 1981 Frederick James Hinton owned Wansdyke and the land now registered to the Respondents, together with some additional land to the south-east, some 7.5 acres in all and known as Marsh Farm. On 15th September 1982 his personal representative, Lloyds Bank Limited, executed an Assent ("the September Assent") of all this land to themselves upon trust for sale, *"SUBJECT to the right for the owners or occupiers for the time being of the land edged in blue on the said plan……..at all times and for all purposes to pass with or without normal agricultural or domestic vehicles or animals along the road or way marked in green on the said plan between the points marked "A" and "B""*. The land edged blue is Wansdyke: the "*the road or way marked in green on the said plan*" is the Track.

4. The September Assent was followed by the Wansdyke Assent in favour of Mr Malcolm Hinton, the first-named Applicant, referred to above. By means of this Deed, Wansdyke was vested in Mr Hinton, together with a right of way over the Track in the same terms as was reserved out of the September Assent. Point "A" is at the south-western corner of Wansdyke, at the point where the drive leaves the Track. The next relevant document is a Deed dated 12th June 1984 ("the Deed of Grant"), made between Lloyds Bank Plc (1) and John Frederick Hinton and Robert Trelawney

Hinton, the owners of Foxbridge Farm. These Hintons are the father and uncle of Malcolm Hinton, the first-named Applicant. Foxbridge Farm is situated a short distance to the north of Wansdyke. In the Deed of Grant, it is recited that Lloyds Bank Plc is the owner of the 7.5 acre parcel, forming part of Marsh Farm, which was the subject of the September Assent. By clause 1 of the Deed of Grant, Lloyds Bank Plc granted to the owners and occupiers of Foxbridge Farm *"full right and liberty …… at all times hereafter by day or night with or without vehicles of any description and for all purposes connected with the proper use and enjoyment of [Foxbridge Farm]……to pass and repass along the said track indicated by dotted lines in blue…"*. The effect of the Deed of Grant, therefore, was to make the Track subject to a vehicular right of way in favour of Foxbridge Farm. From this time onwards, the Track was therefore subject to two express vehicular rights of way. First, a right of way in favour of Wansdyke as far north as the entrance to the Wansdyke itself. Secondly, a right of way in favour of Foxbridge Farm over the entire length of the Track up as far as the northern boundary of the Respondents' Title.

5. The final piece of the jigsaw is the Conveyance dated 19th June 1984 ("the Sadler Conveyance") and made between Lloyds Bank Plc (1) and Gerald Arthur Sadler and Muriel Dorothy Sadler (2). By virtue of the Sadler Conveyance, Mr and Mrs Sadler acquired all the land dealt with by the September Assent, comprising some 7.5 acres of land, and subject to the two specified rights of way over the Track, in favour of Wansdyke and Foxbridge Farm. On 17th July 2008 Mr Sadler conveyed the land described as *"Land on the north west side of The Marsh, Wanborough, Swindon"* to the Respondents. This is the same parcel as was sold to Mr and Mrs Sadler in 1984, save for a field to the south and east of the Track. The parcel is, as I have stated above, registered under Title WT27447.

EVENTS AFTER 1984

6. It appears that shortly after his purchase, Mr Sadler erected or caused to be erected a post and barbed wire fence along the western side of the Track, separating it from the remainder of his land. One of the issues in this case is whether this was done to acknowledge that the Disputed Land lay outside his ownership, or whether it was simply intended to keep his horses safe from vehicles using the Track. According to the Respondents, when they first saw the Track, it gave every appearance of being

disused, and the entrance to the land to the north was blocked by overgrown vegetation. Indeed, photographs have been produced by the Applicants showing the Disputed Land in September 2010, from which it is quite apparent that the Track was grassed over with no visible tyre tracks, suggesting minimal vehicular use. There was a derelict JCB, belonging to Mr Hinton, parked immediately to the west of the boundary of Wansdyke, partly within the undergrowth on the west bank of the Stream, and partly on the verge of the Track itself. This JCB had been in the same place for many years, and remains *in situ* to this day. After their purchase of the land in 2008, the Respondents cleared the land, and built new stables in November 2008. At the same time they replaced Mr Sadler's barbed wire fence with more substantial post and rail fencing. They needed to connect a new electricity supply to the stables from the electricity post situated in the extreme north-eastern corner of the land, just to the east of the Track. This involved digging a deep trench within the Disputed Land, in which the cable was laid. Once the cable was installed, they then widened and re-surfaced the Track with stone chippings. This took place in or around Spring 2009. At this stage, relations between the Hintons and the Stalkers were good. However, one or two issues arose between them. In the first instance, the Hintons became concerned by members of the public who had begun to use the Track as an alternative to the public footpath that ran to the north. Because this had become blocked they sought out an alternative route, and once the Track was upgraded it became an obvious route, even though it was not subject to a public right of way. The Stalkers say that Mrs Hinton wanted the Stalkers to erect a lockable gate just to the south of the entrance to Wansdyke, to keep the public out, but they declined to do so.

7. Matters came to a head in 2010. In the Spring of that year the Stalkers changed tack. They decided that they would use the land they had bought not merely to stable their horses, but to run a commercial alpaca breeding operation. In order to do this, they needed additional land, and they negotiated to buy a parcel immediately to the north (to the west of Foxbridge Farm), accessible via the Disputed Land, and in the ownership of a Mr John Yeandle. They have in fact gone into possession of this land – registered title WT272101 – and have constructed a large barn on it. However, they have not yet completed the sale for reasons I shall explain. When the Respondents began to clear the land, at Mr Yeandle's request, it seems that Mrs Hinton objected, on the grounds that Mr Yeandle did not own the land but it was owned by a Mrs

Jowal. However, Mrs Jowal was unable to prove a title and matters proceeded with Mr Yeandle. Subsequently, the Applicants claimed to have acquired a title to part of this land – described as "the First Land" in the ST1 made in support of the application – which has caused a delay in the completion of the Respondents' purchase. The application in respect of "the Second Land" has been withdrawn, although Mr Hinton told me from the witness box that they still intended to claim this land. At the same time the Applicants claimed to have acquired a possessory title to the Disputed Land – described as "the Second Land" in the same ST1. The application was made on 25th November 2010, and the dispute was referred to the Adjudicator on 25th October 2011.

THE APPLICANTS' WRITTEN CASE

8. It might be helpful if I summarised the contents of the Statement of Truth submitted by the Applicants in support of their application in respect of both parcels of land. First, as to the claimed period of adverse possession, they contend that both parcels were *"orally gifted"* to them by Frederick James Hinton at the time of their marriage in 1971, at the same time as the gift of Wansdyke, and that they have occupied the land ever since. Under claimed "*Acts of adverse possession*", they say that the First Land "*formed a separate close on which we kept farm animals*". As to the Second Land, they state that the application for planning permission to build the Wansdyke bungalow includes a plan which *"shows the Second Land as being included within the curtilage of the land on which the construction of bungalow was permitted.*" In respect of both parcels, they say that since 1971 the Applicants *"have regarded the First Land and the Second Land as being part of the land owned and occupied by us as part of the Wansdyke Land."* Under the heading "*Enclosure of the land*:" they rely on the following. First, at the time of the alleged oral gift in 1971 there was no fence along the "southern" boundary of the Second Land *"as at this stage it formed part of the field that was owned by the late Frederick James Hinton."* [The Applicants refer throughout to the southern and northern boundaries – more accurately these should be referred to as the western (or south-western) and eastern (or south-eastern) boundaries respectively]. *"The northern boundary of the Second Land formed a ditch with bushes which separated the garden forming part of the Wansdyke land from the enclosures of land on which we kept animals.*" The First Land and the Second Land were separated by a fence and gate. When the remainder of Marsh Farm was sold at

auction to Mr Sadler in 1984, "*there was no boundary feature in place defining the actual boundary between the land sold at auction and the Second Land but soon after Mr Sadler's purchase of such land in 1984 he defined such boundary when he erected a barbed wire fence along the northern boundary of the land he had purchased at auction. Significantly this fence did not incorporate the Second Land within the land fenced off by Mr Sadler and the Second Land remained outside the fencing that he had put up. He never raised with us any suggestion that my ownership of the Second Land or of our continued occupation and possession of it.*"

9. Under the heading "*other relevant details*" the Applicants stated as follows. First, that they have been in undisturbed possession and occupation of both parcels of land since 1971. "*Our usage of the First Land has been for the keeping of animals and as to the Second Land for the parking of a JCB tractor and other farm implements and machinery.....The JCB.....was first parked there about twenty years ago ...and has remained there without any objection or complaint being made.....*" *I also kept ploughs and other farm equipment on the Second Land as I used such for farming purposes and also used such for my vocation which was that of a vintage plougher.*"

10. On 15th December 2011 the Applicants submitted their Statement of Case, which contains a Statement of Truth signed by Malcolm Hinton. This specifically refers to the ST1 already mentioned, and relies on the facts alleged therein. Certain additional points are raised, largely by way of commentary on the Respondents' Objection dated 6th February 2011 to the original application. In respect of the Respondents' allegation that there was "*to their eye, no sign of recent maintenance or repair work having been carried out on the land*", their reply was; "*This is farming country and one does not maintain the same as one would perhaps in the middle of a town or city. As far as my wife and I were concerned, the land was maintained to our satisfaction.*" Paragraph 16 of the Statement of Case contains a new allegation: "*If further evidence against Mr and Mrs Stalker was required, Paragraph 5 of their Objection is it. They say "The fencing that we have erected has followed the line of the previous barbed wire fence but it is not intended to mark the boundary." The problem with this Statement is it confirms the existence of a previous fence. That fence is the fence that I erected and I erected it shortly after the oral gifting of the land to me upon my*

marriage." In Paragraph 17 of the Statement of Case the Applicants allege that they "*complained vociferously*" to the Respondents when they re-surfaced the Track.

THE HEARING

11. I heard this case at Swindon Magistrates Court over a period of two days, having held a very useful site view on the previous afternoon. The Applicants were represented by Mr Peter Riddle, of Morrison & Masters, Solicitors, and the Respondents by Mr Tim Walsh, of Counsel. Both Applicants gave evidence, and in addition they called the following witnesses: Mr Geoffrey Maslin, Mrs Margaret Errington, Mr James Hinton, Mr Martin Maslin, Mr Neil McFadyen, and Mr Allen Williams. The Respondents both gave evidence, but they called no other witnesses. They had issued a Requirement Notice, requiring the attendance of Mr Gerald Sadler, and they had submitted a Summary of his evidence. However, Mr Sadler is elderly, and is suffering from various serious ailments, and in the event I set aside the Requirement Notice at the hearing. Accordingly, the Respondents were unable to call any evidence as to the adverse possession of the Track which predated their purchase, in the summer of 2008.

THE LEGAL FRAMEWORK

12. There has been some confusion with regard to the precise legal basis for the Applicant's application. The Land Registry Case Summary characterises the application as being made for the alteration of the register, pursuant to Schedule 4 of the Land Registration Act 2002 Act ("the 2002 Act"), to remove the Disputed Land from the Respondents' Title. Mr Riddle's own Skeleton Argument contends that the application is made under Schedule 6 of the 2002 Act, on the basis of 10 years' adverse possession prior to the date of the application. After some debate, it was agreed between the parties that the application is properly made under Schedule 4. Indeed, since the Hintons are not, in my judgment, currently in possession of the Dispouted Land, and have not been in possession within the period of six months prior to the date of the application, they are probably not entitled to rely on Schedule 6 in any event. On an application under Schedule 4, the Applicants must establish that the Disputed Land should not have been included within the Respondents' Title on first registration, on the grounds that the Applicants had already acquired a title to the land (whilst unregistered) by virtue of sections 15 and 17 of the Limitation Act 1980.

On this analysis, the inclusion of the Disputed Land within WT274471 on first registration was a mistake. However, whether or not the alteration of the register should be treated as "rectification" depends on whether the Respondents had notice of the Applicants' title when they were first registered. This is the effect of section 11(4)(c) of the 2002 Act, as explained in Ruoff & Roper at para. 33.060. If it is simply "alteration", and a mistake is proved, there is a presumption in favour of so doing, subject only to the existence of "*exceptional circumstances*" – see Schedule 4 para 2(3). On the other hand, if the alteration of the register amounts to "rectification", the interests of the proprietor in possession are regarded as paramount and rectification will only be ordered if it would be unjust not to rectify. This is the effect of Schedule 4 para 6(2). I shall analyse these provisions in more detail in due course.

13. Whichever is the basis for the application, the burden is on the Applicants to prove that they have been in adverse possession of the Disputed Land for a period exceeding 12 consecutive years ending no later than the date of first registration, on 8th September 2008. Thankfully, there is no real controversy between the parties as to the proper tests to be applied. The Applicants must establish both (a) factual possession and (b) an intention to possess, within the meaning of those phrases as explained by the House of Lords in JA Pye (Oxford) Ltd v Graham [2003] 1 A.C 419 at paras 40 to 43 and in the seminal first instance decision of Slade J in Powell v McFarlane (1977) 38 P & CR 452.

THE LATE SERVICE OF EVIDENCE

14. Directions for the hearing of this reference were given by the Adjudicator on 15th February 2012, requiring the exchange of witness statements by 14th March 2012. Hearing notices identifying the hearing date – 16th and 17th October 2012, with a site view on 15th October 2012 – were sent out on 4th July 2012. For various reasons, the time for exchanging witness statements was extended by consent to a date in May 2012. At that time, the Respondents lodged their statements. No statements were lodged by the Applicants. Accordingly, the only evidence upon which they were entitled to rely was the Statement of Case signed by Mr Hinton, to which the ST1 (also signed by him) was attached. Some 3 days before the Site View, on 12th October 2012, the Applicants' solicitors emailed a further 8 witness statements "*for*

inclusion in the Trial Bundle". No permission had been given, or even requested, for the late submission of evidence. When the hearing commenced, I asked Mr Riddle if there was any explanation for the lateness of the evidence, but none was forthcoming. The Respondents objected, and I gave them the option of adjourning the hearing in order to be able to deal with this new evidence. They did not wish to take this course, and in the event I gave permission for the Applicants to rely on this new evidence. To be fair, Mr Hinton's witness statement largely repeats the facts set out in the ST1. Beyond this, however, the statements are surprisingly thin as regards the acts of adverse possession relied on, notwithstanding the number of witnesses involved. The Applicants' son, James, refers to parking vehicles on the Disputed Land, riding a motorbike up and down the track, and keeping the track clear of brambles and weeds. Martin Maslin refers to using the track to get to Foxbridge Farm, and seeing vehicles parked on it. Geoffrey Maslin refers to using the track to access Foxbridge Farm, and parking and sometimes repairing vehicles on the Disputed Land when taking part in ploughing matches. Mr Williams mentions using the track between Foxbridge Farm and Wansdyke on many occasions, and putting his own implements and machinery on the Disputed Land with the Hintons' permission. Mr McFadyen and refers to Bonfires being held on the Disputed Land by the Hintons. Under cross-examination, he accepted that these in fact took place on the land to the north. Mrs Errington, Malcolm Hinton's sister, supports her brother's witness statement. All the witnesses say that they believed that the Disputed Land belonged to the Hintons. They also say that they believed that Mr Sadler erected the barbed wire fence in order to mark the boundary.

FINDINGS OF FACT

15. On the basis of the witness statements and extensive cross-examination of the Applicants and their witnesses, I make the following findings of fact.

    a. First, at or around the time of the Applicants' marriage, in 1971, Mr F J Hinton said that he would give them the area known as Wansdyke upon which to build their matrimonial home. Since he already owned it, as well as the land to the west (including the Respondents' title), there was no need to execute any formal documents at this stage. Instead, he made a Will in which

the half acre plot was devised to Mr Hinton, and after his death the October Assent by the personal representative gave effect to this gift.

b. Second, I find that the "oral" gift did not include, and was not intended to include, any land to the west of the natural boundary of Wansdyke, formed by the Stream. At the time of the gift, and until Mr F J Hinton's death in 1981, the land to the west of the Stream (including the Disputed Land) formed part of a field which he used for grazing cattle. There has been a fence along the western bank of the Stream for many years, replaced several times by the Applicants, as they both confirmed in their evidence. It is very likely that this fence was originally erected as stock-proof fencing to prevent Mr F J Hinton's cattle from getting into the Stream from the west. I reject the Applicants' evidence that Mr F J Hinton indicated that the Disputed Land formed part of the gift to them. This would be quite improbable, given that it formed part of his working farm, and Wansdyke already had an obvious and distinct physical boundary formed by the Stream and bank. Further, if he had intended to include this land there is no explanation why the gift in his Will did not reflect that intention. The terms of the October Assent are entirely inconsistent with the Applicants' evidence in this regard. It follows that the Hintons never believed that the Disputed Land belonged to them as a matter of title.

c. Third, I find that Mr Sadler erected a barbed wire fence along the western side of the Track in or about 1984 and, further, that the Applicants themselves on several occasions since 1982 replaced the fence along the western side of the Stream. Accordingly, once Wansdyke and the Respondents' Title came into separate ownership in 1984, the Disputed Land was fenced on either side. In the absence of any direct evidence from Mr Sadler, his intention in erecting the fence can only be a matter of inference. I have no difficulty in drawing the inference that he intended to erect a barrier between the vehicular right of way – the Track – and his own livestock. If no fence had been erected, there would have been nothing to prevent his horses from straying into the path of the agricultural and other vehicles that were entitled to use the Track in connection with Foxbridge Farm. It also follows, of course, that the statement in the Applicants' Statement of Case, that they erected the barbed wire fence along the western side of the Track, is untrue.

d. Fourth, Mr Sadler installed a gate in the northern boundary of the Track – leading towards Foxbridge Farm – which he subsequently removed. This is the Applicant's own evidence. This strongly supports the inference that I have drawn that the western fence erected by Mr Sadler was not intended as a boundary fence. If it had been, he would have had no business installing a gate on the other side of the alleged boundary fence.

e. Fifth, I find that the Track has been used as a vehicular access to Foxbridge Farm over a period of many years, as all of the Applicants' witnesses confirmed. I accept the Stalkers' evidence that there was some evidence of gravel or chippings on the Track when they bought their land. As to user, by way of example Mrs Hinton said in cross-examination that she was able to drive her Mini car up the Track to visit her mother-in-law at Foxbridge Farm until approximately 6 years ago. However, the state of the Track varied according to the weather, and it was often impassable in winter. Her son or some other person connected with the family would sometimes clear the weeds and grass with a strimmer. This was done solely to keep the access clear for the benefit of the access to Foxbridge Farm. However, by the time that the Stalkers arrived on the scene, in 2008, the Track was no longer used, and indeed the access to Foxbridge Farm was blocked by trees and undergrowth. This is entirely consistent with Mrs Hinton's recollection of the pattern of user.

f. Sixth, use of the Track by the Hintons and others visiting Foxbridge Farm was always attributable to the legal right of way that existed over the Track in favour of Foxbridge Farm.

g. Seventh, in or around 1990 Mr Hinton parked an old JCB tractor on the side of the Track, tucked partly into the undergrowth that grew on the western bank of the Stream. He intended at some point to restore and repair the vehicle, but in effect abandoned it there and allowed it to deteriorate. That JCB remains in place to this day.

h. Eighth, on other occasions Mr Hinton or his friends would park vehicles on the Track for short periods, and occasionally repair vehicles. This was usually done in connection with ploughing competitions in which they participated, while they were assembling at Wansdyke before driving to the location, or for other temporary purposes. There was no longer-term use of the Disputed

Land, and any parking was always done so as to leave clear the main access route to Foxbridge Farm. Mr Hinton's own working vehicles were either parked within Wansdyke (the aerial photograph attached to his ST1 shows this clearly) or at the farms where he was working. I should say that he is an agricultural contractor, and own a variety of heavy plant and vehicles.

i. Ninth, I do not accept that animals were kept on the Disputed Land. In this respect, it is highly significant that the keeping of animals was not part of the Applicants' case at the time of the ST1. The only reference to animals related to the "First Land" – lying to the north of the Disputed Land. It is quite improbable that animals would be kept in close proximity to an active vehicular right of way.

j. Tenth, the Hintons made no claim to the Disputed Land until after Mr Stalker requested him to move the JCB in August or September 2010. It is common ground that Mr Hinton did remove a plough and other implements from the eastern edge of the Disputed Land as a result of Mr Stalker's initial request in the summer of 2010. The first documented claim to have title is made in their solicitors' letter dated 21st September 2010 which refers to their having *"owned and occupied"* the land for upwards of 40 years, and having *"a valid and good title"* to it. I do not accept their evidence that they discussed the ownership of the Disputed Land with the Stalkers when they first arrived, and claimed to own it. At all times until the delivery of the solicitor's letter, the Stalkers conducted themselves in the entirely understandable belief that they owned the Disputed Land, which was of course included within their registered title. They did not ask permission before digging a substantial trench in the roadway, which remained open for several months, in order to connect their electricity supply. Nor did they ask permission before carrying out a complete re-surfacing of the track at considerable expense. Furthermore, they committed themselves to buying Mr Yeandle's land to the north, and building a substantial new barn on it for the purposes of their business, on the footing that they had free access over the track. It is quite inconceivable that they would have done these things if there had been any inkling that the land was claimed by the Hintons. Actions speak louder than words. The fact that Mrs Hinton (as she grudgingly conceded in cross-examination) asked the Stalkers if she could use some of the clay that was dug out of the trench, for

her hobby as a potter, tells its own story. It indicates that at this stage – in early 2009 – the Hintons had not even begun to contemplate that the Disputed Land belonged to them.

k. Eleventh, I accept the Respondents' evidence that they gave express permission to the Applicants to place ploughs and other machines on the Track in order to prevent members of the public from obtaining access as an alternative to using the public footpath.

l. In the absence of any direct evidence from Mr Sadler, I am unable to make any finding as to whether or not he gave permission to the Hintons to leave the derelict JCB tractor within the Disputed Land, in its present position between the Track and the eastern boundary. I have reached my conclusions on the assumption that no such consent was given. If consent was given, of course, the Hintons' case is even weaker.

16. In reaching these conclusions, I have preferred the evidence of the Respondents to that of the Applicants where the two come into conflict. I found the Respondents to be transparently credible witnesses who did not embroider or exaggerate their evidence. This relates in particular to the conversations said to have occurred between the parties after 2008 and admissions made by the Respondents. The actions of the parties between 2008 and 2010 are quite inconsistent with the Applicant's evidence. In my judgment, the Applicants' credibility is also undermined by their insistence that they have always treated the Disputed Land as their own, and believed they owned, from the time of the original "gift" by Frederick James Hinton in 1971. Quite obviously, this contention is absurd. The land at that time was part of and indistinguishable from the field used by Frederick James Hinton for grazing cattle, and the only boundary features were on the east, between the Disputed Land and Wansdyke. Mr Hinton tried to persuade me that he had had a conversation with his grandfather in 1971 in which the latter indicated, with a sweep of his arm, that the Disputed Land thenceforth belonged to him. I am quite unable to accept that any conversation relating to the Disputed Land ever took place, nor can I accept that the Hintons genuinely believed at the time that the Disputed Land belonged to them.

THE LEGAL CONSEQUENCES OF THESE FINDINGS

17. In the light of the findings of fact that I have made, how does this affect the legal basis of the Applicants' application?

a. I conclude that the Applicants have never been in exclusive factual possession of the Disputed Land, or of any identifiable part of it. Although of course it is common ground that the JCB tractor has occupied its present footprint for many years, that does not in my judgment amount to exclusive factual possession of any identifiable area of the Disputed Land. Apart from this permanent presence, all the other acts of adverse possession were merely temporary and never amounted to the taking of factual possession. At best, the Applicants might have acquired an easement to store items on the Disputed Land, but I do not think the evidence even goes that far.

b. These limited activities do not demonstrate an intention to possess the Disputed Land. Since the date of the Deed of Grant in 1982, the Disputed Land has been subject to a full vehicular right of way in favour of Foxbridge Farm. The Hintons have legitimately made use of the Disputed Land to access Foxbridge Farm, as indeed have other witnesses. In the words of Slade J in Powell v McFarlane at page 480: *"In view of the drastic results of a change of possession …… a person seeking to dispossess an owner must, in my judgment, at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him."*

c. Given that the Hintons had every right to be on the Disputed Land in enjoyment of the Foxbridge Farm right of way, and given the limited nature of the activities relied on, it is impossible to say that the true owner – Mr Sadler – would have any idea that the Hintons were seeking to dispossess him.

d. Accordingly, I hold that the Hintons have not acquired a title to the Disputed Land based on adverse possession.

e. It follows that the registration of the Respondents with an absolute title was not the result of any mistake by the Land Registry.

18. If am wrong about this, and the Hintons had acquired a title prior to 2008, it is then necessary to consider whether the register should be altered, in order to remove the Disputed Land from their title and to add it to the Applicants' title. In turn, this requires further consideration whether the alteration of the register under Schedule 4

amounts to "*rectification*" within the meaning of paragraph 1. The legal analysis – on the hypothesis that the Applicants had been able to establish that they had obtained a title to the Disputed Land – is as follows. By virtue of section 11(4) of the 2002 Act, first registration of the Respondents as freehold proprietors of the Disputed Land vests the estate in them free of all interests other than (a) overriding interests and (b) *"interests acquired under the Limitation Act 1980 of which the proprietor has notice."* The only potentially applicable overriding interest in this case would arise if the Hintons were in *"actual occupation"* of the Disputed Land at the date of first registration. If they were in actual occupation, and they had already obtained a title by adverse possession, the Respondents' registration would be subject to the Hintons' interest. Even if they did not establish actual occupation, the Respondents would take still subject to their interest if they had "*notice*" of it. Notice is not defined in the 2002 Act, so the usual principles will apply. If the Respondents' estate, by virtue of section 11(4)(b) or (c), was subject to the prior interest of the Applicants, the alteration of the register to cure the mistake would be mere alteration, and not rectification. This is because the alteration of the register would not prejudicially affect their title, since it is already subject to the Applicants' interest. By virtue of Schedule 4 paragraph 2(3), there is a presumption in favour of alteration, in the absence of exceptional circumstances.

19. If, however, section 11(4)(b) and (c) do not apply, and the Respondents' estate is not subject to the Applicants' prior interest, any alteration of the register to give effect to the Applicants' interest would (necessarily) prejudicially affect their title. This converts "*alteration*" into "*rectification*". If the registered proprietors are in possession of the affected land, no alteration may be made unless (a) they have been guilty of fraud or lack of proper care, or (b) *"it would for any other reason be unjust for the alteration not to be made"* – see Schedule 4 paragraph 3(2). The relevant date is the date of the application. Since there is no basis for sub-paragraph (a), the Applicants would have to rely on (b) and demonstrate that it would be unjust, in the circumstances of this case, for the alteration not to be made.

20. In relation to these issues, my findings are as follows:

a. The Applicants were not in "*actual occupation*" of the Disputed Land when the Respondents were first registered. The appearance of the Disputed Land, prior to the Respondents' re-surfacing, may be recalled. It was essentially open land, separated from Wansdyke by a clear physical boundary feature, with a derelict JCB parked on the side of the Track, partly inside the screen of trees on the bank of the Stream. It is clear that the Applicants were not on any view in occupation of the land.

b. Further, it cannot be said that the Respondents were "*on notice*" of the Applicants' interest. For the reasons which I have already explained, the only physical sign of the Applicants' presence on the Disputed Land was the abandoned JCB. Even if the Respondents had asked the Applicants, immediately prior to their purchase, why the JCB had been left there, they would not have been alerted to any alleged adverse possession claim. The Applicants did not believe that they had any claim to the Disputed Land until they fell into dispute with the Respondents, and their position was articulated by their solicitor in September 2010 (and even then it was not expressed as an adverse possession claim). Even if enquiry had been made by the Respondents in 2008, therefore, the adverse possession claim would not have come to light.

c. Accordingly, this is therefore a case of "*rectification*", not mere alteration, and the provisions of paragraph 6(2) of Schedule 4 apply, since the Respondents are in physical possession of the Disputed Land. In my judgment, it would not be unjust in this case to refuse to alter the register. The Disputed Land, given that it provides access to the various components of the Respondents' farmland, is essential to their commercial operations. They acquired the land without notice of any adverse claim and have organised themselves on that basis. It would be quite unjust to deprive them of this land, even if the "mistake" had been proven. On the other hand, the Hintons have shown no need for this land, which is in any event subject to a right of way in favour of another farm in the family's ownership. The Disputed Land has never been treated as part of their land and it is quite unclear to me what use it is to them.

d. Even if the Applicants had been able to prove adverse possession for 12 years prior to 2008, in my judgment it would have been right to refuse to alter the register, leaving the Hintons to their indemnity from the Land Registry, if any.

21. I shall therefore direct the Chief Land Registrar to cancel the Applicants' application dated 25th November 2010. Furthermore, I see no reason why the Applicants should not bear the successful Respondents' costs, to be subject to a detailed assessment. If they wish to contend for a different order, they should submit reasons within 7 days, serving a copy on the Respondents, who may reply also within 7 days. I shall then consider the matter further.

Dated this 7th day of December 2012

Owen Rhys

THE ADJUDICATOR TO

BY ORDER OF THE ADJUDICATOR TO HM LAND REGISTRY