



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

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2015/0675

BETWEEN

LINWORTH MILLER

Applicant

and

SONER KEMAL HASSAN

Respondent

**Property Address: Land to the east of Electric Lane, London
Title number: TGL108410**

ORDER

The Chief Land Registrar is ordered :

- (1) to give effect to the application in Form AP1 dated 9 July 2014 but limited only to removing the Respondent as sole registered proprietor of title number TGL108410; and
- (2) not to give effect to the said application in so far as it sought to replace the Applicant as the sole registered proprietor of title number TGL108410.

BY ORDER OF THE TRIBUNAL

McAllister

Dated this 26th day of July 2016





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**Property Address: Land to the east side of Electric Lane, London
Title number: TGL108410**

**Before: Judge McAllister
Alfred Place, London
12 July 2016**

Representation: Mr Gibson instructed by Alpha Rocks Solicitors appeared for the Applicant; Mr Harris instructed by Ziadés & Hodders Law (check) appeared for the Respondent.

DECISION

Introduction

1. The dispute between the parties relates to the ownership of a yard ('the Yard') to the east of Electric Lane, London SW9. It lies behind numbers, and to the south of, 435 to 441

Coldharbour Lane, and is surrounded on three sides by walls or buildings. The main access to the Yard is through a gate from Electric Lane. This gate bears the name 'Soner Square' (the Respondent's name) . It is also possible, as it has been for many years, to gain access to the Yard from the rear of number 441 Coldharbour Lane (which is owned by the Respondent) and from the rear of 439 Coldharbour Lane (which is owned by the Applicant, Mr Miller, but leased to Mr Kelly, who uses the premises as a bookshop).

2. The last known paper title owner of the Yard was Joyce Patricia Damen who was registered as freehold owner on 13 April 1995. It is not known whether Ms Damen is still alive.
3. On 1 February 2013 the Respondent applied to Land Registry to be registered with title to the Yard based on adverse possession. As will be seen in more detail below this was the latest in a total of four applications for title by adverse possession made variously by the Applicant and the Respondent from 1997 onwards. The 2013 application was successful, and the Respondent is registered with absolute title (and not possessory title) under title number TGL108410.
4. By an application dated 9 July 2014 the Applicant applied to rectify the register of TGL108401 under paragraph 5 of Schedule 4 to the Land Registration Act 2002 ('the Act') by removing the Respondent as registered proprietor. He did so on the basis that paper title to the Yard passed to him when he bought 439 Coldharbour Lane from Ms Damen on 4 January 1980 or, in the alternative, that he is in possession of the Yard, and that in any event the Respondent has not been in adverse possession.
5. For the reasons set out below I find that the Respondent was not in adverse possession in February 2013, and had not been in adverse possession for the previous ten years. But I also find that the Applicant has not been in adverse possession either for 10 years prior to July 2014 or ten years prior to the hearing. The reality is that neither the Applicant nor the Respondent can show that they have acquired title in this way.
6. I also find that, in all the circumstances of the case, (and on the assumption that the Respondent is or was in possession at the date of the application) rectification of the register should be ordered either because the Respondent by lack of proper care caused or

contributed to the mistake on the register or because in any event it would not be unjust not to rectify. It would be wrong, in view of the history of this matter, for Mr Hassan to continue to be registered as owner. The effect of this decision is that the registered proprietor of title TGL108401 will revert to being Joyce Patricia Damen or whoever is entitled to her estate if she has died.

The facts in more detail

7. Mr Miller and his son Stirling Miller are the registered owners of No 439 Coldharbour Lane ('No 439'). No 439 was purchased from Ms Damen on 31 March 1980. The solicitors acting for Mr Miller sent Land Registry a detailed letter on 5 December 2014, following his application to rectify the register, enclosing a number of documents. One of these is the auction particulars for the sale of No 439. The property is described as a shop, back room, covered yard, open yard, separate WC, and two workshops. The workshops (or in any event structures) in the Yard can be seen on the older filed plans of the neighbouring properties. In July 1980 Mr Miller was refused planning permission to develop the Yard. It was nonetheless suggested to him by his planning consultants that he should apply to upgrade the 'existing workshop for a light industrial use'. No 439 was registered on 16 June 1980, and it is clear from the filed plan that no part of the Yard forms part of the title of No 439.
8. The issue of the ownership of the Yard clearly remained contentious. In 1987 Ms Damen brought proceedings in the High Court against Mr Miller. On 2 December 1988 the parties entered into a consent order whereby Mr Miller agreed to give up possession immediately of the Yard with damages to be assessed. The action, or a previous action, had, it seems, been proceeding for some time, since the order refers to an affidavit sworn by Ms Damen in 1984.
9. Mr Miller's evidence is that he had been and remained in occupation of the Yard following this order and did not at any time give up possession. He did not pay damages to Ms Damen. Mr Harris sought to argue that if this was the case Mr Miller was in contempt of court, and thereby precluded from obtaining title by adverse possession at any point in the future. With respect to Mr Harris, this argument is simply misguided. There

is no bar to adverse possession being acquired either because the squatter has agreed to or been ordered to give up possession.

10. The mere fact that of judgment being entered for possession will not stop time from running. If, therefore, the paper title owner obtains such an order and the squatter remains in possession, time continues to run in his favour. If the owner loses his right to enforce the judgment, his title will be extinguished. The true owner cannot enforce a judgement for possession without leave of the court if more than 6 years have elapsed from the date of the judgment, and the court will not generally grant leave after this time (see Jordan and Radley-Gardner, *Adverse Possession*, 2nd Ed, para 15-21 ff). A consent order, however, could be construed as an acknowledgment of title under section 29 of the Limitation Act 1980, in which case time would start to run again, and a further 12 years would need to elapse before the paper title was extinguished.
11. By a lease dated 15 April 1994 made between Mr Miller and Stirling Miller as landlords, and Diego Pedrioli as tenant, No 439 was let for a term of 15 years. The lease was presumably assigned to Patrick Kelly, on or shortly after the date of the lease. Mr Kelly has occupied No 439 for over 20 years, running a second hand bookshop called 'Bookmongers'. I heard evidence from Mr Kelly, and I will return to this below. The lease is of the shop premises only and does not grant any rights over the Yard.
12. On 2 June 1994 Ms Damen entered a caution against the title of No 439. This related to the proceedings referred to above. In April 1995 Ms Damen was registered as freehold owner of the Yard.
13. On 20 January 1997 the Respondent, Mr Hassan, bought the leasehold interest in 441 Coldharbour Lane ('No 441'). He had no involvement in these premises or the Yard prior to this date. No 441 was being used as a café until December 2013. It is now being converted into flats.
14. On 6 February 1997 Mr Miller made the first of two applications for adverse possession of the Yard. I should say at this point that whilst the trial bundle contained some documentation relating to this and other applications (by both parties) this documentation was far from complete. I have been able to obtain from Land Registry all the relevant

material (or so much of it as has been retained) relating to the various applications. I do not consider that it was necessary to invite comments from the parties on these documents: they speak from themselves.

15. The application was supported by a statutory declaration (a copy of which is in the bundle), and photographs showing, amongst other things, the zinc framed boundary fence between Electric Lane and the Yard with a locked double gate. The keys were, it was said, 'under the supervision of Mr Miller and his son and the lessees of the lock up shops at both 439 and 441 Coldharbour Lane'. The declaration is confusing in that it appears to draw a distinction between the 'land to the rear of No 439' and the 'yard'. As shown on the plan attached to the declaration, the 'land to the rear of No 439' is the Yard, excluding what has now become No 25 Electric Lane. Mr Miller stated that the Yard had been used by his tenants, visitors etc since 1980.
16. Land Registry responded by letter dated 20 February 1997 (a copy of which was also attached to the letter dated 5 December 2014, referred to above). The application was rejected because of the Court Order dated 2 December 1988. It seems to me that it is strongly arguable that the consent order amounted to an acknowledgment of title, within section 29 of the Limitation Act 1980, and therefore time would have run again from this date (and Mr Miller would not have been able to show 12 years adverse possession). If the consent order did not amount to an acknowledgment of title, then Land Registry, in my view, were wrong in treating the order as starting time running again and should have investigated his claim that he had been in adverse possession since 1980. But all this is now part of the history of the Yard.
17. On 13 January 1999 the Respondent, Mr Hassan, purchased the freehold title of No 441. On 29 January 1999 he purchased the freehold of land at 25 Electric Lane from the London Borough of Lambeth. This is a small area of land which, on the ground, had formed part of the Yard, to the north of a property known as Hereford House on Electric Lane, and to the south of a property known as the Coach and Horses public house on the corner of Electric Lane and Coldharbour Lane. The plot fronts onto Electric Lane. It is registered with title number TGL 156908. Mr Hassan applied for planning permission to build two flats. The work was completed in July 2003. At the rear of the new building, and separated from it by a few feet, is a small wall which now divides the building from

the Yard. It is Mr Miller's case that he installed a new gate at the access of the Yard from Electric Lane in 2002 and that he alone has a key to this gate. Again, I will return to his evidence in more detail below.

18. On 28 March 2008 Mr Miller made a further application to Land Registry for title by adverse possession of the Yard. This was supported by a statutory declaration dated 5 September 2007. In this Mr Miller stated that he had occupied the Yard continuously since he had purchased No 439, and used the Yard to store his work tools. Land Registry replied on 2 April 2008 stating that the fees had been underpaid. The required amount was paid. A Land Registry survey of the yard was carried out on 27 June 2008.
19. The survey noted that the Yard was waste land, with no clear occupant. The land did not appear to be maintained. Part of it was used as a bin storage area. The report also noted that the Yard could be accessed via the rear doors of Nos 439 and 441 and through a locked access gate leading from Electric Lane. It was not possible to confirm whether Mr Miller had keys to this gate, although the writer of the report was told by the occupier of No 439 (Mr Kelly) that Mr Miller did have keys. The photographs show the Yard clear of any structures, in an untidy and unkempt state, with bins stored in the area behind the gate leading to Electric Lane. The two doors leading from No 441 and 439 can clearly be seen.
20. On 15 July 2008 Land Registry wrote to the solicitors then acting for Mr Miller (shortly thereafter this practice was intervened in by the Solicitors Regulation Authority). This letter sets out in some detail the necessary legal criteria for acquiring title by adverse possession. The letter stated as follows: *' Our surveyor has reported that the land being claimed appears to be wasteland with no clear occupant. Indeed, looking at the photographs it is difficult to ascertain evidence of the land being used for any purpose at all (apart from possibly the storage of bins on a small part thereof). On top of this in order to be in adverse possession a squatter needs to be in exclusive possession of the land. As can be seen... the land can be accessed via 441 Coldharbour Lane and from what appear to be flats at 25 Electric Lane. (This is not accurate: there is no access from the flats to the Yard).*
21. The letter also stated that much more detail was needed regarding the purpose to which the Yard had been put, and the question of access from the other properties would also

have to be dealt with. The writer concluded by saying that, unless further information was forthcoming, the application would be cancelled on 5 August 2008. Mr Miller withdrew his application, on the basis that he could make a further application on another date.

22. In about October 2011 Mr Hassan made his first application for title by adverse possession of the Yard. The only documentation I have received from Land Registry is the survey report dated 6 December 2011. No reference was made by Mr Hassan to this earlier application in the proceedings before me. The report states: *'The land edged red forms a yard area known as Soner Square. It appears that the applicant is in exclusive occupation of this area. The land can be accessed via locked access gate. (I confirm that the applicant holds keys for this gate). The land can also be accessed via the access door leading from the applicant's café at 441 Coldharbour Lane and via the access door leading from 439 Coldharbour Lane.'*

23. I do not know why this application was not proceeded with, or whether it was rejected. The photographs show the rear of the Yard in the same or similar unkempt and abandoned state as the 2008 photographs. And, of course, access to the Yard was by exactly the same means in 2008 as it was in 2011, and as it is now.

24. As stated above the Applicant's (second) application to Land Registry was dated 1 February 2013. Mr Hassan gave a detailed account of the history and use of the Yard. He claimed that the Yard was used in connection with his café business as a garden and area for relaxation. This assertion does not fit in any way with any established user as set out in earlier applications, or with any of the photographic evidence. He also claimed that, as soon as he completed the purchase of No 441 (in 1997) he renewed the corrugated fence and replaced the gate to which he had the key. The whole of the land was, it was said, used. (It will be recalled that Mr Miller made his first application for title by adverse possession in 1997). In addition, Mr Hassan claimed that he replaced the gate in 2002 and retained the keys. The owners of the flats at 25 Electric Lane use the Yard for storing bins.

25. The declaration also states the following: *'I am aware that a claim was made by Mr Linworth Miller which he withdrew as he was never in possession of the land. The property in question has been leased to Mr Patrick Kelly since 1994. The gate at the rear of the premises was installed by Mr Miller but he never used it. In 2008 when Mr Miller*

made his application to the Land Registry he gave access through the back of his shop because I would not allow access when it was requested of me without prior notice. This statement does not, of course, tally with the report made by the Land Registry surveyor in June 2008.

26. Mr Miller's application to change the register of the title to the Yard by removing Mr Hassan is dated 3 July 2014. This too was supported by a statutory declaration. In this he stated that he has maintained the land since he purchased No 439, and originally used it as as builders yard. He referred to Mr Kelly and his use of the land for deliveries. As for the gate onto Electric Lane, he stated that he erected a new gate in 2007, and gave the keys to Mr Hassan and Mr Kelly. This gate was removed 2 or 3 years ago and replaced with the gate which is now there, when Mr Hassan put his name on the gate. The survey in 2011 shows the gate with the words 'Soner Square' above it. The statutory declaration again repeated that Mr Miller had acquired title to the Yard when he bought No 439 in 1980.

Evidence at the hearing

27. Mr Miller's evidence at the hearing is that he has never given up possession of the Yard from 1980 onwards, and always had access through the gate onto Electric Lane until approximately September 2015 when Mr Hassan changed the locks and refused to give him a key. He believed he had bought the Yard in 1980 when he bought No 439, and used it as part of his builder's business. It is clear that he continues to believe that this is the case. There were buildings or structures in the Yard, and indeed there are photographs of dilapidated wooden structures, amidst piles of timber, rubble, metal poles, railings etc. He repeated that he did not give up possession after the court order or pay damages.

28. He described the use of the Yard by Mr Kelly to take books through the back of the shop. He also stated that he replaced the gate to Electric Lane in 2007, when his old dilapidated gate became too rotten, and gave a key to Mr Hassan. When Mr Hassan in turn replaced this with the gate that is there now, a key was given to him by Mr Hassan. At the present, as I was able to see on the site visit, the Yard is again full of builders materials and assorted materials, at least in part connected with the work being done to No 441. In essence, Mr Miller's evidence amounted to saying that he (and his son and Mr Kelly) always had keys to the gate to the Yard, as did Mr Hassan, and that matters changed at

the end of last year when Mr Hassan prevented access from the gate onto Electric Yard by changing the lock and by putting large dustbins behind the gate.

29. Before the two new flats at 25 Electric Lane were built it was possible, according to Mr Miller, (although difficult) to drive into the Yard. Mr Kelly confirmed that he used the back entrance to the shop for deliveries and, before the new building was erected, was able to drive in and out of the Yard. He has not been able to use the gate for some time because the locks have been changed and because of the obstructions caused by the dustbins. Pressed on the frequency of his use of the Yard, Mr Kelly stated that, in the early days he would go to Cambridge once a month to buy books, and would take them into his book shop through the back door onto the Yard. Now he can pull up outside the shop to make deliveries. He remembered clearly the last time he used the back entrance with a delivery of books, which was around the time of his 50th birthday, five and a half years ago. There was no difficulty gaining access. The key to the gate was given to him by Mr Miller. He was never given a key by Mr Hassan.

30. I have summarised above Mr Hassan's evidence, as set out in his Statement of Truth in support of his (successful) application for adverse possession. Before me, he stated that the Yard had been full of rubbish which had been fly tipped from the Coach and Horses and from the squatters living to the east in Clifden Mansions, so much so that he threatened Lambeth Council with legal action. The Council, he says, cleared the Yard in 1999. This is not borne out by the photographic evidence, which shows the Yard in a poor state as recently as 2008, and not very much improved in 2011. Mr Miller's evidence is that the rubbish was deposited in the Yard by Mr Hassan. Mr Hassan denied that Mr Miller had ever stored materials in the Yard, or that he had ever seen Mr Kelly use the Yard to get to the rear of the bookshop. Mr Kelly, he said, was simply being untruthful on this point. He also stated that Mr Miller had claimed to own the Yard, but was never able to produce proof. Mr Miller went as far as offering to sell to Mr Hassan that part of the Yard at the rear of No 441.

31. Mr Hassan's evidence is that the gate which is there now was erected by him in 2002. He alone has a key, and he never gave one to Mr Miller or Mr Kelly. He was never given a key by Mr Miller. He stated that Mr Miller never complained about not having a key, even

though he claimed to own the Yard. On his evidence, neither Mr Kelly nor Mr Hassan have been able to have access to the Yard since 2002.

32. Asked about what acts of possession he could claim to have exercised over the Yard, Mr Hassan repeated that he had cleared the rubbish, and resurfaced the area behind the gate to make deliveries easier to his coffee shop.

Conclusions on the evidence

33. I fully accept that Mr Miller believes that he acquired the Yard in 1980, and that he continued to believe that he owned or had acquired title to the Yard, notwithstanding the 1988 consent order. Having heard Mr Miller, this belief is not inconsistent, it seems to me, with the applications he made to Land Registry for title by adverse possession in February 1997 and in March 2008, and by the evidence of Mr Hassan. There was clearly an element of doubt (at least in the early years) as to the whether the purchase of No 439 included the Yard. It seems to me entirely plausible that he would have used the Yard, again at least in the early years, as an extension of his shop, and stored materials there. In 1994 the shop was let to Mr Kelly, and thereafter the evidence is less clear as to any use he might have made of the Yard.

34. The photographs, however, all show the Yard full of what can only be described as assorted rubbish (wood, pieces of iron, railings, discarded mattresses, rubble, tiles, broken materials) until the photographs taken by the Land Registry surveyor in 2013, when the Yard appears to be relatively clear and relatively tidy.

35. I do not, of course, have to follow or adopt the views expressed by Land Registry in March 2008. But, based on the photographic evidence, it is hard not to agree with the conclusion of the surveyor that the Yard 'appears to be wasteland with no clear occupant' and that the Yard did not appear to be used for any particular purpose.

36. Access to the Yard has at all times been from the rear of 439 and 441, and from the front gate. The point made by Land Registry in 2008 that this access suggests more than one user is, it seems to me, a good one. I do not know what happened to Mr Hassan's application in 2011, but, on any footing, it is difficult to see what had changed between

2008 and 2013, nor what it was that led Land Registry to accept that Mr Hassan had been in exclusive occupation for at least 10 years by February 2013, when Land Registry was not satisfied (and in my view rightly) that anyone was in occupation of the Yard in 2008.

37. As for access from the main gate, I do not accept the evidence of M Hassan that he alone has had a key, nor that he has prevented access from 2002 onwards to Mr Miller and Mr Kelly. The very fact that a further application for adverse possession by Mr Miller was made in 2008 makes this assertion inherently implausible. Nor do I accept the suggestion that, if, contrary to his own evidence, Mr Hassan did give keys to Mr Miller, he did so on the basis that he owned the Yard and was allowing access. It seems to me that access to the Yard and use of the Yard was shared, at least until recently.

38. I found Mr Kelly to be entirely credible in his evidence that he last recalls using the gate about five and a half years ago, at about the time of his 50th birthday. Although Mr Miller's evidence was in some respects a little confused, I fully accept his evidence that Mr Hassan changed the lock on the gate last autumn or thereabouts. I do not have to decide when the current gate was installed, since the issue is whether it was possible to gain access through the gate, but if I had to I would prefer Mr Miller's evidence on this point.

39. In effect, there was something of a tug of war between Mr Miller and Mr Hassan over the ownership, by adverse possession, of the Yard. Since, as I find, both had access to the Yard and made some (limited) use of it over the years, it follows that neither can show that he has acquired title by adverse possession. The evidence given by Mr Hassan as to his use of the Yard falls far short of the evidence needed to establish both factual possession and the requisite intention to possess. Mr Hassan did not have, in my judgment, the appropriate degree of physical control of the Yard, nor the intention to exclude all others, in so far as practicable.

40. For the same reasons I am not satisfied that Mr Miller has acquired title by adverse possession. I accept that he has used the Yard over the years since 1980 onwards, but, as I say, this user was shared with Mr Hassan.

41. At the outset of the hearing, Mr Gibson, for Mr Miller, stated that the issues were whether either Mr Miller or Mr Hassan could show 10 years adverse possession, or whether, on the facts, neither could. I agree with his analysis.

Rectification of the register

42. As mentioned above, the Act contains provisions which allow the register to be altered. Section 65 give effect to schedule 4 to the Act. Paragraph 5 of Schedule 4 allows the registrar to alter the register for the purpose of, amongst other things, correcting a mistake. Where a disputed application is referred to the Tribunal, the Tribunal's role is to consider how the registrar should exercise his powers.

43. It is now settled law that the party applying to alter the register by removing land from another person's title does not need to show an interest in the land: see *Mann v Dingley* [2011] EWLandRA 2010 0582, *Paton v Todd* [2012] EWHC 1248 and *Balevents v Sartori* [2014] EWHC 1164.

44. The meaning of 'mistake' was considered in *Baxter v Mannion* [2011] 1 WLR 1594. In that case the respondent had obtained title by adverse possession. The paper owner had received notice of the application, but had failed to respond to Land Registry in time. He then sought rectification of the register to restore himself as proprietor. On the facts, it was held that the respondent had not been in possession for 10 years prior to the date of the application. It was also held that it would be unjust not to correct the mistake.

45. Paragraph 6(2) provides that no alteration affecting the title of the 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 (that is to say, being registered as proprietor) or (b) it would for any other reason be unjust for the alteration not to be made.

46. If the proprietor of the estate is not in possession, then the presumption is that, if there is a mistake, rectification will be ordered unless there are exceptional circumstances which justify not making the alteration.

47. In this case, I am far from convinced that Mt Hassan is now in possession of the Yard. However, for these purposes, I am prepared to assume that he is. He has changed the locks to the gate, and the Yard is now being used as an extension of the building works to No 441. The question is then whether he has by fraud or lack of proper care caused or substantially caused the mistake or whether it would in any event be unjust for the alteration not to be made. The Statement of Truth in support of the application was, in my view, misleading in a number of material respects. I do not accept that he occupied the Yard exclusively from 1997 or 1999 'for different purposes at different times', or that 25 Electric Lane formed part of the Yard (it clearly did not) or that the use of the Yard was uninterrupted by any third party. The fact that the registered owner (assuming Land Registry were able to serve the notice of application on her or her heirs) did not object is nothing to the point: a non objection does not in any way validate or strengthen a claim which is otherwise bad, as was held in *Baxter*.

48. In any event, as I have said, in all the circumstances of the case it would be unjust to leave the register as it is. I can see no reason why, after so many years in which Mr Miller and Mr Hassan used the Yard and had access to the back of their properties, it could possibly be right that Mr Hassan should now remain as the registered proprietor.

49. The effect of my order is that Mr Hassan is removed as the registered proprietor of TGL108410. The former registered proprietor, Mrs Damen, (or the beneficiaries of her estate) will no doubt be re-instated. It may well be, of course, that both Mr Hassan and Mr Miller have acquired prescriptive rights to access the rear of their respective properties over the Yard, but this is another matter.

Costs

50. In view of my findings, my preliminary view is that this is a case where no order as to costs should be made. However, if either or both the parties wish to argue that they are entitled to their costs, they are to file and serve submissions by 10 August 2016, and may reply to the other's submissions by 23 August 2016. I will then consider the position.

BY ORDER OF THE TRIBUNAL

Dated this 26th day of July 2016.

