

[2019] UKFTT 0590 (PC)

REF/2018/0301

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

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

KESTONS PARK (1975) LIMITED

APPLICANT

and

(1) JAMES ANTHONY DERIAZ CROFT

(2) JOHN TREVOR DAVY

(3) KARUNA SOOD

(4) PRAVIN KUMAR SOOD

(5) DEAN FRANCIS JONES

(6) JASON WADE JONES

RESPONDENTS

**Property Address: The Estate Roads, Verges and Footpaths, Keston Park Estate,
Orpington, Kent**

Title Number: SGL765275

Before: Judge Martin Dray

ORDER

IT IS ORDERED THAT:

- (1) The Chief Land Registrar do give effect to the Applicant's application dated 4 December 2015 for first registration as if the Respondents' objections thereto had not been made.

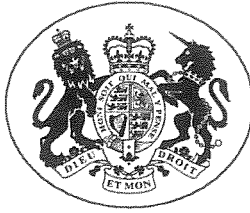
- (2) If the Applicant seeks its costs of the reference from the Fifth and Sixth Respondents, it must file and serve a costs schedule in Form N260 or similar (containing only costs from the date of the reference, 9 April 2018, onwards) by 4pm on 6 September 2019.
- (3) Any submissions on costs (both in relation to whether costs should be awarded and the quantum of the costs sought by the Applicants) which the Fifth and Sixth Respondents wish to make must be filed and served by 4pm on 20 September 2019.
- (4) The Applicant may file and serve any counter-submissions on costs by 4pm on 4 October 2019.

Judge Martin Dray

Dated this 23rd August 2019



BY ORDER OF THE TRIBUNAL



[2019] UKFTT 0590 (PC)

REF/2018/0301

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

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

KESTONS PARK (1975) LIMITED

APPLICANT

and

(1) JAMES ANTHONY DERIAZ CROFT

(2) JOHN TREVOR DAVY

(3) KARUNA SOOD

(4) PRAVIN KUMAR SOOD

(5) DEAN FRANCIS JONES

(6) JASON WADE JONES

RESPONDENTS

**Property Address: The Estate Roads, Verges and Footpaths, Keston Park Estate,
Orpington, Kent**

Title Number: SGL765275

Before: Judge Martin Dray

Sitting at: 10 Alfred Place, London WC1E 7LR

On: 17 June 2019

DECISION

Max Thorowgood of Counsel, instructed by Grant Saw LLP, for the Applicant.

The Fifth and Sixth Respondents appeared in person.

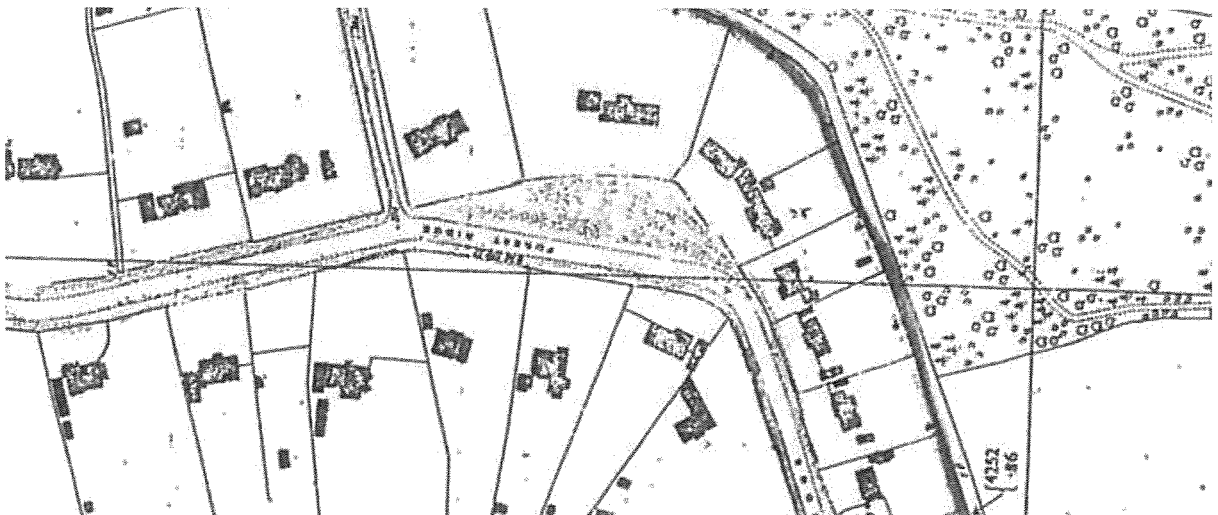
Historical background

1. The following account is drawn from the materials before me. I believe it to be common ground and uncontroversial but if and insofar as there is any dispute it represents my findings of fact. Numbers in square brackets refer to the corresponding pages in the trial bundle before me.
2. In 1923 Frederick Howard Rogers acquired [95] what he went on to develop and became known as the Keston Park Estate (“the Estate”), a residential estate of some 143 acres which now comprises c.208 houses served by a number of private estate roads.
3. When the estate was constructed Mr Rogers proceeded to sell-off the individual plots.
4. One such plot was 20 Forest Ridge. It was conveyed by Mr Rogers to Kate Elizabeth Glasspoole by a conveyance dated 26 May 1926 (“the 1926 Conveyance”).
5. The plot was vacant at the date of the 1926 Conveyance. The house at 20 Forest Ridge was built and completed between 1927 and 1930. It was around then (c.1929) that the metalled road known as Forest Ridge was built. Before that the access was unmade, a muddy track.
6. 20 Forest Ridge was in turn sold to a Mr Dixon in April 1944 [259] and in 1958 it passed to a Mrs Turner [259]. On 13 May 1965 it was transferred to a Mr & Mrs Hamilton [259]. That led to the first registration of the title to 20 Forest Ridge under title no. SGL9603. [104] The registration was pursuant to an application dated 28 May 1965 [259] and, although the effective date of registration was 1 June 1965 (being the date of receipt of the application at HMLR), it is likely that in practice the application was actually completed in July 1965, for the title plan is dated “7/65”. [109]
7. The property passed to Mr J P Jones and & Mrs S M Jones, the Fifth and Sixth Respondents’ parents, in 1971. [262] In 2008 it became vested in the Fifth and Sixth Respondents, in whose name the title is now registered. [148]
8. Travelling back in time, all the plots on the Estate were sold-off in or around the 1920s. Mr Rogers died testate in 1939. His will was dated 2 May 1938. Probate was granted in

1940. In 1966 trustees of his will were appointed. By an assent dated 21 January 1972 (“the Assent”) [113] the following was expressed to be vested in the trustees:

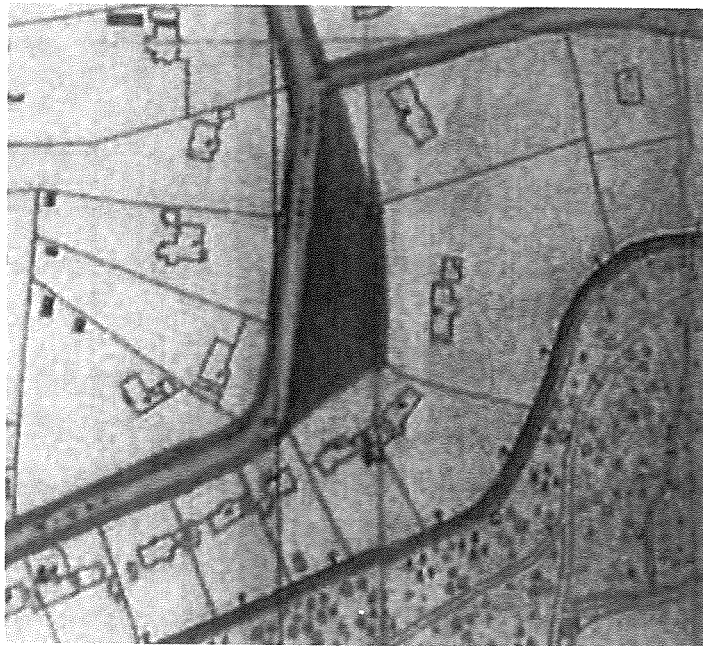
“All those pieces or parcels of land forming part of the estate known as Keston Park Estate ... shown on the plan attached hereto and thereon coloured blue and having frontages to Forest Ridge and Holwood Park Avenue and also the roadways coloured yellow and the grass verges coloured green on the said plan and known as Ninhams Wood Holwood Park Avenue Pine Glade Beech Dell Forest Ridge Forest Drive and Longdon Wood ...”

9. The available copy of the Assent does not enable one to identify the different colours shown on the original plan. Nonetheless it is evident that, in general terms, the Assent relates to the various estate roads on the Estate, including Forest Ridge. What is more it is apparent from the extract of the plan [114] reproduced below that, in the vicinity of 20 Forest Ridge (which property sits at the apex of a bend in the road), the land ostensibly the subject of the Assent includes a not inconsiderable swathe of land adjacent to the route of the road itself. The inclusion of such additional land certainly suggests a belief on the part of those concerned that 20 Forest Ridge (and its immediately neighbouring plots) is (are) set back considerably farther from the road than is the typical plot elsewhere on the Estate. There are relatively few places where the estate roads bend significantly; in general, the relationship between the plots and the roads is constant (i.e. there is a uniform narrow verge on both sides of the estate road). The land in the vicinity of 20 Forest Ridge presents an exception to this rule of thumb.



10. The Applicant (then known as Keston Park Residents Association [122]) was incorporated in 1975. [121] Its objects include the acquisition of those areas of land, roads, easements, tracks, ways, footpaths and verges owned or vested in Mr Rogers’ trustees. [124]

11. By a conveyance dated 20 March 1979 (“the 1979 Conveyance”) [133] the trustees conveyed to the Applicant “All those the Estate Roads ... the verges and fixtures and footpaths ...”. The “Estate Roads” were defined as “the roads on Keston Park” including Forest Ridge, shown for identification purposes only coloured yellow on the conveyance plan. The “verges” referred to “the grass verges abutting the Estate Roads” coloured green on that plan. The “footpaths” mean those coloured orange on the same plan.
12. Like the Assent, the plan to the 1979 Conveyance [134] (an extract of which appears below), which is based on a map dated 1976, shows a large strip of land coloured green (and hence denoted in the 1976 Conveyance as “verge”) fronting 20 Forest Ridge and lying between that property and the carriageway, the same being part of the intended subject-matter of the 1979 Conveyance.

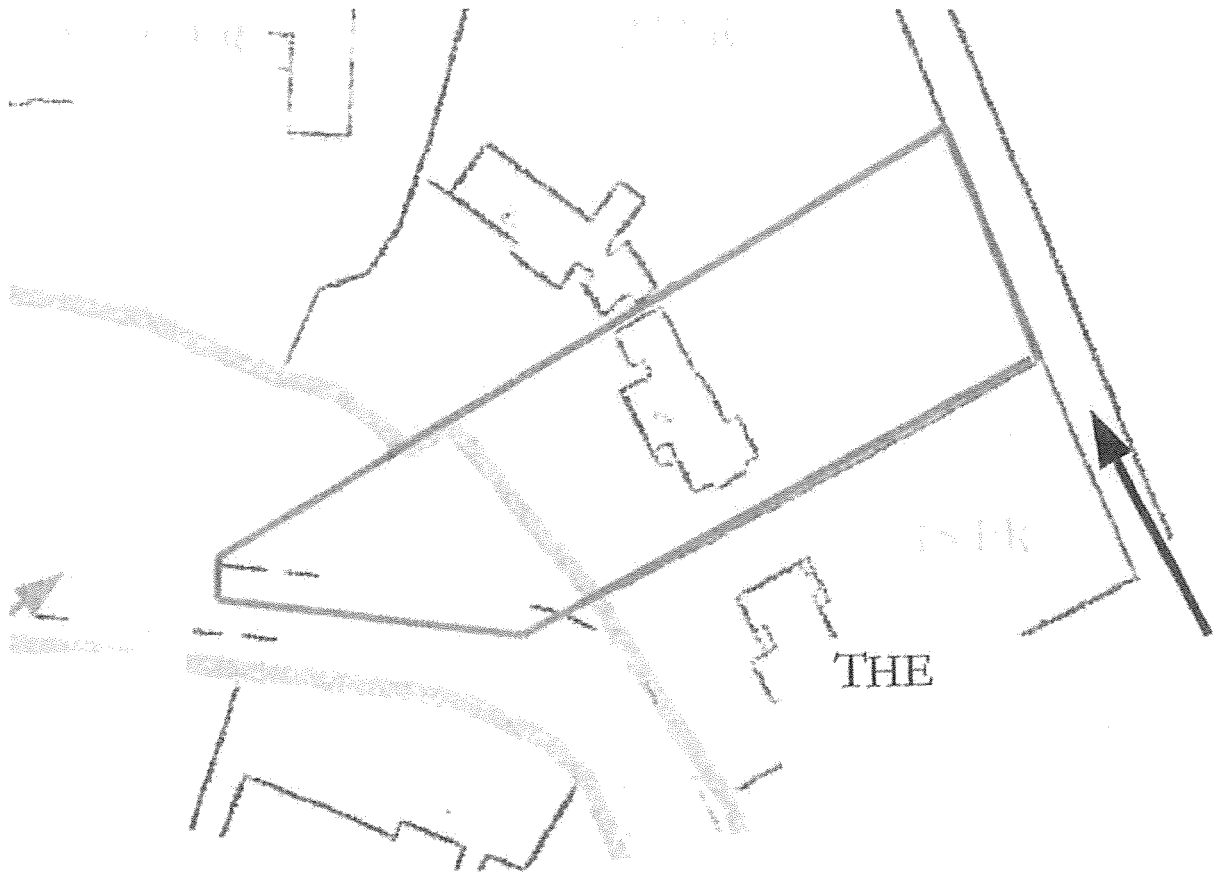


13. Clause 4 of the 1979 Conveyance [138] is a covenant by the Applicant not to transfer the estate roads, verges, fixtures and footpaths thereby conveyed except as a whole and then only to a body who shall hold the same on the trusts declared by clause 1 of the deed (the property in question being held on trust for the owners of the various lots on the Estate).

The application, objections, proceedings and the parties' positions

14. On 2 December 2015 (effective date 4 December 2015) the Applicant applied for first registration of the title to the estate roads and verges on the Estate at large, including the area alongside 20 Forest Ridge. [159] The application was based on the 1979 Conveyance.
15. Since then the Applicant has amended the application so as to remove from it a strip of land comprising a former footpath situated to the west of the road known as Pine Glade. [229] The revised proposed title plan is at [231A]. This renders irrelevant a point made by the Fifth Respondent in his statement of case. [26, para.(d)]
16. A handful of objections were made to the application. All but those of the Fifth and Sixth Respondents have since been withdrawn or otherwise disposed of within the course of the proceedings.
17. The Fifth and Sixth Respondents made separate objections by letters dated 22 April 2016 [183] and 8 August 2016 [184] (effective date of each: 28 April 2016). In summary, they maintain that the Applicant does not have title to the estate roads generally and, in particular, to the strip of land fronting 20 Forest Ridge between that property and the middle of Forest Ridge itself.
18. The dispute was referred to the Tribunal in April 2018. [227]
19. The Applicant filed a statement of case. [1] The Sixth Respondent filed a statement of case. [12] Separately, the Fifth Respondent filed a statement of case. [16]
20. I also received written submissions from the Applicant and the Fifth and Sixth Respondents which were supplemented by oral submissions at the hearing, at which the Applicant was represented by counsel, Mr Thorowgood, and the Fifth and Sixth Respondents, who have acted throughout in person, both appeared and addressed me.
21. In addition, witness statements were provided by Mark Elswood on behalf of the Applicant [41] and the Sixth Respondent [48]. At the hearing oral evidence was given by Mr Elswood, who submitted two short video clips, one showing the land in front of 20 Forest Ridge, and both Respondents also testified. Each witness was cross-examined.

22. Despite having made separate objections and filed separate statements of case, it became apparent that the Fifth and Sixth Respondents unsurprisingly make common cause. I therefore do not distinguish between their positions.
23. Although, as noted above, a general challenge to/rebuttal of the Applicant's claim to registration at large has been advanced, it is evident (from both their written and oral representations) that the Fifth and Sixth Respondents do not present specific grounds for opposition to the Applicant's application, save insofar as it concerns the strip of land in front of 20 Forest Ridge (as to which see below). Indeed, as they explained their position to me, it appeared that their generic objection had been put forward on the basis that they did not appreciate that they could object to the application in part only.
24. So far as the land fronting 20 Forest Ridge ("the Disputed Land") is concerned:
- (1) It comprises what is predominantly a grass verge situated behind low-level wall, and in part some of the in-and-out driveway which serves 20 Forest Ridge.
 - (2) It is an area of land of c.294m². It is said to comprise almost one half of the entire front garden of 20 Forest Ridge (as it stands today). [28, para.(d)] & [31, para.(vii)]
 - (3) The Fifth and Sixth Respondents lay claim to this area and, consequently, deny the Applicant's title thereto.
25. An illustrative plan portraying the location and extent of the Disputed Land, produced by the Sixth Respondent, is at [15]. The plan indicates (in approximate terms only [12, para.2]) the general relationship between the claimed extent of 20 Forest Ridge according to the Respondents (shown by the blue line) and the land encompassed by the Applicant's application (shown by the red line). The Disputed Land is the roadside area between the blue and red lines on the extract of the plan which appears below.



26. The Fifth and Sixth Respondents maintain that the 1926 Conveyance included the Disputed Land (to the centre point of Forest Ridge). It is said, “*Number 20 Forest Ridge is perhaps a rare (but by no means unique) example where it was intended the plot should extend to the road*”. [24] Their case is that the 1926 Conveyance passes “*all the land to the middle of the road (at that time unbuilt and the trajectory of which had not been determined)*”. [33, para.(b)] This is reflected on the illustrative plan. [15] On this basis the Fifth and Sixth Respondents contend that the Disputed Land (having been conveyed away in 1926) did not remain with Mr Rogers and so could not in turn have been the subject of the 1972 Assent and 1979 conveyance.

27. The Applicant disputes this. It maintains that the Disputed Land was not included in the 1926 Conveyance but was retained as part of the Estate and in turn devolved to the Applicant.

28. In their statements of case the Fifth and Sixth Respondents assert, in effect, a fallback claim to adverse possession of the Disputed Land. However, at the hearing they expressly chose not to pursue that contention (and hence were not cross examined in relation to their

evidence in that regard). Accordingly, I am not concerned with any adverse possession plea and so take no account of any acts of claimed use and enjoyment of the Disputed Land, confining myself to consideration of the historical materials. Whether the Fifth and Sixth Respondents would be at liberty to raise any adverse possession plea in the future, if they should seek to do so, is not a matter for me and I express no view on it.

Missing documentation and disclosure issues

29. Focusing on the 1926 Conveyance, the immediate and real difficulty is that to resolve this litigation I am required to determine its effect (i.e. what it conveyed), despite the fact that 1926 Conveyance is not before the Tribunal. The Applicant does not have a copy. Neither, they say, do the Fifth and Sixth Respondents. [30,para.(i)] For its part HMLR has not retained a copy.
30. The parties were required to give disclosure by the Tribunal's Order of 20 November 2018. [76] However, although the Fifth Respondent referred in his statement of case to assorted historical documentation (in particular but not limited to the 1944, 1958, 1965 & 1971 instruments mentioned above) in terms such that he must have had sight of, if not the instruments themselves, at least documentation specifically referencing the same, no such material was disclosed.
31. This apparent omission was explored at the hearing. The Fifth Respondent was asked about it. He said more than once that, whilst he could not be sure, he believed he had sourced the information online, most likely from HMLR. I was sceptical about this especially because: (a) the register of title for 20 Forest Ridge does not refer to such documents or indicate that copies are filed at HMLR; (b) moreover, HMLR's portal yields a negative so far as the availability of such documents are concerned; (c) the reported information is very specific to 20 Forest Ridge (thus rendering unlikely the prospect of it having been obtained by general internet searches).
32. The Applicant invited me to conclude that the Fifth and Sixth Respondents have possession (or at least sight) of such documents and, in particular, that (despite their protestations to the contrary) they possess, or have seen, the 1926 Conveyance too, and the Applicant asked me to infer that the non-disclosure was attributable to the documentation being unhelpful to the Fifth and Sixth Respondents' case.

33. I was not prepared to reach such a conclusion or draw such an inference without giving the Fifth and Sixth Respondents a further opportunity to produce the relevant documentation (relating to the devolution of the title to 20 Forest Ridge) or, as the case might be, to explain its absence. Consequently, at the end of the hearing I made an Order for specific disclosure, including the making of a witness statement in respect of any documentation said not to be in their possession. I gave the parties liberty to file submissions in relation to any matters arising from such disclosure.
34. The Fifth and Sixth Respondents provided a bundle of further disclosure [258-282] and all parties made submissions. I have taken these into account.
35. The additional disclosure includes (amongst other things) the following:
- (1) Architectural plans of the house at 20 Forest Ridge dating from 1927. [258]
 - (2) A list of documents (in form A13) submitted to HMLR in 1965 on first registration. [259] This shows that HMLR was then presented with, amongst other things, the 1926 Conveyance, the 1944 Conveyance, the 1958 Assent and the 1965 transfer.
 - (3) A letter from a firm of solicitors to Mr J P Jones dated 5 November 1971. [262] This includes the following:

"I enclose herewith the title deeds of 20 Forest Ridge which you may retain. Following the purchase by Mr Hamilton the title was registered at HM Land Registry and the deeds are replaced by a 'Land Certificate' so that the enclosed deeds are now valueless."
36. The Fifth and Sixth Respondents say, and I accept, that they obtained the form A13 from HMLR under cover of HMLR's letter of 9 June 2017. [206]. In that letter HMLR stated,
- "If Land Registry retains a document on completion of a registration an asterisk is made in the 4th column of that form. An asterisk does not appear in the 4th column in this case with reference to the 1926 Conveyance. The 1926 Conveyance would therefore have been returned to [the lodging solicitors, who then acted for the Hamiltons]."
37. The Fifth and Sixth Respondents also disclosed an assortment of extra material. Some is said to be germane to adverse possession (despite that not being a live issue). Some comprises maps/plans (e.g. from 1960) relating to 20 Forest Ridge. [272] A miscellany of other documents is produced, including the register of title 34 Forest Ridge [276] and a copy of a Court Order in the case of *Jones v British Gas Corporation* (as to which see below) [282]. In so doing, the Respondents have also at places given a commentary which goes beyond addressing the issue as to what documentary material is in their possession.

For instance, it is claimed that the background to the court case was that the Applicant erroneously gave permission to lay gas mains over the Disputed Land.

38. The Applicant has objected to the disclosure essentially on the basis that: (a) it is late; (b) there is no good reason for the failure to disclose it earlier; (c) it does not advance matters and/or is irrelevant. Further, the Applicant submits that – stemming from the facts and matters set out in paragraphs 30 & 31 above – its concerns as to what has become of the historical deeds, including the all-important 1926 Conveyance – have been exacerbated rather than allayed. It complains that the Fifth and Sixth Respondents have failed to explain the position in this regard. The Applicant also contends that the additional evidence (insofar as it goes beyond addressing the possession of documents) should not be admitted because it is too late and the Respondents have not been cross-examined on it.
39. I agree that there is no good reason for the lateness of the disclosure. None is proffered by the Fifth and Sixth Respondents. I do, however, admit the Form A13 and the 1971 letter since these are contemporaneous documents which directly bear on the conveyancing history and the existence and location of the deeds. I also admit the Court Order because that is a document of record. In addition, I admit a letter from HMLR dated 8 November 2018 [269] because this sheds light on the stamped note to which I refer in paragraphs 46 & 47 below (and the correspondence with HMLR [266 & 268]). I decline, though, to admit the remaining documents, not only on account of their lateness but also on the grounds of irrelevance and prejudice to the Applicant. I also refuse to admit the additional evidence (e.g. that in relation to the court action). If that was to be given, it could and should have been earlier.
40. Should I now infer, as the Applicant invites me to do, that the Respondents have (or have seen) more than they have disclosed? On the one hand, the Respondents say that it is believed that the original conveyances were destroyed in the light of the statement in the letter of 5 November 1971 (paragraph 35(3) above). There is potentially some force in this, in that one might reasonably expect a lay recipient not to bother to retain documents described as “valueless” (although the same letter said that the recipient might “retain the title deeds”). [262] On the other hand, it is not at all obvious why one would destroy the original deeds and yet retain (a) the historical architects’ drawings [258] and (b) moreover, the letter of 5 November 1971 itself [262]. Further, the fact that it is now said by the

Respondents that the details of the documents pleaded in the statement of case were allegedly derived from the A13 [259] rather than (as was alleged in evidence) internet research is a quite fundamental difference which gives me cause for some concern.

41. In the end, whilst I do have some doubts about the veracity of the account given by the Respondents (the Fifth Respondent also said in evidence that he had asked his father who did not have any documents), I have not been persuaded on the balance of probabilities (bearing in mind their firm protestations to the contrary) that they do in fact possess (or have seen/access to) the 1926 Conveyance. Although their approach to disclosure has been unsatisfactory, I do not consider it appropriate in all the circumstances to draw an adverse inference as to the existence in their hands of the 1926 Conveyance, still less the terms thereof.

Construction of the 1926 Conveyance – what did it convey?

42. This is the central, determinative issue in the case.

43. For better or worse, I am obliged to construe the 1926 Conveyance blind. I have not seen it or its plan. I must do my best using the secondary evidence to which I refer below.

44. When the title to 20 Forest Ridge was registered in 1965, HMLR (with sight of the 1926 Conveyance) described the land in question as “The Freehold land shown and edged red on the plan of the above Title ... known as 20 Forest Ridge, Keston.” [104]

45. The title plan [109] prepared at the time of registration shows the registered property stopping plainly some way short of Forest Ridge (with which road it is not depicted as contiguous), so excluding the Disputed Land from the registered extent of 20 Forest Ridge.

46. However, one must bear in mind that the filed plan bears the following stamped note:

“The boundaries shewn by dotted lines have been plotted from the plans on the deeds and are subject to revision on survey.”

47. In their letter of 8 November 2018 [269] HMLR advise:

“The purpose of the title plan is limited to identifying the position of the property in relation to the features on the Ordnance Survey map. The stamp added to the plan reflects that at the time of registration the Ordnance Survey map carried only a partial fenced extent and so *the*

remainder of the boundary was plotted on by Land Registry to reflect the extent included in the documentary title".

48. In the circumstances (i.e. the fact that, as the A13 [259] records, the 1926 Conveyance was submitted for registration), I find that the conveyance/plan from which HMLR plotted the boundaries in question was the 1926 Conveyance/its plan. (I believe this to be common ground but, if not, I so determine the issue.) That the 1926 Conveyance had (unsurprisingly) a plan is borne out by the reference thereto in the restrictive covenants (as to which see paragraph 51 below), and by the fact that a note on the registered title no. SGL9603 [107 & 155] makes it plain that HMLR had seen the depicted T-marks referred to in the second such covenant.
49. It is common ground that on the title plan [109] the northern boundary of 20 Forest Ridge, i.e. that fronting Forest Ridge, is depicted by a dotted line. Hence I find that on the balance of probabilities this boundary (and hence the *prima facie* exclusion of the Disputed Land from the registered title of 20 Forest Ridge) was derived by extrapolation from the 1926 Conveyance plan.
50. Incidentally, appears that no survey of the area has ever been conducted by HMLR. The current title plan for title no. SGL9603 remains that produced on first registration. [156] It has not been updated.
51. Besides the title plan, the register of title no. SGL9603 extracts and records restrictive covenants imposed by the 1926 Conveyance. These are set out in the schedule of restrictive covenants. [153-155] They include:
1. The building line shall be 25' back from the frontage line unless some other building line shall be shown *on the plan of the plot ...*
 2. The purchaser shall make and erect a good and sufficient open pale fence to be approved of by the vendor or a hedge on the side or sides marked "T" on the plot within the boundary line *on the said plan.*
 5. *The purchaser shall pay to the vendor from time to time one half of the cost of repairs to and the formation construction and maintenance of the part or parts of the road or roads on which the plot abuts or may at any time hereinafter abut (which road or roads with the footpaths thereof are herein called "the road") coextensive with the plot **Until the road shall have been constructed the purchaser will keep that portion thereof which lies between the plot and the centre of the road in good order and condition.** The purchaser shall make good any damage done to the road by reason of any extraordinary traffic caused by her over the road.*

52. As I note below, I have little else to go on when it comes to ascertaining the extent of 20 Forest Ridge conveyed by the 1926 Conveyance. The available pieces of the jigsaw are heavily limited.
53. No other terms of the 1926 Conveyance are reproduced in the register of title no. SGL9603. For instance, no beneficial easements (rights of way) over the estate roads are recorded. It is thus not known if any were expressly granted, although (if not) rights would have arisen in any event e.g. pursuant to s.62 Law of Property Act 1925 or implied grant – and HMLR intends (if the application is upheld) to register the estate roads (generally) as subject to rights of way. [230]. I return to the issue of easements below.
54. I do not have sight of any other relevant conveyancing instruments in relation to 20 Forest Ridge (before the 2001 transfer). Although the same may simply have referred back to the 1926 Conveyance, they might perhaps have included a plan. Again, there is a blank in this respect.
55. Although it is well established that the parcels of a conveyance are to be construed with reference to the position on the ground at the date of the conveyance, there is no evidence as to the position on the ground in 1926, save that a metalled carriageway did not then exist. So I derive no assistance from such considerations. It is primarily for this reason, coupled with the abandonment of the adverse possession plea (and the fact that I have various plans and the video clips before me), that I refused the Respondents' initial request for a site inspection; what is visible in 2019 is not a useful guide to the state of affairs in 1926.
56. There is also no relevant evidence before me as to the terms of the historical conveyances of other plots on the Estate (which might possibly have pointed, for example, to all instruments being in similar form and having plans bearing dimensions and, as the case might be, clearly including or excluding parts of the estate roads), which evidence might in turn have justified inferences in relation to the content and effect of the 1926 Conveyance. No such research has been undertaken by the parties. I unearthed one document but it was agreed to be of marginal relevance and I say nothing more about it. As it is, I am forced to work with what little is known or can be deduced about the 1926 Conveyance itself.
57. Returning to the title plan [109]:

- (1) The Fifth and Sixth Respondents submit that it is not determinative of the boundaries of 20 Forest Ridge given the absence of survey and in light of the express note of qualification thereon (as to which see paragraph 46 above).
- (2) Conversely, the Applicant places reliance on the plan and contends that the plotting of the boundary undermines the Respondents' assertion that their ownership extends to the mid-point of Forest Ridge alongside 20 Forest Ridge. The Applicant says that the plan indicates the existence of a verge between the property and the estate road, i.e. the Disputed Land, which it is claimed is retained by the Applicant.

58. In my judgment, one must necessarily be circumspect about placing undue reliance on a title plan prepared by HMLR, not only because of the noted want of any survey (and hence of any definite correlation of the plotted conveyance boundaries to the ground) on first registration (itself c.39 years after the 1926 Conveyance)) but also because title plans only indicate general boundaries: r.278 Land Registration Rules 1925 (see now s.60 Land Registration Act 2002). As such, the exact line of the boundary is left undermined, as, for instance, whether or not the land registered includes the whole or any proportion of any adjoining road: *ibid*.

59. That said, and whilst firmly bearing in mind the inherent limitations of any title plan (which must necessarily play second fiddle to the governing conveyance), I do believe that – in the absence (now) of the 1926 Conveyance – weight can properly be attributed to the position of the boundary relative to Forest Ridge depicted by the title plan. The register and filed plan were undoubtedly meant to describe the registered land and indicate its boundaries so far as practicable and, allied to that, the filed plan was to be used for assisting the identification of the land: Land Registration Act 1925, s.76(b). I consider that the title plan may fairly be taken to be as an accurate a portrayal of extent of 20 Forest Ridge as HMLR was able to plot based on the 1926 Conveyance (the primary evidence as to the boundary, of which instrument had sight at the time); in other words that the title plan faithfully reflects the 1926 Conveyance plan.

60. So, whilst subordinate to, and liable to be displaced by, the 1926 Conveyance (if available), in the absence thereof the title plan is, in my judgment, to be taken as strong, reliable and probative (albeit secondary) evidence of the extent of the land conveyed by the 1926 Conveyance. Moreover, the fact that the title plan clearly denotes (to any viewer) the

property boundary being set well back, and at a considerable remove, from the road (and the property not including the Disputed Land) is, to my mind, of real significance. It is a meaningful pointer to the position of the historically set boundary, and it is undoubtedly consistent with and supportive of the Applicant's case as to the location of the relevant boundary of 20 Forest Ridge. Though not determinative, it is nevertheless an important factor to be weighed in the balance.

61. It is asserted by the Fifth and Sixth Respondents that the qualificatory wording found on the title plan denotes that the 1926 Conveyance was *itself* expressed in terms that made the boundaries of the plot subject to later, more accurate surveying by reference to the position of the as-built road. I reject that claim. Having regard to the wording, I firmly believe that the note on the title plan refers simply to a want of surveying by HMLR in 1965. This is consistent with HMLR's 2018 letter: see paragraph 47 above. Further, if (which possibility I reject) the note had been intended to reproduce an inherent limitation within the 1926 Conveyance, one would fully expect the qualification to have been distinctly recorded (a) in the register (not just on the plan) and (b) moreover, in terms that made it plain that it derived from the instrument as opposed to the HMLR's own process (i.e. that it was a transposition of existing text). As it is, there is no such suggestion.
62. The Fifth and Sixth Respondents also contend that because the metalled road at Forest Ridge was not constructed until after the 1926 Conveyance (as the terms of the restrictive covenant no.5 effectively acknowledge) the front boundary could not have been, and was not, fixed at the date of the 1926 Conveyance. They maintain that the boundary could only have been set after the construction of the road, asserting that "*the frontal boundaries of 20 Forest Ridge could not be definitively determined at the time of conveyance ... [not] until such time the road Forest Ridge had actually been built*". [24, para.(f) and see also [29, para.(a)]
63. I disagree. A conveyance must be certain as to its ambit. As Megarry J said in *Neilson v Poole* (1969) 20 P&CR 909:

As to any particular parcel of land, either the conveyance conveys it, or it does not; the boundary between what is conveyed and what is not conveyed must therefore be proclaimed. The court cannot simply say that the boundaries are uncertain, and leave the plot conveyed fuzzy at the edges, as it were. Yet modern conveyances are all too often indefinite or contradictory in their parcels. In such circumstances, to reject any evidence afforded by what the common vendor

has done in subsequent conveyances seems to me to require justification by some convincing ground of judicial policy; and I have heard none.

64. In my judgment, the notion of the 1926 Conveyance having left the extent of the property undetermined or, at best, unascertainable until the metalled road was built is untenable and uncommercial. It would mean that on day 1 after the sale/purchase neither contracting party would know whether the use of a given parcel of land in proximity to the route of the future road was a trespass vis-à-vis the other. I reject that possibility as inherently improbable.
65. The Fifth and Sixth Respondents' case is effectively that the parties in 1926 are to be taken as having agreed to live with a temporary period of uncertainty, framing their agreement on the basis that, although the metes and bounds of the land conveyed are not fully identified in the agreement, there is an in-built mechanism for rendering the same certain in due course, namely when the road has been constructed. To my mind, such a reading of the 1926 Conveyance (with its ambulatory effect and the attendant difficulties it presents in the interim period) is an extreme one, and even if conceptually possible, is not here supported by the limited available evidence of the contents of the 1926 Conveyance.
66. This conveniently brings me to the restrictive covenants. As to these:
- (1) The Applicant's case is that they too underscore the notion that 20 Forest Ridge does *not* extend to and include the road. Particular reliance is placed on covenant no.5.
 - (2) By contrast, the Fifth and Sixth Respondents also point to words in that covenant: "the road or roads *on which the plot abuts or may any time hereafter abut ...* coextensive with the plot" and submit that these demonstrate that the Disputed Land *was* conveyed to their predecessor in title by the 1926 Conveyance.
67. In my judgment, the better view is that the covenants do not bear the weight which the Fifth and Sixth Respondents try to place on them. I so conclude for several reasons.
68. First, covenant no.5 is obviously framed in standard terms. Hence the reference to "*the road or roads on which the plot abuts*"; the plural "roads" being wholly inapposite in the instant case (which is not a corner plot fronting two roads). This reduces the importance

of the covenant in terms of setting/indicating boundaries; it is not an individually fashioned covenant crafted for the specific case.

69. Secondly, the words “*the road or roads which the plot abuts*” are immediately followed by the words “*or may at any time hereafter abut*”. To my mind, this language does not spell out clearly either that any road (made or unmade) then abutted the plot or that, somewhere down the line, a road *would* necessarily directly abut the plot; the phraseology is equivocal and, for instance, merely alludes to a possibility that such scenario *may* come to pass. It does not inexorably tie the limit of the plot to the road at some (present or future) time.
70. Thirdly and most significantly, it strikes me that (irrespective of the preceding words) the succeeding stipulation that “*Until the road shall have been constructed the purchaser will keep that portion thereof which lies **between the plot and the centre of the road** in good order and condition*” spells out that the plot did and does not include any part of the road. The road (this expression including, by reason of the extended definition, footpaths too) lies beyond it. The distinction drawn materially undermines the concept of the plot including *any* part of the road, let alone extending to its mid-point, for (rather than indicating that the land to the centre of the road is part of the plot) the language distinctly confirms that this is not so.
71. The Respondents argue that the provision in question applies only before (and not after) the metalled road is built. Whilst that is so as regards the purchaser’s actual obligation to maintain the relevant area (by reason of the words “until the road shall have been constructed”), I do not believe that the point detracts from the clearly expressed limit as to the ambit of the land conveyed, i.e. the position of its front boundary.
72. On a different – though not wholly unrelated – front, I am also influenced by the apparent lack of any reserved easements in the 1926 Conveyance. Although the Chief Land Registrar would not have been compelled to record the same on the register (for they would have taken effect as overriding interests: s.70(1)(a) Land Registration Act 1925), nonetheless it is reasonably to be expected that he would have done so: see e.g. r.41 Land Registration Rules 1925. The want of an entry is redolent of the absence of any such reservation. Further, it strikes me that the premise of (the standard form) covenant no.5, namely that the vendor will build and maintain the estate roads and that each purchaser will

contribute rateably towards the expenditure, connotes, indeed demands, that all parts of the estate roads will remain in the ownership of the vendor. If the position were otherwise, the estate owner would not be able to undertake such work without a suitable reserved easement – of which there is no evidence.

73. Similarly, I bear in mind the difficulties which would flow if a given plot on a large estate included ownership of the portion of the estate road coextensive with its frontage. It would mean that the owners of other plots who acquired title from the common vendor after the date of the conveyance would only have access rights thereover if the vendor had reserved a suitable right of way for its/their benefit. Matters would be greatly exacerbated if multiple plots had similar ownership of aliquot shares of the common estate roads. Multiple reciprocal rights would be required by dint of the resultant patchwork quilt of ownership. Although it is not impossible to cater for this scenario by appropriate drafting, the complexity and inherent undesirability tends to point against it being a likely or desirable outcome – a view enhanced by the noted absence of any recorded easements on title no. SGL9603.
74. I also have regard to the terms of the 1972 Assent and the 1979 conveyance. As outlined above, albeit that the plans are expressed to be for the purpose of identification only, these instruments are plainly drawn on the basis that the Disputed Land had been retained, and not conveyed, by Mr Rogers historically. In this regard they are fully consistent with the picture painted by the title plan for title SGL9603. I, like Megarry J, consider that it would be perverse to ignore evidence of what the common vendor did in subsequent conveyances, and here the subsequent conveyance (effected by the deceased vendor's estate) confirms the belief that the land in question had never passed as part of 20 Forest Ridge.
75. For completeness I raised with the parties the possibility that the presumption of ownership *ad medium filum* might apply in this case. I invited and received submissions on the point. I am persuaded that it is not here relevant/engaged. It is only a presumption and, as such, liable to be displaced. I believe that the combination of factors outlined above (in particular, (a) the limits of 20 Forest Ridge as shown on the 1926 Conveyance plan (reflected by the HMLR plan); (b) the terms of covenant no.5; (c) the want of any known easements; (d) the ambit of the subsequent conveyances) serve effectively to rebut the presumption.

76. For the above reasons I conclude that on the balance of probabilities:

- (1) The 1926 Conveyance did not include any part of the road (Forest Ridge), whether to the mid-point or otherwise.
- (2) The 1926 Conveyance did not include the Disputed Land as part of 20 Forest Ridge;
- (3) The Disputed Land was retained by Mr Rogers.
- (4) The front boundary of 20 Forest Ridge is accurately shown on the title plan for SGL9603.

Ownership of the estate roads generally

77. I alluded above (paragraphs 17 & 23) to a challenge by the Fifth and Sixth Respondents to the Applicant's claim to ownership of the estate roads generally. I find nothing to sustain this objection. There is nothing to indicate, let alone demonstrate, that (contrary to the terms of the Assent and 1979 Conveyance) Mr Rogers did not retain the estate roads at large or that the same have not devolved to the Applicant (as per its epitome of title) [141].

78. In this context I also remark that the Respondents' claim (see paragraph 26 above), that of the various plots on the Estate, 20 Forest Ridge is unusual in (allegedly) owning the road in front of it, sits uneasily with the notion that each and every part of the estate roads passed with the historical conveyances of all the respective plots such that the Applicant acquired and now holds no residue. Further, the Fifth Respondent admits that there are examples on the Estate where a strip of land between the plots and the road *is* vested in the Applicant: [23, para.(c)]. Although the Fifth Respondent also contends that there are also "numerous examples" of plots running to and including the roadside verge, no *specific* instances (based on identified historical conveyances) are given – and Mr Elswood said that the Applicant is not aware of any such cases. [44, para.16]. The Respondents' case entails the somewhat improbable scenario of a want of consistency in the various dispositions of different plots across the Estate. For the reasons already given, I consider it more likely than not that a uniform approach, involving the retention by Mr Rogers of the estate roads, was adopted.

79. I find that the Applicant has established title to the estate roads etc. (including the Disputed Land) claimed/shown on the revised plan at [231A].

Miscellaneous

80. For the avoidance of doubt, I have considered all of the parties' arguments, even if not mentioned specifically in this decision (in which I have focused on those points I regard as most important). In what follows I touch on some of the (peripheral) arguments only to indicate my rejection thereof. The arguments here addressed are illustrative, not exhaustive, and similarly my expressed reasoning is not exhaustive.
81. It is suggested by the Sixth Respondent [13, para.9 & 10] that the motives of the Applicant are germane. I do not believe that they (whatever they may be) have any bearing on the instant case which is simply one of determining historically-derived title.
82. The Sixth Respondent also contends [14, para.11] & [49, para.6] that if successful the Applicant would be able to set aside covenants in the 1979 Conveyance. Again, I fail to see the relevance of the point (even if were a good one, which I do not believe it is). It is also suggested that the 1979 Conveyance may have conveyed not land but only rights, roles and responsibilities (with particular reference to clause 4 thereof). I disagree. The 1979 Conveyance clearly transfers land.
83. The Fifth and Sixth Respondents place reliance on a 1982 county court decision in *Jones v British Gas*, said by them to have been an action between their parents and the statutory undertaker in which the court tested and upheld the Jones' claim to the position of the boundaries and extent of their land. [12, para.3] However, the Fifth and Sixth Respondents disclosed no documentation in that regard except for (late in the day) the Court Order. [222] The Order shows that that the litigation was between the parents, British Gas and a Mr & Mrs Stubbs (third party). The Order deals only with a judgment for £775.82 and costs. It confirms that the Applicant was not party to the litigation. So the Applicant was/is not bound by it. Also, there is nothing on the face of the Order to demonstrate what the subject-matter of the claim was or that the court dealt with the 1926 Conveyance in any way. I derive no assistance from it.
84. The Applicant made play of the fact that straight-line extrapolation of the boundary lines plotted on the illustrative plan [15] would see the Respondents' neighbour (22 Forest Ridge) lack ownership of/access to the middle of the road fronting that property. However, though the point had something of a forensic attraction, I attach no real weight to it because

the Respondents fairly stressed the illustrative (cf definitive) nature of the drawing and, with reference to the actual lie of the land (as appears from the video clip) disclaimed any intention to assert ownership of the road in front of 22 Forest Ridge.

Disposition

85. I determine the Applicant's claim to be well-founded and to succeed.

86. I shall direct the Chief Land Registrar to give effect to the Applicant's application for registration as if the Respondents' objections thereto had not been made.

Costs

87. In this jurisdiction costs usually follow the event, i.e. the loser pays the winner's costs. In the circumstances my provisional view is that the Respondents should pay the Applicant's costs. However, I will entertain submissions on the matter before making any decision. To this end directions are included in my Order which accompanies this decision.

Judge Martin Dray

Dated this 23rd August 2019

BY ORDER OF THE TRIBUNAL

