Neutral Citation Number: [2022] EWCA Civ 11

Case No: CA/2021/000503

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

APPEALS (ChD)

Mr Justice Michael Green

[2021] EWHC 330 (Ch)
Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13 January 2022

Before :

LADY JUSTICE KING

LORD JUSTICE NUGEE

and

LORD JUSTICE WILLIAM DAVIS

- -

Between :

(1) COLIN WHITE — **Claiman**
(2) FRANCES WHITE — **Appellan**

- and -

(1) MERWIN AMIRTHAN AMIRTHARAJA — **Defendan**
(2) JENNIFER SHIROMI AMIRTHARAJA — **Responde**

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Robin Howard (instructed by **Hattens Solicitors**) for the **Appellants**

Brie Stevens-Hoare QC and **Max Thorowgood** (instructed by **Indra Sebastian Solicitors**)

for the **Respondents**

Hearing date : 14 December 2021

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30am on 13 January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Nugee:

Introduction

1.
This second appeal arises out of a dispute over who is entitled to the ownership of a small strip of land in Stanford-le-Hope, Essex, which I will refer to as **"the passageway"**. The passageway runs from the back garden of a house belonging to the Appellants, Mr Colin White and his mother Mrs Frances White, between two brick buildings (**"the office"** and **"the workshop"**) to an access road. The Appellants have a registered title to their house but this does not include the passageway. It is instead included in the registered title to the workshop, of which the Respondents, Mr and Mrs Amirtharaja, are the registered proprietors. Because the Appellants in this Court were the Respondents below, and vice-versa, I will refer to the parties as **"the Whites"** and **"the Amirtharajas"** respectively to avoid confusion.

2.
In this action the Whites claimed title to the passageway. This was based on adverse possession of the passageway by their predecessor, a Mr Bright, who lived in their house for some 40 years between 1977 and 2017. They sought rectification of the register accordingly.

3.
The claim was tried by HHJ Holmes sitting in the County Court at Southend. He gave judgment on 4 October 2019 upholding the claim to adverse possession, and by his Order dated 31 October 2019 declared that the Whites were entitled to be registered as proprietors of the passageway with title absolute and ordered rectification of the register.

4.
The Amirtharajas appealed to the High Court. The appeal was heard by Michael Green J. He gave judgment on 19 February 2021 at [2021] EWHC 330 (Ch) allowing the appeal, and by his Order dated 26 May 2021 set aside the declaration and orders made by HHJ Holmes.

5.
The Whites sought permission to appeal to this Court on a large number of grounds but by an Order dated 9 June 2021 Asplin LJ refused permission on all grounds except one. I give the details below but in essence this ground is that Michael Green J permitted the Amirtharajas to run a new point on appeal when he should not have done. The suggested new point was that in fact their predecessors, two brothers by the name of James, had a good paper title to the passageway, rather than merely the possessory title with which they (and subsequently the Amirtharajas) were registered.

6.
The appeal was ably argued by Mr Robin Howard who appeared for the Whites. For my part, however, I have concluded that this point cannot by itself assist the Whites. The essential reason why Michael Green J allowed the appeal is that he concluded that the acts which were relied on to prove that Mr Bright had been in adverse possession of the passageway were equivocal and insufficient to prove that he had the requisite intention to possess. That was fatal to the Whites' claim. That conclusion does not seem to me to have been in any way dependent on whether or not the Amirtharajas' new point should

have been permitted, or was well founded: the question whether the James brothers had a paper title to the passageway or not was, so far as I can see, irrelevant to the question whether Mr Bright's acts demonstrated the necessary intention to possess.

7.
I would therefore dismiss the appeal.

The layout on the ground

8.
The Whites' property, which they bought in 2017, is called Hollis House. It is a house with a rear garden at 1 Ruskin Road, a residential road, in Stanford-le-Hope. Ruskin Road runs roughly north-south, and Hollis House is on the west side. Although it is No 1, it is not in fact at the end of the road; proceeding north there is another house next to Hollis House, built later, called Priors Lodge, and then some other buildings before Ruskin Road ends in a T-junction with London Road, about 50 metres or so from Hollis House.

9.
If you then turn left (west) into London Road, you come in due course to a Costcutter supermarket on the left at 16 London Road, which is run by the Amirtharajas. Next to the Costcutter is an Esso petrol station. The Amirtharajas, or their companies, own the Costcutter and the petrol station. From the rear of the forecourt of the petrol station you can gain access to an un-named access road which runs east behind the back of the Costcutter and emerges (although by this stage it is more of a track than a road) into Ruskin Road just north of Priors Lodge. On the south side of this access road, to the rear of Priors Lodge, are two single-storey brick buildings, the western one being the office(formerly a pair of garages) and the eastern one the workshop. It appears they had previously been used in connection with a car repair business. The Amirtharajas bought these buildings in 2017 with a view to developing them in connection with the Costcutter.

10.
Between the office and the workshop is a narrow gap about 1 metre wide, with the brick walls of those buildings on either side. This forms the passageway, about 5 or 6 metres long, running south from the access road to the rear garden of Hollis House. It is closed with a gate at the northern end. There is no boundary feature at the southern end where it runs into the rear garden of Hollis House.

Evidence of ownership

11.
The trial judge had a certain amount of evidence as to the ownership of (i) Hollis House, (ii) the office, and (iii) the workshop and passageway.

12.
The evidence of the ownership of Hollis House was as follows:

(1)
Between 1957 and 1963 the house, split into two flats, was owned by a Mr and Mrs Brown.

(2)
Between 1963 and 1968 it was owned by a Mr Hall.

(3)

It then passed through three further owners before it was bought in November 1977 by Mr Kenneth Bright. It appears that the title was then registered at HM Land Registry as the office copy of the current title (EX198859) shows the freehold to have been registered on 19 December 1977. Mr and Mrs Bright lived at Hollis House for almost 40 years until February 2017.

(4)
They then wished to retire to Devon, and Mr Bright sold Hollis House to Mr William White, his wife Mrs Frances White and their son Mr Colin White, who were friends and neighbours (Mr Colin White owned 3 Ruskin Road and Hollis House was bought for his parents to retire to). The sale was completed on 23 February 2017 and the three Whites were registered as proprietors with title absolute at HM Land Registry on 1 March 2017 under title number EX198859.

(5)
An office copy of this title (as at 10 March 2017) was in evidence. The filed plan shows the registered land as a simple rectangular plot running back from Ruskin Road to include the house and rear garden. It does not include the passageway. The charges register contains details of restrictive covenants entered into in a conveyance dated 28 February 1900 [1] by which this and other land (not identified) was conveyed by a Mr Hill to a Mr Edward James.

13.
The evidence as to the ownership of the office was as follows:

(1)
The title to the office (described as the site of two garages) is registered at HM Land Registry under title number EX598089. An office copy of this title (as at 28 April 2017) was in evidence. It shows that the title was first registered on 6 July 1998, and refers to an assent of the land dated 29 September 1994 made between (1) a Mr Taylor and a Mr Lionel James and (2) a Mr Carl James and a Mr Julian James.

(2)
Messrs Carl and Julian James are brothers (**“the James brothers”**) and the sons of Mr Brian James, who died on 6 April 1993. It is common ground that they inherited the office from him and that the assent in their favour was made by his executors.

(3)
It also seems a reasonable supposition that Mr Brian James derived his title, directly or indirectly, from the Mr Edward James who had acquired Hollis House and other land in 1900, and there was indeed a suggestion in the Defence (although there was no finding to this effect, and Mr Howard told us there was no evidence on the point at trial) that Mr Edward James was the James brothers’ grandfather. But there was in fact no evidence of any transaction under which the land passed from Mr Edward James to Mr Brian James.

(4)
In 2017 the Amitharajas bought the office, together with the workshop and passageway, from a successor to the James brothers (in a single purchase). The sale completed on 12 April 2017 and the Amirtharajas were registered as proprietors of the office with title absolute on 21 April 2017. The filed plan of this title is very small but there is no real doubt that it does not include the passageway.

14.
The evidence as to the ownership of the workshop and passageway was as follows:

(1)
On 21 January 2005 the James brothers applied to HM Land Registry on Form FR1 for the first registration of title to property referred to as “Land at Stanford-Le-Hope R/O [rear of] 16 London Road”, supported by a statutory declaration which identified the land by reference to a plan. The plan is not as clear as it might be, but the property so identified was the workshop and appeared to include the passageway. The application was for possessory title, not title absolute. [2]

(2)
The statutory declaration in support, dated 20 December 2004, was made jointly by the James brothers. They said that they had owned the property since 1994 when they inherited it from their father Mr Brian James, and that he had owned and occupied the property for at least 44 years until his death in 1993; they also said that there had been no challenge to their ownership, nor did they believe that there had been any to their father’s. [3]

(3)
Unlike with the office, there was no evidence of any assent. Again it seems a reasonable supposition that Mr Brian James had acquired the land from Mr Edward James, but there was no evidence to this effect.

(4)
The Registrar instructed a surveyor to confirm the boundaries. A Mr Simon Gardner duly attended on 14 March 2005 and met Mr Carl James. The instructions to Mr Gardner, in the form of a series of requisitions together with a survey plan, and his report, in the form of replies to the requisitions together with photographs and his explanatory plan, were in evidence. The survey plan shows that the Registrar understood that the property which the James brothers sought to register included the passageway. This was shown on the survey plan as closed at the north end but open at the south end where it opened into the rear garden of Hollis House, and Mr Gardner’s instructions were to confirm the boundaries, in particular between points A and B on the plan, which were either side of the gap at the south end of the passageway. Mr Gardner confirmed the boundaries and recommended no revision to the “LIS”, which Michael Green J was told referred to the Land Information System, part of Ordnance Survey, which recorded physical features on the land. He also recorded that Mr Carl James told him that he “already has title to [the passageway] included with the two garages to the west”. This was incorrect (see above) but is some indication of what Mr James understood the position to be.

(5)
On this basis the title was registered under title number EX741623. An office copy of this title (as at 28 April 2017) was in evidence. It showed the title as having been registered on 24 January 2005 (presumably backdated to the date of receipt of the application), and the title as being then a possessory title. The filed plan is again very small but there is no real doubt that it does include the passageway as well as the workshop.

(6)
This property, as already referred to, was sold to the Amirtharajas together with the office in 2017 by a successor to the James brothers. The Amirtharajas were registered as proprietors with possessory title on 21 April 2017.

(7)
At some stage after purchase but before February 2019 the Amirtharajas upgraded their title to this property to title absolute. We have not seen a copy of the upgraded title, or any evidence as to the

process by which they applied for and obtained the upgrade, but we were told that it is usually possible for a possessory title to be upgraded to a title absolute after the lapse of 12 years.

Evidence as to user

15.
The trial judge had quite a lot of evidence of user of the passageway. On the view I take it is unnecessary to review this in any detail, as Michael Green J held that Mr Bright's use of the passageway was equivocal and that cannot now be challenged, as explained below. But the evidence before the trial judge was as follows:

(1)
Mrs Brown, who owned Hollis House between 1957 and 1963 with her husband, gave evidence at trial. They lived in the ground floor flat, and they used the passageway for access, as did the occupiers of the first floor flat, dustmen collecting rubbish, and others. Indeed the judge accepted that it seemed to be the primary means of access. There was a gate across it but it was unlocked.

(2)
Mr Hall, who owned Hollis House between 1963 and 1968, also gave evidence at trial. He also used the passageway for access. He said there was originally a gate at the south end, [4] but he moved it to the north where it now is to stop youths misusing the passageway. He also said he rented the office (or garages) and the workshop from Mr Brian James. He said that Mr James regarded the passageway as an access to Hollis House and did not claim ownership of it.

(3)
The main evidence relied on by the Whites however was that of Mr Bright, who owned Hollis House between 1977 and 2017. He did not give oral evidence, but he had made a statutory declaration in October 2017 in support of an application by the Whites to be registered as owners of the passageway, and this was adduced as hearsay at the trial. He said that when he purchased the property in 1977 there was a gate with a lock of sorts at the north end. He replaced this in about 1997 with a new gate and padlock after vandals broke down the old one. He used the passageway for access from the garden of Hollis House to the roadway, and for storing ladders and items for dumping; he took garden waste and bulky items out through the passageway. On one occasion he found the exit blocked by car tyres and he complained to the car repairers and they were removed. On another occasion in 2009 they asked his consent to access the passageway to raise the height of the workshop to accommodate a car hoist; he would unlock the gate to allow the builders in and lock it again in the evening. He said that during his ownership he had exclusive use and occupation of the passageway.

(4)
Somewhat in contrast to this Mr Gardner, the surveyor who attended in 2005, said in his report that the passageway was blocked at both ends (although at the southern end only by rubbish) and did not seem to have been used for many years; it was not used or "occupied" as such by anybody. On the explanatory plan which he included in his report he marked the passageway as "Un-used passage" and the door or gate at the north end as "Door (not able to open)".

The proceedings in the County Court

16.
As appears above the Whites bought Hollis House in February 2017 and the Amirtharajas bought the office, workshop and passageway in April 2017. Almost immediately disputes arose. The Amirtharajas

applied for planning permission to redevelop the properties they had acquired as a storage unit ancillary to the Costcutter. That involved building over the passageway. By May 2017 their solicitors were alleging trespass, and the Whites' solicitors were asserting that they had a right of way over the passageway; by June 2017 they were asserting a title by adverse possession. In October 2017 the Whites applied to HM Land Registry for registration of a possessory title to the passageway, supported by Mr Bright's statutory declaration. This was however rejected by HM Land Registry on the ground that Mr Bright's declaration referred both to occupying the land and enjoying a right of way over it. Planning permission was granted in September 2018 (on the Amirtharajas' third application), in the teeth of opposition from the Whites.

17.
In January 2019 the claim was issued in the County Court. It was issued in the names of all three Whites, despite the fact that Mr White senior (Mr William White) had died in September 2017, as their solicitors had informed the Amirtharajas' solicitors at the time. This curiosity was compounded by the fact that no-one (on either side) mentioned his death at the trial, with the result that the trial judge assumed he was still alive. Indeed it appears that Mr Howard, the Whites' own counsel, was not told that one of his ostensible clients was dead. This frankly bizarre way of carrying on gave rise to a number of issues which were raised on appeal to the High Court, but none of them is any longer in issue on appeal to this Court and the details do not matter.

18.
I will have to look in more detail below at how the claim was pleaded on both sides, but for present purposes it is sufficient to say that the Whites pleaded that Mr Bright had been in adverse possession of the passageway and had acquired good title to it by at the latest 12 October 2003 (when the Land Registration Act 2002 came into force), and claimed an order directed to the Chief Land Registrar to alter the register by removing the passageway from title EX741623 (the workshop) and adding it to EX198859 (Hollis House).

19.
In June 2019 Mr Bright executed a transfer of any interest he had in the passageway to the Whites.

20.
The trial took place over 2 days in October 2019, and HHJ Holmes gave an oral judgment on the next day, 4 October 2019. Having carefully set out the evidence he dealt with the law at [26], saying that the law was not in serious dispute so he could summarise it briefly. The Whites sought an order that the Chief Land Registrar be directed to alter the register by removing the passageway from the title to EX741623 and including it in the title to EX198859. That could be done on the basis that the original registration of the James brothers was a mistake [26]. If a mistake were identified in registration then the Court had to make an order correcting the mistake unless there were exceptional circumstances which justified not doing so [33].

21.
HHJ Holmes then found a mistake in that the James brothers were not in possession of the passageway when they applied for possessory title. He held that registration of the passageway on the information before him (the James brothers' statutory declaration and Mr Gardner's report) was not open to the registrar, and that given the open line between the passageway and the garden of Hollis House, the registrar should not have taken any steps to register the passageway without notice to the owners of Hollis House [39]-[40].

22.

That, he said, was sufficient to deal with the mistake issue, but he went on to consider whether the Whites had established adverse possession. He concluded that they had, as follows:

“53. All of the evidence supports a change from its being a principal accessway in the 1950’s and 1960’s to being an occasional access and storage area in the period with which I am concerned. There is no evidence to contradict that clear picture. The only evidence that the defendants can rely upon is the statutory declaration of Messrs James, which does not give evidence of possession, although it does assert title. In fact, beyond registration there is no evidence of ownership of the passageway by the Jameses. Whether it was at some stage owned by the owners of one or other of the buildings either side of the passageway, was owned by the owners of Hollis House, or whether it belonged to the Crown, is not something I can determine nor am I required to do so.

54. I am satisfied on the balance of probabilities, notwithstanding the absence of Mr Bright and the caution with which I must view the statutory declaration, there has been actual possession and an intention to possess in 12 years ending with first registration. Given that conclusion I must order rectification unless there are exceptional circumstances which would justify not doing so.”

He then went on to consider if there were exceptional circumstances, and concluded that there were not [56]. There would therefore be an order to rectify the register and include the title to the passageway with the title to Hollis House [63].

23.
By his Order dated 31 October 2019 he therefore declared the Whites to be entitled to be registered as proprietors with title absolute to the passageway; directed the Chief Land Registrar to remove the passageway from title EX741623 and add it to title EX198859 and alter the title plans accordingly; and ordered the Amirtharajas to pay costs.

The appeal to the High Court

24.
On 28 October 2019 the Amirtharajas lodged an Appellant’s notice and sought permission to appeal from the High Court. The Grounds of Appeal underwent several iterations, as follows:

(1)
The initial Grounds of Appeal were amended after receipt of the transcript of the judgment. That resulted in six Grounds of Appeal.

(2)
Those grounds were considered by Falk J. On 5 February 2020 she granted permission on Grounds 2 to 6, but refused it on Ground 1.

(3)
On 31 Mar 2020 the Amirtharajas applied to strike out the claim as an abuse of process, or as being invalid, on the ground that Mr White senior had died before it was issued. That application came before Fancourt J on 8 April 2020. He dismissed the application but permitted the Grounds of Appeal to be amended to include a new Ground 5(1A) and a new Ground 6 (both based on the fact that Mr White senior had died before the claim was brought). Amended Grounds of Appeal were therefore served which deleted Ground 1, amended Ground 5 to include Ground 5(1A), added Ground 6 and renumbered the original Ground 6 as Ground 7.

(4)

The Amirtharajas then applied to further amend the Grounds of Appeal and adduce new evidence. That application was opposed by the Whites and came before Michael Green J together with the appeal.

25.
The grounds for which the Amirtharajas had permission, either from Falk J or from Fancourt J, were as follows:

(1)
Ground 2 was that HHJ Holmes erred in considering what weight to give to the hearsay evidence of Mr Bright.

(2)
Ground 3 was that Mr Bright's use of the land, as found by HHJ Holmes, was consistent only with its use as an easement of access and storage and not with possession with the requisite intent to possess.

(3)
Ground 4 was concerned with whether there was a mistake in the registration of the James brothers with title to the passageway. I give the details below.

(4)
Ground 5 was concerned with whether there were exceptional circumstances.

(5)
Ground 6 raised the abuse of process argument.

(6)
Ground 7 was that HHJ Holmes was wrong to find that the Amirtharajas were not in possession of the passageway at the time of the claim, and erred in failing to consider whether they could establish adverse possession through their predecessors in title.

26.
The Amirtharajas' application to amend the Grounds sought to make 3 further amendments. One was not pursued at the hearing, and another was refused by Michael Green J for reasons that are not now material. The third was an amendment to Ground 4(3). As it stood in the unamended form for which Falk J had given permission Ground 4 read as follows:

"The learned Judge erred in holding that the first registration of the disputed passageway was a mistake in that:

(1)
he applied the wrong test as to what constitutes a mistake. The learned Judge failed to consider what the Registrar would have done if he or she had known the true state of affairs at the time of the entry or deletion, as set out in NRAM Ltd v Evans and the Chief Land Registrar[2017] EWCA Civ 1013 and Antoine v Barclays Bank plc and the Chief Land Registrar[2018] EWCA Civ 2846;

(2)
the learned Judge erred in holding that the [Amirtharajas'] predecessors in title did not have possession of the disputed land;

(3)

The learned Judge failed to consider whether the James brothers, as predecessors in title of the [Amirtharajas], could themselves have either had the paper title to the disputed land or been in adverse possession, either as an exceptional circumstance or so as to entitle the [Amirtharajas] to be registered as the proprietors of the disputed land on account that their adverse possessory title was superior to that [of] the [Whites].

(4)
The learned Judge did not go on to consider whether the Registrar could have registered the disputed passageway as qualified title under section 9(1)(b) of the Land Registration Act 2002."

27.
The proposed amendment to Ground 4(3) sought to develop an argument that the James family were owners of the entire estate on which the office, workshop and other properties were situated from 1900 onwards, and that they therefore either had paper title to, or had been in adverse possession of, the passageway long before any owner of Hollis House could have been in adverse possession. This was proposed to be supported by fresh evidence in the form of the registered titles to various other properties in the area, namely the petrol station, the Costcutter, Priors Lodge and a scrapyard behind Hollis House.

28.
In the event, as explained in more detail below, Michael Green J refused this amendment as well, holding that the fresh evidence did not meet the test in Ladd v Marshall[1954] 1 WLR 1489.

Judgment of Michael Green J

29.
The appeal was heard by Michael Green J on 2 and 3 February 2021. He handed down a reserved judgment at [2021] EWHC 330 (Ch) on 19 February 2021.

30.
Having set out the facts and summarised the judgment below and the grounds of appeal, he next dealt with the application to amend the grounds. He dealt with the proposed amendment to Ground 4(3) as follows:

"40. The principal objection is to the introduction of new evidence to support the points in the new subparagraph (3) of Ground 4. In fact the original Ground 4 refers to the paper title of the Passageway and to the Appellants' predecessors in title being in adverse possession of the Passageway. The conveyance on 28 February 1900 to Mr Edward James was before the Judge in the Office Copy Entries of Hollis House. Mr Thorowgood wants to introduce the Office Copy Entries in relation to the petrol station, the Costcutter, Priors Lodge and the scrapyard behind Hollis House in order to strengthen the evidence in relation to the paper title. The application is made under CPR 52.21(2) and Mr Thorowgood says that it satisfies the Ladd v Marshall [1954] 1 WLR 1489 tests for when new evidence should be admitted on an appeal.

41. Mr Thorowgood, who did not appear at the trial (the Appellants were represented by their then solicitor, Mr Eaton of Birketts), says that these Office Copy Entries could not have reasonably been obtained and collated because the Appellants "did not appreciate the necessity to show that they or their predecessors in title were the proprietors of the paper title". He also submitted that such evidence would have had an important effect upon the Judge's decision because the Respondents

would have to have shown that their predecessors in title had dispossessed the paper title owners of the Passageway.

42. Mr Howard pointed to certain anomalies on the face of the new evidence and said that even with this evidence the Judge would not have been able to come to the conclusion that the Appellants are saying would inevitably follow consideration of the evidence. More forcefully he submitted that paper title was never pleaded by the Appellants and it was not an issue considered at the trial. He relied on Haddon-Cave LJ's observations in Singh v Dass [2019] EWCA Civ 360 [15]-[18].

43. Even though I have seen the new evidence, I do not think it would be right or just to take it into account on this appeal. If it had been an issue at trial, there may have been more of an exploration as to the paper title and it is possible that more relevant documents might have come to light. These might have required evidence to be obtained from other witnesses. I therefore refuse to allow both the new evidence to be admitted on this appeal and the proposed amendments to the Grounds of Appeal. The Appellants are still entitled to run the argument as to paper title and adverse possession by their predecessors in title but they cannot do so by reference to the new evidence."

31.
He next dealt at some length with the law on adverse possession, and then considered each of the Grounds of Appeal in turn.

32.
On Ground 2 (the weight to be attached to Mr Bright's statutory declaration) he concluded that HHJ Holmes did not properly weigh it against the uncontroverted contemporaneous evidence, and did not properly assess whether it provided good enough evidence of his alleged possession and intention to possess the passageway [78].

33.
On Ground 3 (whether Mr Bright had an intention to possess) he concluded as follows:

"85. In my judgment, Mr Bright's evidence was at least equivocal as to his intention to possess the Passageway. The purpose of the locked gate is consistent with controlling access to the Passageway rather than intending to exclude the owner. When the owner wished to gain access it does not appear that there was any problem in doing so; nor does Mr Bright seem to have asserted to the James brothers at any time that he was now the owner of the Passageway. Again the clearest evidence that Mr Bright did not truly believe that he owned the Passageway is the fact that he did not even purport to transfer title to it to the Respondents. As there is no explanation for this in the Statutory Declaration, the only proper conclusion that the Judge should have drawn from it was that Mr Bright never had the requisite intention to possess the Passageway. He only ever wanted to protect his right of way."

34.
On the basis of his conclusions on Grounds 2 and 3, he held that HHJ Holmes was wrong to find that Mr Bright was in adverse possession of the passageway [86].

35.
On Ground 4 (mistake in registering the James brothers with title to the passageway), he identified that HHJ Holmes had found 3 mistakes: (i) the James brothers were not in possession of the passageway; (ii) notice should have been given to Mr Bright as owner of Hollis House; and (iii) Mr Bright had by then acquired title by adverse possession [87].

36.
So far as the third mistake was concerned, he said that in the light of his conclusions on Grounds 2 and 3 it was obviously not a mistake for Mr Bright's title to the passageway not to be added to the Hollis House title [90]. He added:

"That was the only real substantive dispute about the accuracy of the register because there would be no point, so far as the [Whites] are concerned, in removing the Passageway from the Workshop title if it was not going to be added to the Hollis House title."

37.
He then considered the first mistake. It is simplest to cite this part of his judgment in full:

"91. In relation to the registration of the James brothers with possessory title to the Workshop and Passageway the Judge considered that this was a straightforward mistake by the registrar because "none of the information available to the registrar could justify such a decision" [36]. By s.9(5) LRA 2002, possessory title can only be registered if the person is "in actual possession of the land". The Judge considered that Mr Gardner's Report showed that no one was in possession of the Passageway and that the James brothers did not have any means of getting onto the Passageway because they did not hold a key.

92. The context of the application at the time is important. I have not allowed the Appellants to amend their Grounds of Appeal to bring in evidence and argument on the question of the paper title ownership of the Passageway and surrounding land. But the evidence that was before the Judge showed that the James brothers had paper title to the Office in the form of the Assent from their father's executors. They similarly inherited the Workshop from their father but there does not appear to have been a similar Assent in relation to it. That may indicate a lack of evidence as to the actual paper title and may explain why they applied only for possessory, rather than absolute, title to both the Workshop and the Passageway. They did however confirm in their Statutory Declaration that they had owned the Workshop and Passageway since their father's death and that he had owned and occupied both unchallenged for at least 44 years.

93. The relevant test for correcting a mistake on the register is whether the entry that was made on the register would have been different had the registrar known the true state of affairs at the time. The true state of affairs was as stated in Mr Gardner's Report and the James brothers' Statutory Declaration and application. These were the only documents considered by the Judge in relation to this. On the basis of those same documents the registrar concluded that the James brothers should be registered with possessory title (which was all they were asking for), taking into account presumably the difficulty of establishing actual possession of a narrow strip of land used only for access. Perhaps the registrar relied on the principle set out by Slade J in Powell v McFarlane that the paper title owner or those claiming title through the paper title owner are deemed to be in possession of the land. As no one else appeared to be in possession of the Passageway and it had not been used for many years, the James brothers who were claiming to have inherited the Passageway from their father were deemed by the registrar to be in possession of it.

94. In any event, there is no "true state of affairs" that has emerged since 2005 to undermine the registration of the Passageway together with the Workshop. The Judge reinterpreted the evidence that was before the registrar. That was not an appropriate way to apply the relevant test for a mistake."

38.

In relation to the second mistake, he said that failure to give notice to Mr Bright, although unfortunate, was not a relevant mistake [95].

39.
He therefore upheld Ground 4 as well [96]. In those circumstances Ground 5 (exceptional circumstances) and Ground 6 (abuse of process) did not arise and he did not seek to resolve them [97], [105].

40.
By his Order dated 26 May 2021 he allowed the appeal and set aside the declaration and orders made by HHJ Holmes.

Ground of appeal

41.
The Whites sought permission to appeal on no less than 12 grounds. By Order dated 9 June 2021 Asplin LJ refused permission on all grounds except Ground 1. This reads as follows:

“The Learned Judge allowed the [Amirtharajas] to advance their appeal on the basis that their predecessors the James family had paper title to the disputed passageway prior to any owner of Hollis House being able to obtain title by adverse possession. This represented a serious procedural irregularity and the Learned Judge ought not to have permitted such argument to be advanced, as it had not been pleaded by the [Amirtharajas] nor ever advanced or considered at trial.”

42.
It is also relevant to note the grounds for which permission was refused, as follows:

(1)
Grounds 2 and 3 were concerned with the treatment of the paper title issue. They had a real prospect of success but did not raise an important point of principle or practice.

(2)
Grounds 4 to 7 were concerned with whether the acts of possession were sufficient to show possession or intent to possess or were equivocal. They did not raise an important point of principle or practice and had no real prospect of success.

(3)
Ground 8 was concerned with the failure of the predecessor to transfer the passageway. It had no real prospect of success.

(4)
Ground 9 was concerned with the conclusion in relation to the effect of permission to use the passageway. It had no real prospect of success.

(5)
Grounds 10 and 11 were concerned with the interpretation of the statutory declaration and Mr Gardner’s report. They had no real prospect of success.

(6)
Ground 12 concerned the question whether registration of possessory title was a mistake. This did have a real prospect of success but did not raise an important point of principle or practice.

Was Michael Green J wrong to allow the paper title point to be relied on?

43.
In the result the only question before us is whether Michael Green J was wrong to allow the paper title point to be relied on.

44.
Mr Howard advanced a careful argument to that effect, consisting of the following steps:

(1)
The question whether the James brothers had a paper title to the passageway was not raised as an issue at trial.

(2)
It was therefore a new issue taken on appeal to Michael Green J and he should not have allowed the Amirtharajas to rely on it on appeal.

(3)
Although he did not say so expressly, he impliedly accepted the argument to that effect and it infected his reasoning and undermined his conclusions.

(4)
The appeal should therefore be allowed, Michael Green J's judgment set aside, and HHJ Holmes' judgment restored.

45.
It may assist the reader to say now that I accept steps (1) and (2) but do not accept either step (3) or step (4), for reasons that I will now try to explain.

(1) Was paper title in issue at trial?

46.
The starting point for considering what was in issue at trial is what was pleaded in the statements of case. So far as the Particulars of Claim are concerned:

(1)
After the background had been given, Paragraph 10 pleaded that Mr Bright occupied and possessed the passageway continuously from 1977 to February 2017, and that "he did so in such manner and with such intent as to give rise to a right of action in any person entitled to recover the land (it is denied that any such person existed) and thereby constitute adverse possession", followed by particulars of the acts relied on.

(2)
Paragraph 11 pleaded that the effect of that was that the Limitation Act 1980 both barred the right of anyone else to recover the land and extinguished their title so that Mr Bright acquired good freehold title to the passageway at the latest by 12 October 2003, when the Land Registration Act 2002 came into force.

(3)
Paragraph 12 pleaded the registration on 24 January 2005 of the James brothers as proprietors of the workshop and passageway with possessory title.

(4)

Paragraph 13 pleaded that such registration, insofar as it included the passageway, was a mistake in that the James brothers “were not in possession of the passage, had no right to possession of the passage, had no title to the passage, and had no access to the passage.”

(5)
Paragraph 20 pleaded that the Whites were entitled to an order transferring the passage from the Amirtharajas’ title to the workshop to their own title to Hollis House, “thereby correcting the mistake set out at paragraph 13 above.”

(6)
Paragraphs 21 and 22 pleaded claims to alternative relief, namely declarations that they held the freehold of the passageway by virtue of the transfer from Mr Bright or that they were entitled to be registered as proprietors of it.

(7)
The prayer for relief put forward three alternative heads of relief corresponding to those pleaded in Paragraphs 20, 21 and 22 respectively.

47.
Apart from one slight oddity, this is a perfectly conventional claim based on the plea that Mr Bright had acquired title by adverse possession. The one oddity is the suggestion in Paragraph 10 that there was no-one entitled to recover the land. This is odd because the legal title to the fee simple in land is usually vested in someone, often the personal representative of the last known owner, and in the last resort, in the absence of any other owner, land is in almost all circumstances vested in the Crown. Mr Howard accepted that this was so and that this part of the pleading was ineptly drafted, but said that what was meant was that there was no-one who was actually able to prove a better title, which makes rather more sense.

48.
The Defence, so far as relevant, pleaded as follows:

(1)
Paragraph 12 pleaded:

“Paragraph 10 is denied:

a.
The Defendants rely on the Survey indicating that the Disputed Land at that time was blocked at its southern end by rubbish and not occupied by anyone;

b.
The Defendants further rely on the statutory declaration of Mr Carl William James and Mr Julian Brian James dated 17 December 2004;

c.
Further/alternatively, the Defendants aver that their predecessors in title and their predecessor’s [sic] father and grandfather were in possession of the Disputed Land at all relevant times;

d.
Further/alternatively it is denied that the matters pleaded amount to adverse possession in the premises.”

(2)
Paragraph 13 pleaded:

“Paragraph 11 is denied for the reasons set out above. The Defendants rely on the Survey and aver further/alternatively that any relevant occupation of the Disputed Land by the Claimants and/or Mr Bright did not last for 12 uninterrupted years and/or occurred after registration of the Disputed Land. The Defendants are the true owners of the Disputed Land.”

(3)
Paragraph 15 simply pleaded that Paragraph 13 was denied “for the reasons set out herein and Paragraph 12 is repeated.”

49.
There was no Reply, and neither Particulars of Claim nor Defence was ever amended.

50.
One should no doubt not be overly critical of statements of case in the County Court. But the essential function of pleadings, in the County Court as well as the High Court, is to identify the issues which will be in play at trial so that the parties can prepare their disclosure, evidence and arguments accordingly. On the face of the Defence, there was in my judgment nothing to suggest that the Amirtharajas would seek to set up a case that the James brothers had a paper title to the passageway. Specifically:

(1)
Paragraph 12 was responding to the plea of adverse possession and on a reasonable interpretation at most amounted to a denial that Mr Bright was in possession and an averment that the James family was. I do not think it can be read as positively asserting that the James brothers had a paper title.

(2)
Paragraph 13 did assert that the Amirtharajas were the “true owners”. But in context that I think should be read as no more than an assertion that the Amirtharajas, being registered proprietors with title absolute, had a statutory title to the land that the Whites, not being able to show 12 years’ uninterrupted adverse possession by themselves or Mr Bright, were in no position to dislodge.

(3)
Paragraph 15, which is where one would expect to find a positive plea that, contrary to Paragraph 13 of the Particulars of Claim, the James brothers did have title to the land if that was going to be alleged, was in fact a bare denial which took matters no further. If a defendant wishes to set up a positive case, it is incumbent on them to do so, rather than rely on a bare denial: see CPR r 16.5(2)(b). A positive plea that the James brothers had a paper title to the passageway would have required particulars to be pleaded (and if not pleaded they would have had to have been given on request) of when and how the legal title had become vested in them.

51.
Simply looking at the statements of case therefore, I accept Mr Howard’s submission that the question whether the James brothers had a paper title to the passageway was not raised as an issue for trial.

52.
In the light of some of the submissions we received, it may be helpful if I explain at this stage what I understand by the expression “paper title”. It is relevant to note that the title to the passageway was

not registered until 2005. The Whites' case was that Mr Bright had by 2003 acquired a good title by adverse possession, having been in possession for in excess of 12 years. Necessarily therefore that question had to be decided by reference to the principles applicable to unregistered land: the law in relation to adverse possession is in some respects different where the land is registered land, both under the Land Registration Act 1925 and, even more so, under the Land Registration Act 2002, but we are concerned in the present case with a claim that Mr Bright acquired title by adverse possession of land that was at the time unregistered.

53.
Due to the widespread registration of land, the principles and practice in relation to dealings with unregistered land are less familiar than they once were, but they are very well established: see generally Megarry & Wade, The Law of Real Property (9th edn, 2019) chap 5 and chap 14, especially §14-068ff. Under an open contract for the sale of unregistered land the vendor is obliged to make a good title to the land: ibid §14-073. He does this by providing to the purchaser the records of past transactions, such as sales, mortgages, grants of probate and the like: ibid §14-075. The aim of course is to show an unbroken chain of title ending with the vendor himself. In theory such a chain could stretch back into the distant past, but the vendor only has to take it back to a good root of title (such as a conveyance on sale, legal mortgage or assent) which is at least 15 years old (the period specified by the Law of Property Act 1969, the minimum period having been progressively reduced from 60 years since 1874): ibid §14-076, §14-077.

54.
A vendor who can satisfy this requirement to produce a chain of transactions starting from a good root of title at least 15 years old and ending with himself has a "good title". A good title is "one which is free from incumbrances and which can be proved in the manner required by law. Such a title can be forced on an unwilling purchaser…": ibid §14-074. That is what I would understand by the phrase "paper title", namely a title that can be demonstrated by reference to such a chain of transactions. It does I think go a bit further than this because sometimes a vendor has a paper title but it is less than perfect: in such a case he may have a "good holding title", that is one which although imperfect in some way, is "unlikely to be challenged successfully, normally because any adverse claims have been barred by lapse of time": ibid. This is similar to the provision found in s. 9(2) of the Land Registration Act 2002 under which a person may be registered with absolute title if the registrar is of the opinion that "the person's title to the estate is such as a willing buyer could properly be advised by a competent professional adviser to accept", the registrar being entitled by s. 9(3) to disregard the fact that the title appears to be open to objection "if he is of the opinion that the defect will not cause the holding under the title to be disturbed." But a vendor who cannot demonstrate a conveyance (or other assurance such as an assent) to himself does not in my view have a paper title at all.

55.
In the vast majority of cases, no doubt, a person with a paper title in this sense will be the owner of land and vice-versa. So it is not uncommon to see the expressions "paper title", "paper owner", "true owner" and the like used interchangeably. Strictly speaking they are not entirely synonymous, as it is theoretically possible for a person with a good paper title not in fact to be the true owner of land (if for example there were some undisclosed transaction anterior to the root of title which conferred title on someone else); or conversely for the true owner of land not to have a paper title (if for example there had been a conveyance to him but all evidence of it had been lost). But these are unlikely scenarios and for practical purposes the expressions mean much the same.

56.

In the context of claims for adverse possession, the contest is usually between the paper owner (O) and the adverse possessor or squatter (S). It may be worth explaining this in a bit more detail. Again the law is very well established and can be found in Megarry & Wade chap 7. Possession by itself gives a good title against all the world except someone having a better legal right to possession: ibid §7-004. If S dispossesses O, S therefore acquires all the rights of a person in possession. This enables him to bring claims in tort such as trespass and nuisance, and to recover the land if he is himself dispossessed by a third party (T), assuming that T is not claiming under O: ibid §7-008. Indeed although it is common to think of S acquiring a title after 12 years' adverse possession, this is not strictly accurate. S acquires a fee simple estate in the land on taking possession, albeit it is subject to O's superior right until O's title has been extinguished by limitation: ibid. The extinction of O's title (usually after the lapse of 12 years) therefore does not confer a title on S; what it does is make his title good against O as well.

57.
Two things follow from this analysis. First, if O has a paper title, he will have a better right to the land than S, and be able to recover the land from S unless and until S has barred O's title by sufficiently long adverse possession. Second, just as S can recover possession from T, O does not need a paper title to have a better right to the land than S. All he needs is to have formerly been in possession himself.

58.
In the context of the present case, what this means is that it was neither necessary nor sufficient for the Amirtharajas to establish that the James brothers had a paper title to the passageway. It was not sufficient, as even if they had had, it would have been defeated if the Whites could establish that Mr Bright had 12 years' adverse possession of the passageway. It was not necessary, because if the James brothers had been in possession of the passageway, they and hence the Amirtharajas had a better right to it than the Whites unless the Whites could establish 12 years' adverse possession by Mr Bright. Indeed unless they could do this, they had no pleaded claim at all: all the relief they sought was predicated on being able to establish his adverse possession for the requisite length of time.

59.
With that slightly elaborate detour, I can return to the question whether the issue whether the James brothers had a paper title to the passageway was raised at trial. It seems plain to me that Mr Howard is right when he submits that it was not. Not only was it not positively pleaded, but there was no evidence before the Court of any chain of title ending with the James brothers: indeed there was no documentary evidence of their title to the workshop or passageway at all. The closest that the evidence came to it was their statutory declaration which asserted that they had inherited the land from their father who had owned it for 44 years, but that does not purport to prove a paper title.

60.
Ms Brie Stevens-Hoare QC, who appeared with Mr Max Thorowgood for the Amirtharajas, suggested in her skeleton argument that Mr Hall had been cross-examined at trial on the basis that Mr Brian James was the owner of the freehold title of the workshop and the person entitled to permit Mr Hall to access the passageway because title was vested in him. In fact, the transcript of the cross-examination shows that the relevant questions were very limited:

"Q. The garages and the workshop, you were a tenant of Mr James?

A. Yes, I was.

Q. Brian James, yes, and he said to you, you could use the alleyway didn't he?

A. No.

Q. Well in your statement your say 'I confirm that the landlord at the time, Mr James, informed me the alleyway was for access to Hollis House'?

A. Oh yes, in the early days when I bought it, it was known as access to Hollis House."

I accept Mr Howard's submission that this falls some way short of cross-examining Mr Hall on the basis that title to the passageway was vested in Mr Brian James.

61.
We were also provided with the trial skeleton prepared by Mr Eaton who was then appearing for the Amirtharajas. This referred to the James brothers having thought the passageway was theirs, but made no attempt to set up a paper title in them. We had a transcript of Mr Eaton's closing oral submissions which Mr Howard said (and Ms Stevens-Hoare did not suggest otherwise) similarly made no attempt to prove a paper title.

62.
In those circumstances it is scarcely surprising that HHJ Holmes said in his judgment that whether the passageway was at some stage owned by the owners of one or other of the buildings either side, was owned by the owners of Hollis House, or whether it belonged to the Crown, is not something he could determine nor was he required to do so (his judgment at [53], quoted in paragraph 22 above).

63.
I therefore accept Mr Howard's submission that the question of whether the James brothers had a paper title to the passageway was not an issue that was raised at trial.

(2) Should Michael Green J have permitted the paper title point to be raised on appeal?

64.
I can deal with this point very shortly. There is no dispute as to the law. The principles applicable where a party seeks to raise a new point on appeal were summarised by Haddon-Cave LJ in Singh v Dass [2019] EWCA Civ 360 at [15]-[18]. These include the principle that an appellate court will not generally permit a new point to be raised on appeal if the point either requires new evidence or the evidence at trial would have been different had it been run below. This is very well settled law, which dates back at least to The Tasmania(1890) 15 App Cas 223.

65.
In the present case Michael Green J correctly refused to allow the amendment to Ground 4(3) precisely because if the proposed amended ground had been an issue at trial, the evidence at trial might have been different: see his judgment at [43] (cited in paragraph 30 above).

66.
But he went on to say that the Amirtharajas were still entitled to run the paper title argument in the unamended Ground 4(3), namely that HHJ Holmes had failed to consider whether the James brothers could themselves have either had paper title to the passageway or been in adverse possession of it. So far as concerned a paper title this was a new point, for reasons already given; and, for exactly the same reasons as Michael Green J gave, it was one that if taken at trial might have led to different evidence being adduced, either by other witnesses being called, or further documents being produced, or indeed, as Mr Howard submitted, by other questions being asked of those witnesses who

were called. In the words of Lord Herschell in The Tasmania at 225, the High Court could not possibly be “satisfied beyond doubt … that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial.”

67.
It was not disputed by Ms Stevens-Hoare that the objection that a ground of appeal raises a new point is a substantive objection that can be taken at the hearing of the appeal notwithstanding that permission to appeal has already been granted: the grant of permission to appeal is not itself permission to the appellant to run a new point. This must be so, not least because an application for permission to appeal in the High Court often proceeds without any prior opportunity for the respondent to raise such an objection.

68.
In those circumstances I accept Mr Howard’s submission that Michael Green J should not have permitted the paper title point to be run on appeal. It is only fair to add that although the Singh v Dass objection was squarely put before him as a reason for refusing the amendment to Ground 4(3), it is not clear whether the unamended Ground 4(3) was objected to on the same basis, so this may have been a pardonable error on his part. But now the objection has undoubtedly been taken, it can in my view be seen to be well-founded.

(3) Did Michael Green J accept the argument?

69.
This is where I part company with Mr Howard’s submissions. As Mr Howard accepted, Michael Green J nowhere expressly finds that the James brothers did have a paper title. Indeed to my mind this rather understates the position. It seems clear to me that Michael Green J did not accept that the James brothers had a paper title to the passageway. He dealt with this at [92] (cited in paragraph 37 above) where he said that the evidence before HHJ Holmes showed that they had paper title to the office because they had an assent from their father’s executors; but there did not appear to have been any similar assent in relation to the workshop. So “that may indicate a lack of evidence as to the actual paper title and may explain why they applied only for possessory, rather than absolute, title to both the Workshop and the Passageway.”

70.
This seems to me to be entirely correct. The James brothers did not give evidence before HHJ Holmes. There was therefore no explanation from them of why they only applied for possessory title. But the very fact that they applied for possessory title rather than title absolute (as they had done with the office) suggests that they were not in a position to prove a paper title to either the workshop or the passageway; and whatever the reason, the fact is that there was no evidence before HHJ Holmes that they had a paper title to either. Whether that was because Mr Brian James had never had one, or because although he did, there had for some reason never been an assent, or because documents had been lost, was something that was neither explained nor even touched on in evidence. The simple fact is that the position before HHJ Holmes was that there was no evidence at all as to a paper title to the passageway (or indeed the workshop) being vested in anyone. It was certainly not enough to point to the 1900 conveyance referred to in the registered title of Hollis House. All that showed was that other (unidentified) land had been included in the same conveyance as Hollis House; and while the schedule of restrictive covenants there set out suggested that what had been conveyed was a building estate laid out in a number of plots, there was nothing to indicate its extent.

71.

Mr Howard suggested that Michael Green J had nevertheless made what he called a non-explicit finding that the James brothers had title to the passageway. He relied in particular on two passages in his judgment. One was at [85] where Michael Green J referred to the 2009 admission of workmen to the passageway to work on the roof. What he said (see paragraph 33 above) was that when “the owner” wished to gain access it does not appear that there was any problem in doing so. But this has to be read with what he says in [83] where he points out that by 2009 the James brothers had already registered their title to the workshop and passageway and they only needed the gateway to be unlocked. In that sense the James brothers were owners in 2009: they were by then the registered owners, having persuaded the registrar that they had possessory title. I do not think one can read into this any decision or assumption by Michael Green J that they in fact had a paper title.

72.
Mr Howard also relied on Michael Green J’s comment in [85] that Mr Bright does not seem to have asserted to the James brothers at any time that he was now the owner of the passageway. He submitted that that was a clear echo of a passage, cited by Michael Green J at [49], from the classic exposition of the law of adverse possessionby Slade J in Powell v McFarlane (1977) 38 P&CR 453, where he said at 476 that even contemporary declarations made by a person to the effect that he was intending to assert a claim to the land are of very little evidential value for the purpose of supporting a claim to adverse possession unless they were specifically brought to the attention of the true owner. Mr Howard said that this demonstrated that Michael Green J thought of the James brothers as the owners of the passageway. But again I do not think that this will bear the weight that Mr Howard sought to put on it. What we do know about the passageway is that the James brothers claimed that their father had owned it for 44 years and that they had inherited it; it is not disputed that they owned the buildings either side (albeit they only had a paper title to the office not the workshop); there does not appear to have been anyone else claiming a title to it; and I do not find it surprising that Michael Green J thought that if Mr Bright was going to assert a title to anyone, the obvious person to assert it to would be the James brothers. I do not regard this as any sort of implicit finding that they in fact had a paper title.

73.
The other passage relied on by Mr Howard was at [93] where Michael Green J suggested that the registrar applied a presumption of possession based on the status of true owner. What Michael Green J actually says (paragraph 37 above) is that “perhaps” the registrar applied the presumption that the paper title owner or those claiming through the paper title owner are deemed to be in possession. But this is only a tentative suggestion; and in any event again Michael Green J does not say that the James brothers had a paper title, but only that they claimed to have inherited the property from their father who they said had owned and occupied it for 44 years. In any event he then went on to say at [94] that nothing had emerged since 2005 to undermine the registration or that disclosed a new true state of affairs. All that had happened was that the Judge reinterpreted the same evidence that was before the registrar, which was not an appropriate test for a mistake. As with the passage at [85] I do not read this passage as based on a finding, not made explicitly, that the James brothers did have a paper title to the passageway.

74.
Mr Howard also suggested that Michael Green J’s erroneous treatment of the paper title issue permeated the whole of his judgment (in his vivid metaphor, like the second colour in a piece of shot silk) and infected his conclusion on adverse possession. For the reasons I have given I do not accept the premise: I do not find either explicitly, or implicitly, in the judgment any indication that Michael

Green J erroneously supposed the James brothers to have had a paper title to the workshop or passageway.

75.
But quite apart from all this, I do not accept the conclusion either. The paper title issue was so far as I can see wholly irrelevant to the question whether the Whites could establish a title by adverse possession. That turned on Grounds 2 and 3, namely whether HHJ Holmes erred in the weight he gave to Mr Bright's statutory declaration, and whether that evidence sufficiently proved an intent to possess. Michael Green J dealt with these grounds first before he started considering Ground 4 and there is nothing in his reasoning in relation to them that suggests that the paper title issue had any bearing on them. The essential reasoning was that Mr Bright's acts were equivocal as to his intention to possess the passageway. That does not depend on whether the James brothers did or did not have a paper title to it. It depended solely on what Mr Bright's intention, to be inferred from his acts, was.

76.
Mr Howard said that it makes all the difference whether a person is seeking to establish adverse possession against an identifiable owner or not. But I do not accept this. It cannot be uncommon in a case of adverse possession for the identity of the paper owner to be unclear: indeed, I suspect that in many cases the adverse possessor either thinks he owns the land already, or takes possession of it precisely because no-one else appears to be interested in it. Whether the identity of the paper owner is known or not does not seem to me to change the nature of the enquiry into whether the putative adverse possessor's acts are equivocal or not: they have to demonstrate an intention to possess, which means an intention "to exclude the world at large, including the owner with the paper title, so far as reasonably practicable and so far as the processes of the law will allow" (Powell v McFarlane at 471-2). That to my mind requires an intention to exclude the paper owner, whoever he may be, and whether or not his identity is known.

77.
In those circumstances I do not accept Mr Howard's step (3). I do not consider that Michael Green J accepted, explicitly or not, that the James brothers had a paper title to the passageway; nor do I consider that it infected his reasoning on the central question, which is whether the Whites could establish that Mr Bright was in adverse possession.

(4) Disposal

78.
In the light of my conclusions so far, the question of disposal does not arise. But in any event I have difficulty in seeing how we could have allowed the appeal and restored the order of HHJ Holmes, which is what Mr Howard sought.

79.
HHJ Holmes' order was based on his conclusion that the Whites had succeeded in establishing that Mr Bright had been in adverse possession. Michael Green J's order was based on the conclusion that he erred in reaching that conclusion. The Whites sought to challenge that on appeal to this Court in Grounds 4 to 7, but permission was refused on the ground, among other things, that they had no real prospect of success (paragraph 42(2) above). To my mind it follows that that is now unchallengeable. That is fatal to the Whites' claim to adverse possession, and hence to their claim to have title to the passageway removed from the Amirtharajas' title to the workshop and included in their title to Hollis House. This was, as Michael Green J said at [90], the only real substantive dispute between the

parties: the Whites had no interest in having the passageway removed from the workshop title if it was not going to be added to their own.

80.
I have admittedly had more doubts about the question whether there was a mistake in registering the James brothers with possessory title. HHJ Holmes' view, that there must have been a mistake as they were not in possession and a person can (by s. 9(5)(a) of the Land Registration Act 2002) only be registered with possessory title if they are in actual possession, seems on the face of it quite persuasive. Ms Stevens-Hoare suggested that that did not matter as the Amirtharajas now had an absolute title, and there is no similar requirement to be in actual possession before being registered with title absolute. This appears to have been a new point, not raised below, and we did not hear extended argument on it, but I am very doubtful about it. If a person was mistakenly registered with possessory title, then one would have thought it was equally a mistake to upgrade that title to an absolute title.

81.
But leaving that point aside, Michael Green J took a different view from HHJ Holmes on the question whether the registration of the James brothers with possessory title was a mistake, and although the Whites sought to challenge this on appeal to this Court in Ground 12, this was another ground on which they were refused permission, in this case because although Asplin LJ did think it had a real prospect of success, it did not raise any important point of principle or practice (paragraph 42(6) above). So this is another conclusion that in my view is now unchallengeable. Quite apart from that, as I have said, the Whites' claim for relief was all predicated on their adverse possession claim; they never advanced a claim for correction of the Amirtharajas' title as a freestanding claim.

82.
In those circumstances where the Whites cannot now challenge either the conclusion that Mr Bright did not acquire a title by adverse possession or the conclusion that the register did not contain a mistake, I have difficulty seeing that the only ground on which they had permission could in any event have been of any assistance to them.

83.
But it is not necessary to pursue this further. For the reasons I have given I would dismiss the appeal.

Lord Justice William Davis:

84.
I agree.

Lady Justice King:

85.
I also agree.

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[1] Also referred to in one place as dated 28 February 1990, but this is obviously a mistake.

[2] In fact, as noted by Michael Green J, the application was for possessory leasehold title rather than possessory freehold. This seems to have been a simple mistake. It appears to have been ignored and to have had no consequences.

[3] They made a second statutory declaration on 13 April 2005. This was similar but not identical. There was no evidence explaining why this was made or why it was worded differently. Nothing would appear to turn on it.

[4] The judgment actually reads “north” but the sense is clear.