[2017] UKFTT 0472 (PC)

PROPERTY CHAMBER
FIRST–TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO:2016/0399

BETWEEN

Denise Margaret Curtain (1)
Brian Hindley (2)
(as Trustees of The Rolvenden War Memorial 1914-20 Trust)

Applicants

and

Edward George Barham

Respondent

Property address: Land lying to the north of Benenden Road, Rolvenden, Cranbrook, Kent TN17 4PF

Title numbers: TT39059 and K945851

Before: Judge John Hewitt
Sitting at: Medway Magistrates' Court and Family Court
On: 4 and 5 April 2017

ORDER

It Is Ordered that:

1. The Chief Land Registrar shall give effect to the original application dated 30 July 2015 to alter the title plan to title number K945851 to remove a parcel of land of about one third of an acre in Rolvenden and numbered 351 on the Ordnance Survey Map for the Parish (1908 Edition), as if the objections of the respondent had not been made; and

2. Any application(s) for costs shall be made in accordance with the directions set out in paragraph 8.2 of the decision dated 26 May 2017.

Dated this 26 May 2017

John Hewitt

By Order of the Tribunal

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DECISION

Representation:

Applicants:	Mr Seb Oram	Counsel
Respondent:	Mr Mark West	Counsel

KEYWORDS – Alteration of the register – mistake – rectification – void or voidable transfers - oral contract– part performance - permanent endowment of a charity – unjust not to make the alteration – exceptional circumstances

Cases referred to:

London Borough of Hounslow v Hale [1990] 24 HLR 9 (Ch)
Bayoumi v Women's Total Abstinence Educational Union Ltd [2004] Ch 46.
Baxter v Mannion [2011] 1 WLR 1954 (CA)
Walker v Burton [2014] EWCA Civ 1228 and [2014] 1 P.& C.R. 9
Williams v Central Bank of Nigeria [2014] AC 1189 CA
MacLeod v Gold Harp Properties Ltd [2014] EWCA Civ 1084

Contents:

1. Decision

1. The decision of the tribunal is that:

1.1 The Chief Land Registrar shall give effect to the original application dated 30 July 2015 to alter the title plan to title number K945851 to remove a parcel of land of about one third of an acre in Rolvenden and numbered 351 on the Ordnance Survey Map for the Parish (1908 Edition), as if the objections of the respondent had not been made; and

1.2 Any application(s) for costs shall be made in accordance with the directions set out in paragraph 8.2 below.

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

2. Procedural Background

2.1 The applicants are two or the several current trustees of The Rolvenden War Memorial Trust 1914-20 Trust (the Charity) which was created by a declaration of trust dated 17 June 1922 [122]. By a deed of gift dated 18 December 1936 [134] a parcel of land situate in Rolvenden, being numbered 351 in the Ordnance Survey (1908 Edition) (the disputed land) was conveyed by Barham Estates Limited to a number of persons who

were the then trustees of the Charity. They were to hold the disputed land upon the trusts, objects, purposes and powers declared in the declaration of trust dated 17 June 1922.

2.2 In circumstances which I shall have to set out in some detail shortly the disputed land was included in a number of conveyances of substantial parcels of land comprising all or part(s) of what was originally known as the Hole Park Estate of which Windmill Farm was once a part. Those conveyances were:

14 August 1912	Ernest Wilfred Cree to Col. Arthur Saxby Barham
2 June 1922	Col. Arthur Saxby Barham to Barham Estates Limited
18 December 1936	Barham Estates Limited to the trustees of the Charity
10 August 1949	Barham Estates Limited to De Berhams Limited [138]
31 May 1958	De Berhams Limited to David George Wilfred Barham and Jeffrey Maurice Browning (as trustees of the 1950 Trust) [154]
23 June 1962	Jeffrey Maurice Browning and Daphne Margaret Browning (as trustees of the 1950 Trust) to David George Wilfred Barham [185]
30 September 1988	David George Wilfred Barham to Edward George Barham [208]

2.3 The respondent, Edward George Barham, (Mr Edward) sought to register Windmill Farm at Land Registry. Registration took place on 23 September 2008 and title number K945851 was allocated. It is not clear which of the above-mentioned conveyances were submitted to Land Registry to support the application. It is not in dispute that the title plan to that registered title includes the disputed land.

2.4 It appears that at the time of registration the then trustees of the Charity (or some of them) were not aware of the 1936 deed of gift relating to the disputed land. This only became apparent in 2014 when the Charity Commission was having a clear out of deeds and documents, and the deed of gift was sent to a representative of the trustees.

The deed of gift was duly passed to the trustees. At about that time Mr Edward had obtained a planning consent to carry out a development on land at or adjacent to Windmill Farm which entailed relocating two football pitches. Mr Edward proposed to relocate them close to the disputed land in such a way which envisaged that an access road and some associated parking spaces would be located on the disputed land. Thus, the disputed land and its true ownership became a focal point; a contentious focal point in the eyes of some.

2.5 In the event the applicants were (or have been) duly authorised by the Charity to make an application to Land Registry seeking an alteration of the title plan of title number K945851to remove the disputed land from it, by way of rectification following a mistake.

2.6 Mr Edward objected to the application. Land Registry, in its administrative capacity, was not able to dispose by agreement of the objection and on 3 June 2016 the Chief Land Registrar referred the disputed application to the tribunal pursuant to section 73(7) Land Registration Act 2002 (the Act).

2.7 Directions were duly given.

2.8 The reference came on for hearing before me on 4 and 5 April 2017.

The applicants were represented by Mr Seb Oram of counsel.

The respondent was represented by Mr Mark West of counsel.

On 4 April 2017, I heard oral evidence on oath from:

Mr Brian Hindley	[55]
Mrs Denise Margaret Curtain	[68]
Mrs Irene Newman	[75]
Mr Edward Barham	[82]
Mr David George Wilfred Barham	[87]

Those witnesses produced their respective written witness statements, which they said were true, and were cross-examined on them.

2.9 On 5 April 2017 I heard closing submissions from Mr West and Mr Oram. Both followed the format of their respective skeleton arguments. I am grateful to them both for their succinct and relevant written and oral submissions which were of considerable assistance to me.

3. The factual background

3.1 Fortunately, much of the factual background was not in dispute.

3.2 I can summarise my findings of fact below. Where there was controversy I have indicated accordingly and given reasons for my findings.

3.3 Although not formally in evidence and not part of my fact finding I set out below an extract from the Hole Park website to help set the scene:

Hole Park has been owned by the Barham family for the past four generations and is set in over 200 acres of superb classic parkland. The colourful gardens enjoy far reaching views over the hills, woods and fields of the picturesque Kentish Weald. They are a skilful mix of formal design and more naturalised planting, giving colour throughout the seasons. The house, which is a private family home and therefore not open, was largely reconstructed in 1959 and is now little more than a quarter of its previous size. It resembles the house as it used to be before additions in the Elizabethan style were built in 1830.

Hole Park Gardens are open every day in spring with limited opening times in summer & autumn. Please see Visitor Information page for opening times and dates. In spring visitors can enjoy the wonderful carpet of bluebells, daffodils, camellias, wisteria, magnolia and other

spring delights. In summer the long borders are filled with colourful herbaceous plants with the exotic border coming to life in late summer. The woodland area and gardens are also a delight in autumn with trees planted specifically with autumn colour in mind.

The Weald in the Garden of England offers a wide variety of gardens, large and small, to interest and captivate gardeners and non-gardeners alike. Hole Park Gardens hold their own against the more well-known gardens of Sissinghurst and Great Dixter.

The nearby village of Rolvenden and the town of Cranbrook are equally worth visiting for picturesque white weather boarded buildings, mills and attractive high streets in typical Kentish scenery.

The Barham Family and the conveyances

3.4. Several generations of the Barham family feature in this case. I set out details below and in parenthesis an abbreviated designation – solely for ease of reference and without intending any disrespect:

Colonel Arthur Saxby Barham	(Col Arthur)	Founder
Harold Arthur Barham	(Mr Harold)	A son
David George Wilfred Barham	(Mr David)	A grandson
Edward George Barham	(Mr Edward)	A great grandson

3.5 Reference in paragraph 2.2 above to the '1950 Trust' is a reference to a private Barham family trust. References to Barham Estates Limited and De Berhams Limited are to companies owned or controlled by members of the Barham family or trustees on their behalf. Over the years' various dispositions of properties have taken place with a view to tax efficient transmissions from one generation to another.

3.6 Hole Park Estate as originally purchased by Col Arthur was plainly a substantial family home with significant land holdings, evidently most of which were tenant farmed and/or under forestry. Mr Edward said, and I accept, that on behalf of the Barham family interests he currently provides management services to an estate now comprising some 2,500 acres or thereabouts.

3.7 Over the years' parts of the Hole Park Estate have been distributed amongst members of the Barham family.

3.8 By way of a deed of gift dated 18 December 1936 [134] Barham Estates Limited conveyed the disputed land to persons who were then trustees of the Charity. It appears that at that time the disputed land was a small parcel from what was known as Windmill Farm. The disputed land was adjacent to and to the north of a parcel of land known as the Cricket Ground which had been gifted to the Charity by the personal representatives of the late Thomas David Cheeseman. At the time of the 1936 deed of gift there was some speculation or suggestion that the disputed land might be used or enjoyed in conjunction with the facilities on offer from the Cricket Ground; and perhaps adapted to provide a bowling green for use by a bowls club. It may be helpful to record that whilst a parcel of land was and is locally referred to as the 'Cricket Ground' it is not used solely for cricket and is laid out with a number of buildings and facilities generally for sporting, social and leisure activities, as envisaged by trust deed.

3.9 It was not in dispute that the disputed land was included (in error) within the land conveyed by the 1949, 1958 and 1988 conveyances referred to in paragraph 2.2 above. It was conceded that given the disputed land was conveyed to the trustees of the Charity in 1936, the subsequent conveyances which purported to convey that land a second time, were void as regards to the disputed land due to double conveyancing.

3.10 By way of a deed of gift dated 30 September 1988 Mr David conveyed large parcels of land to his son, Mr Edward. In broad terms the land conveyed (or at any rate, a large part of it) was known as Windmill Farm. It was not in dispute that the disputed land was included in the 1988 conveyance.

3.11 At the time of the 1988 gift, Mr Edward was an officer in The Queen's Dragoon Guards serving overseas in Germany. I find that Mr Edward did not solicit the gift and it was a typical act of generosity on the part of Mr David who had previously made 'surprise' gifts to Mr Edward and his siblings. At that time, the overall day to day stewardship of the Hole Park Estate remained with Mr David. I also find that at the time of the 1988 deed of gift, Mr Edward was not aware that the disputed land had been gifted to the Charity in 1936. Mr Edward, who like Mr David, qualified as a chartered surveyor, gradually took over stewardship of the Hole Park Estate from about 1990 onwards. At that time, so far as Mr Edward was aware, the disputed land was farmed as part and parcel of Windmill Farm owned by the Barham family interests since its acquisition by Col Arthur in 1912.

3.12 Evidently from throughout the Second World war through to the early 1960's the tenant farmer of Windmill Farm was a Mr J H Gwyther. Mr Gwyther died in 1961 and by that time he had rather let the farm run down and it was in a fairly dilapidated state with buildings in very poor order and the land little better. At that time, the disputed land was also in a neglected state and was overgrown with brambles. Up to this time Mr Gwyther had been paying to the Charity a modest rent for his use of the disputed property.

3.13 Whilst Mr David may well have known that the disputed land was (at one time at least) in the ownership of the Charity which was in receipt of a modest rent, I am satisfied that the impression on the ground to a person without a knowledge of the conveyancing history was that the disputed land was part and parcel of Windmill Farm. Indeed, as late as mid-2014, this was the impression gained by Mr Hindley, Mrs Curtain and Mrs Newman, all of whom have had long associations with the village, in Mr Hindley's case stretching back to the mid-1960s, in Mrs Curtain's she was born in the village in 1961 and has lived in the village since then save for a two-year period when she was away, and in Mrs Newman's case since 1985.

3.14 There came a time when Mr Edward was prevailed upon to register his land at Windmill Farm with Land Registry which was offering inducements. Mr Edward instructed local solicitors, Buss Murton, who had held boxes and boxes of Hole Park Estate deeds and papers going back for some 200 years. Evidently that firm was established over 300 years ago and had acted for Col Arthur on his acquisition of the Hole Park Estate, and for the Barham family (and its corporate interests) on subsequent dispositions of the estate or parts of it.

3.15 Mr Edward said, and I accept, that whilst he held some copies of some key documents concerning Hole Park Estate, or parts of it, he did not have many; and he did not have the 1936 deed of gift to the Charity; and he left it to Buss Murton to attend to the registration of the land with Land Registry on his behalf. I find that Mr Edward did not know what title documents Buss Murton had in its possession concerning the Hole Park Estate and he did not know what title documents Buss Murton submitted to Land Registry in support of the application for first registration of Windmill Farm. Given the background facts and circumstances I find that it was not unreasonable for Mr Edward to have left the project of the first registration of that land in the hands of Buss Murton.

4. The Charity and the gift of the disputed land

4.1 The Charity was created by a trust deed dated 17 June 1922 which appears to have been enrolled with the Charity Commission on 10 August 1922 [122]. The Settlors were:

"The Right Hon: Harold John Tennant;
Frederick Coombe Baker;
Horace Nava; and
Arthur Saxby Barham"

The four Settlors were also the original trustees.

Clause 1 provides for the conveyance of specified land and the messuages and dwelling-houses erected thereon and the War Memorial Cross erected or to be erected thereon by the Settlors to the Trustees to be held on the trusts set out.

Clause 2 provides for the transfer of investments and funds by the Settlors to the Trustees.

Clause 3 provides for the lands and investments to be held upon the objects and purposes; which can conveniently be summarised as:

(a) To pay for the erection of a War Memorial Cross and its dedication and consecration *"... and at all times out of the income arising from the letting of the said messuages or dwelling-houses or the said investments and funds clean the said Cross ... and ... repair amend and restore and ... rebuild the same and generally preserve the amenities thereof"*;
(b) For the relief of distress amongst those parishioners of Rolvenden who took part in the War of 1914-1920 or in any later wars and the dependents of such parishioners;
(c) For the relief of distress amongst other parishioners of Rolvenden;
(d) To let the said messuages and dwelling-houses and any after acquired, to such persons specified in (b) and (c) above;
(e) Public purposes for the benefit of the Parish of Rolvenden and its inhabitants; and
(f) For the moral and intellectual improvement of the inhabitants of Rolvenden.

Clause 4 sets out the powers of the Trustees, which can conveniently be summarised as follows:

"(a) To acquire by purchase lease or otherwise and to improve let or dispose by sale or otherwise land buildings public gardens playing fields and other property within the Parish of Rolvenden and outside that area when specifically necessary for the objects of the Trust

(b) To build, pull down or alter any buildings of the Charity;

(c) To collect rents and evict tenants;

(d) To promote and make grants towards any services commemorative of the 1914- 20 War, or any later war of National importance;

(e) To maintain the property of the Charity and to make grants towards the maintenance of public gardens, playing fields or other spaces or buildings for public purposes;

(f) To raise money on its properties by way of loan, mortgage or otherwise;

(g) To invest the funds which it has available; and

(h) To acquire offices, employ assistants and incur expenses incidental to the management of the Charity.

Clause 5 imposes an obligation on the Trustees to make a formal application to the Charity Commissioners for an Order establishing a Scheme for the administration of the Charity on the basis of the objects, purposes and powers set out.

4.2 Application was duly made for a Scheme, and a copy is at [125]. It states it was sealed on 3rd August 1923. Evidently, the Scheme was made pursuant to The Charitable Trusts Acts, 1853 to 1914. So far as material to this application the Scheme provides:

"1. Administration of Charity –
The above-mentioned Charity and the endowments thereof specified in the Schedule hereto, and all other endowments (if any) of the said Charity, shall be administered and managed by the body of Trustees hereinafter constituted, subject to and in conformity with the provisions of this Scheme.

2.- 22 ...

23. Trustees not to be personally interested –
No Trustee shall take or hold any interest in property belonging to the Charity otherwise than as a Trustee for the purposes thereof, and no Trustee shall receive any remuneration, or be interested in the supply of work or goods, at the cost of the Charity. Provided that this clause shall not prevent any Trustee who is a Clerk in Holy Orders from accepting a fee from the Trustees for conducting an annual or other Memorial Service.

24.-25. ..."

The Schedule mentioned in paragraph 1 contained reference to two parcels of land comprised in the Indenture dated 17 June 1922, but, of course, neither of them concerned the disputed land, because the disputed land was not conveyed until 1936.

It may also be worth recording that the Scheme provides for not less than seven and not more than eleven trustees comprising a mix of Representative Trustees (appointed by the Rolvenden Parish Council for terms of two years) and Cooptative Trustees

(persons residing or carrying on business in or near the parish). The Scheme named the Settlors as the first Cooptative Trustees who were to hold office for life. Thereafter future Cooptative Trustees were to be appointed for terms of five years.

The full number of the Cooptative Trustees was always to be one more than the full number of the Representative Trustees.

Mr David was appointed a trustee in 1957. In 1985 Mr David was elected as chairman of trustees, a post which he says he relinquished in 2015.

Mr Edward was appointed a trustee in April 1996 and he says he was elected as chairman of trustees in April 2015.

Whilst not material to what I have to decide I record it appears that in recent years some of the appointments of Representative and Cooptative trustees may not have been made strictly in accordance with the provisions of the Scheme.

4.3 By a conveyance dated 18 December 1936 and made between Barham Estates Limited (the Company) (1) and Frederick Coombe Baker, Horace Neve, Arthur Saxby Barham, Harry Joseph Allsop. Harold William Hoad and Margaret Mary Tennant (2) as Trustees of the Rolvenden War Memorial Trust, the Company, as estate owner in fee simple in possession, *"...freely and absolutely give and convey the said land and premises to the Trustees for all or any or either of the objects and purposes set forth in Clause 3(a) of the said Deed of Seventeenth day of June One thousand nine hundred and twenty-two and with the powers set forth in Clause 4 of the said Deed"*

It was not in dispute that the 'said land' is the disputed land which was described in the deed as being: *"ALL THAT piece or parcel of land situate at Rolvenden in the County of Kent numbered 351 on the Ordnance Survey Map for the said Parish (1908 Edition) and containing Three hundred and sixteenth thousandths part of an acre Which piece of land is for the purpose of identification only and not by way of conveyance delineated and coloured pink on the Plan drawn hereon..."*

The plan referred to is at the foot of [134].

At the foot of the second page of the deed [135] there is a stamp and seal which bears the legend in upper case: *"Recorded in the books of the Charity Commissioners for England and Wales pursuant to the provisions of section 25(4) of the Settled Land Act 1925"*. That is followed by a manuscript annotation I am unable to decipher ending with the numbers '418'. Beneath that there appears: *"23rd February 1937."*

On the back-sheet of the deed [134] there are two stamps and some manuscript annotations. One bears the legend in upper case: *"Charity Commission Enrolment and Record ?? 26 Jan 1937 93/37"*. The other bears the legend in upper case: *"Received -5.04.1967 Charity Commission"*.

4.4 At [136] there is an extract from what appears to be a local newspaper which records:

"GENEROSITY –

Colonel A.S. Barham has given the village a piece of land adjoining the cricket ground: the War Memorial Committee to be the Trustees. At a meeting on Monday it was suggested the land should be used as a bowling green."

4.5 At [137] there is a Schedule of Deeds. The first five entries refer to a sealed copy of the Scheme, Declaration of Trust, and then three conveyances. Below those entries there is the legend: *"Above are certified by Lloyds Bank as in its possession as security for overdraft."*

There is then listed some further conveyances and documents. One of the entries refers to a Deed of Gift Barham Estates Ltd of paddock adjoining the cricket field.

At the foot of the schedule there appears: *"All the above were examined by Mr Everest and myself on 27 August 1943 except for the first five which have been removed to another place by the Bank for greater security."* That is followed by a manuscript signature which Mr Edward said was that of Col Arthur. It was suggested that this schedule was prepared following war damage to the place where the Charity's deeds and documents were stored. Mr Edward said that he was familiar with this document and he accepted it showed that in 1943, the 1936 deed of gift was in the possession of the trustees.

4.6 It was not in dispute that at some point the disputed land was let by the Charity sometime prior to the Second World War to Mr J H Gwyther who was also the tenant farmer of the adjacent Windmill Farm. He farmed the disputed land as part of Windmill Farm and paid a very modest rent to the Charity. Mr Gwyther died in 1961 by which time both Windmill Farm and the disputed land had been run down to a fairly dilapidated state. Some farm buildings were in very poor order and the disputed land had been neglected and was overgrown with brambles. Mr Gwyther's widow gave up the tenancy of Windmill Farm at Michaelmas 1961 when Mr David, or perhaps a family company, took the farm back. There does not appear to be any evidence as to the termination of the tenancy of the disputed land.

4.7 At [182] there are manuscript minutes of a trustees meeting held on 12 March 1962. It is recorded that present were: Col G C Neve (Chairman), Mr D G W Barham, Mr E J Brooks, Mr T G Brown, Mr P O Hayesmore and Mrs G Newton-Taylor.

A typed copy of one of the entries is at [181] and reads:

"Bowling Green
The Secretary reported that Mr Thorburn was prepared to convey a suitable piece of land at the rear of the Club House for the purpose of establishing a Bowling Green for the Parish. It was agreed that those in the Parish interested in the game should be invited to a meeting to be held at the Club House on 2nd April to discuss the desirability of forming a club and going further into the matter.

Mr Barham agreed to renew the fence at the west end of the Streyte Playing Field in return for the conveyance to him of the small plot to the rear of the tennis courts, .316 acre. The conveyance of the piece of land to be left to Mr Barham."

4.8 At [197] there are manuscript minutes of a trustees' meeting held on 10 July 1962. It is recorded that present were: Col G C Neve (Chairman), Mr D G Barham, Mr E J Brooks, Mr T G Brown, Mr P O Hayesmore, Mrs G Newton-Taylor and Col B B N Woodd.

A typed copy of one of the entries is at [196] and reads:

"Bowling Green Plot – 4 Rinks Green – Seeded £3,300 Turfed £4,300.
The Chairman reported on the position to date, with regard to the provision of a site for the proposed Bowling Green. It was agreed that, owing to the high costs involved, the matter should lapse for the time being."

4.9 At [203] there is an agreed typed copy of an extract from the manuscript minutes of a meeting of trustees held on 17 March 1967 which reads: "*It was agreed that the plot of land given to the trust in 1936 by Col A Barham be sold if agreed by the Charity Commission to Mr D C W Barham for £50.0.0. OS 351".*

Col Neve was the chairman of this meeting. Also present were Mr T G Brown and Mr Hayesmore, both of whom were also present at the March and July 1962 meetings referred to above.

It was not in dispute that Mr David was not present at this meeting. However, he was present at the following meeting on 4 April 1967 which records that all trustees were present and also records: *"The Minutes of the previous four meeting of the Trustees were read and confirmed."*

4.10 At [206] is a copy of a vesting order made by the Charity Commission. It is dated 5 March 1976. It vests in the Official Custodian for Charities a parcel of land being part of land number 767 on the Ordnance Survey (1908 Edition) which was conveyed to the Charity on 6 May 1935. At [207] is a copy of further vesting order dated 5 October 1977 concerning a parcel of land of some 3.775 acres which was conveyed to the Charity on 6 May 1935.

So far as the parties are aware the disputed land has not been the subject of a vesting order.

4.11 There is no clear evidence but I infer that after September 1961 the Charity ceased to receive any rental income from the disputed land, did not use the disputed land itself for any of its charitable purposes and that at some point it became absorbed into Windmill Farm and was farmed as part of that farm. That was the oral evidence of all of the witnesses called on behalf of the Charity. In terms of time Mr Hindley said he first came across the disputed land in 1966 and it appeared to him that it was part of Windmill Farm. He had no reason to think otherwise. Mrs Denise Curtain was born in the village in 1961 and apart from a period of two years has lived in the village all her life. She, like Mr Hindley always assumed the disputed land was part of Windmill Farm. The evidence of Mrs Newman, who has lived in the village since 1985, and who has been a trustee since 1992, was to like effect.

4.12 As time went on trustees of the Charity came and went. In recent years, none of them (save possibly for Mr David), were aware of the 1936 deed gift and that the disputed land was or had been in the ownership of the Charity.

4.13 Rather out of the blue, in 2014, the Charity Commission contacted Mrs Newman to say that they were having a clear out of accumulated deeds and papers and asked Mrs Newman if the Charity wanted to have a document that had been kept on their files or whether it should be destroyed. Evidently the Charity Commission contacted Mrs Newman because her husband had submitted to the Commission trust accounts by email on behalf of the secretary who did have access to a computer. Out of curiosity Mrs Newman asked that the document be sent to her. It was and it turned out to be the original of the 1936 deed of gift.

4.14 For the reasons mentioned in paragraph 2.4 above at about this time there was some sensitivity concerning land adjacent to the Cricket Ground and Mr Edward relocating two football pitches to accommodate a related planning permission he had obtained.

4.15 Mrs Newman passed the 1936 deed of gift to the Charity's secretary on 19 August 2014. He evidently passed it to a Mr Steve Bryant, also a parish councillor and chairman of the Rolvenden Football Club. Following several requests Mr Bryant returned the deed to Mrs Newman at the end of September 2014. Mrs Newman requested a special meeting of trustees be called and this was arranged for 2 October 2014.

4.16 Typed minutes of that meeting are [236]. Mrs Newman and Mrs Curtain accepted that the minutes were a fair summary of what was discussed at the meeting. It appears that at this meeting Mr Edward claimed that the family had acquired title to the disputed land by way of adverse possession. It is recorded: *"E Barham replied that whilst adverse possession may have gained the land for his family the first time he was aware of this gift was the arrival of the deed less than a week ago and that if adverse possession had been the case he believed the 12 year period would have expired prior to his birth. He could not have been a party to it."*

On this issue Mr David, as chairman, put it to the meeting that in accordance with the trust deed a formal enquiry should be placed before the Charity Commissioners for them to rule on the matter and that Mr Hindley and Mrs Newman should prepare a draft submission to be considered at the November ordinary meeting. This was agreed unanimously.

Evidently in more recent years the practice was that the secretary took manuscript minutes of trustee meetings which were then typed up by staff in the Hole Park Estate office and approved for issue by Mr David. Mrs Curtain said, and I accept, that the typed versions of minutes did not always accord strictly with the manuscript versions.

The typed minutes of the 2 October 2014 meeting bear the following annotation:

*"**Post Script***
Further searches of additional minute and account books since the meeting reveal the following:

In about 1950 the tennis club had enquired about taking the land for additional grass court. The request was subsequently withdrawn.

Throughout the early 1950s tenant Gwyther had paid annual £10 rent for the land to the trustees.

At a meeting of the RWMT held on 17 March 1967 –
"It was agreed that the plot of land given to the trust in 1936 by Col a S Barham be sold, if agreed by the Charity Commission, to D G W Barham for £50-0-0 OS 315. G Neve, chairman" [OS 351 being the field number of this paddock] D G W Barham had not been present at this meeting.

Copy 1967 Minute attached.

In light of the new findings, the resolution to put a case to the Charity Commissioners is suspended and will be discussed at the November ordinary meeting if necessary, under matters arising. The matter is now hopefully closed.

D Barham; Chairman"

4.17 The matter came before trustees again in June 2015. By this time, Mr Edward was chairman. At [245] is a note which Mr Edward handed out concerning his conflict of interest. It sets out points which he wished trustees to consider in his absence. It is headed 'Without Prejudice' but at the hearing before me any privilege that might attach to it was waived. For my purposes the following extracts are potentially of significance:

"3. The site is clearly of some significance, given that it forms part of the new Football field site.
4. The minutes of the Trust show that there was no desire to form a bowling green and it was resolved that the land should be sold back to the donor family.
5. Although the sale was clearly intended back in the 1960s I accept it was not completed. This was at a time of other examples of administration for the Trust that lost control of the rifle range and the clubhouse under different, but not unrelated circumstances.
10. Whilst I accept that my father's ability to claim possessory title may be diminished, in that he might not be able to claim title against himself as trustee, I have occupied and owned the land for in excess of 20 years and therefore have my own possessory title claim on it."

4.18 The minutes of the June 2015 meeting are at [247]. At [249] they record that Mr Edward distributed his notes (those referred to above) and that he and Mr David then left the room. Evidently by agreement Mrs Curtain and Mrs Newman had been given access to the Hole Park Estate office and the historic papers and records of the Charity and they had gone through them. The minutes record: *"Trustee Denise Curtain and Irene Newman reported that no trace can be found of the payment of £50 along with no record of the Charity Commission having given permission to sell it back to the donor family."*

The meeting resolved to seek legal advice. As a result, in July 2015 the subject application was made to Land Registry.

4.19 Before leaving these minutes, I want to record that they record Mr Peter Garrott as saying that if the disputed land was used for the proposed pavilion, then it would be on community owned land which was preferable for obtaining grant funding from Sport England, the FA (Football Association) along with obtaining planning permission from Ashford Borough Council.

5. The alleged acquisition of the disputed land by Mr David

5.1 One of the significant issues in this case is whether Mr David acquired title to the disputed land such that later he was able to include the disputed land in his 1988 deed of gift to Mr Edward.

Was there a 1962 oral agreement

5.2 It may helpful to deal with this issue next. Mr Edward's pleaded case is that in 1962 Mr David made an oral agreement with the then trustees to purchase the disputed land. The consideration for the purchase was Mr David agreeing to undertake renewing the fence at the west end of the Street Playing Field. Mr Edward accepts that this agreement was not in writing. Mr Edward relies on the doctrine of part performance.

5.3 Mr Edward also accepts that he was not party to the 1962 agreement and that he has no personal knowledge of the circumstances surrounding it. He relies on the evidence of Mr David to substantiate it.

5.4 Mr David's witness statement is at [87-90]. In paragraphs 8-11 Mr David sets the scene of the early 1960s. There then follows his written evidence on the acquisition and to my mind the key passages are:

"12. ... I do not now recall who it was but, at a meeting of the trustees on 12th March 1962, someone suggested (and the meeting agreed) that if I were to renew the fence on the western boundary of the Street Playing Field, I could have the Property which was of little or no value to the Charity.

13. From my perspective, it made sense to incorporate the Property with the adjoining field to the north and I was happy to accept responsibility for renewing the fence. That work was carried out by my farm employees in the spring of 1962, shortly after the meeting on 12th March 1962 referred to above. I attach a plan showing, highlighted pink, the stretch of the boundary fence which was renewed.

14. I see that the minutes of the meeting of 12th March 1962 record 'The Conveyance of the piece of land to be left to Mr Barham'. I am afraid that, at this remove, I do not now recall what if anything I did about this. Certainly, I have to accept that there was no conveyance. However. Windmill Farm had been conveyed to me by a conveyance of 31st May 1958 which included the Property. It is pure conjecture on my part but I think it very probable that I sought advice and was told that there was no need for a conveyance, in 1962, because the Property [and] *was already mine.*

15. In the spring of 1962, I had renewed the fence on the western boundary of Street Playing Field, I had tidied up the Property and had incorporated it as part of the field to the north... In all this, my activities on the Property were obvious and apparent to any casual observer...

16. If anyone (in particular the then trustees of the Charity) had objected to anything I was doing on the Property. I would have expected them to say so and for the matter to have been discussed at a meeting of the trustees. However, nothing of the sort happened – I had performed my side of the 'bargain' and assumed that the Property was mine.

Also of relevance is:
17. I am afraid I do not know how, at a meeting of the trustees on 17th March 1967, it came to be suggested that I be offered the Property for £50. I was not present at that meeting of 17th March 1967 and do not recall the matter being raised with me beforehand or followed up after that meeting."

5.5 The above statement was signed and dated 2nd Jan '17.

5.6 Mr David was called to give oral evidence on oath. He did so. He was taken to his written witness statement, he confirmed it was true. Mr David was then carefully and sensitively cross-examined by Mr Oram. I have no doubt at all that Mr David was doing his best to assist me, but it quickly became very apparent that Mr David had difficulty in recalling matters in general, let alone in detail. His short-term and his long-term memory was very poor. He also had difficulty in holding concepts together, for example looking and understanding one document, then looking at another and then reverting to the first to discuss apparent inconsistencies.

5.7 Mr David was unable to recall fairly basic facts, such as where he went to university, when he went there and other simple questions often posed a problem for him.

Mr David said that his memory was poor and that he relies heavily on his wife.

5.8 With particular reference to his witness statement at [89] he said:

"I cannot recall with accuracy what happened. One forgets some detail but not everything. If I said so it is what I thought. My memory gets worse – even over the past 3 months. I rely on my wife to tell me where I am sometimes. I poured over my witness statement for a long time and wrote it out."

5.9 Mr David was taken to [238] and to the Post script set out. He said that it had been drafted by Mr Edward and then signed by him – Mr David. His attention was drawn to the reference to a 1967 agreement, and not to a 1962 agreement. Mr David said that he could not now say what agreement he was then referring to.

5.10 Mr David did however say that he recollected in 1962 that the trust no longer needed the land and that it was a bit of a mess and he recollected doing the fencing. He said: *"I probably did it because it was an awful mess and I decided to clear it up."* He said it was sensible for him to have the land back. Further, he said that at that time he did not know of the 1936 deed of gift but said someone must have told him about it. Mr

David supposed that he knew in 1962 that the sale to him would need the approval of the Charity Commission. He also supposed that he had not thought, at that time, whether the sale was or was not contrary to the rules.

5.11 Mr David confirmed that in 1967 he was a trustee but he had no recollection of the 1936 deed of gift being sent to the Charity Commission at that time. Also, he could not recall if that deed was in the possession of the trustees at that time. Mr David confirmed that Col Neve, Mr Brown and Mr Hayesmore were trustees in both 1962 and 1967. When asked about the 1967 minutes if it was correct that the disputed land had been sold to him earlier in 1962, Mr David said: *"Perhaps we did not go through with the 1962 agreement."*

5.12 Towards the end of the cross-examination of Mr David, Mr Oram, quite properly and carefully, put a number of matters to him that were contrary to what was set out in his written witness statement. In effect Mr David agreed with Mr Oram on several points saying things like *"Yes, if you say so it must be so."* I gained the distinct impression that Mr David did not really or fully understand what was being put to him and the effect of what he was saying. There was no re-examination.

5.13 I mean no disrespect to Mr David who clearly has led a long and distinguished career having been to university, become a chartered surveyor, and managed a large estate and having served as a JP, a Kent County Councillor and as a deputy Lieutenant of Kent. However, in the light of Mr David's oral evidence I find I have to treat his oral and written evidence with some caution. The moreso, because the critical events occurred 55 years ago in 1962 and Mr David's recollection of the detail was poor. My attention was drawn to *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) in which at paragraph 22 Legatt J gave guidance as to the approach to be adopted as regards recollections of events which occurred a long time ago.

5.14 I have tried to find other evidence that might corroborate or throw some light on the events. There is very little. It is accepted that the agreement was not put into writing and that there was no conveyance. The part-performance relied upon is the erection of fencing. The labour was said to have been supplied by employed farm hands and so no records exist. I infer that all of some of the fencing materials may have been bought in but no purchase records, receipts or delivery notes have been supplied. All there is, is Mr David's recollections and the minute of the trust meeting.

5.15 On the face of it the minutes of the March 1962 meeting appear to support what Mr David now says he recollects. However, five years later there is the March 1967 the minute proposing a sale of the disputed land to Mr David for £50 subject to agreement of the Charity Commission. Three trustees, Col Neve, Mr Brown and Mr Hayesmore were at both the 1962 and the 1967 meetings. Col Neve was chairman throughout. I find it improbable that none of those three long serving trustees would not have recalled an agreement arrived at five years earlier to sell the same piece of land to Mr Barham. I accept that Mr David was not at the March 1967 meeting which records the proposed sale, but he was at the subsequent meeting when the minutes were confirmed. If there had been a 1962 agreement and if Mr David had performed his side of the 'bargain' I find it implausible that Mr David did not say so. I ask the question why would he have stood by a proposal for him to purchase a parcel of land he already owned without saying so. At that time, Mr Barham was a chartered

surveyor, he was conversant with property matters and he was managing a substantial estate.

5.16 There is some evidence to suggest that the Charity did submit the 1936 deed of gift to the Charity Commission in 1967. The deed bears the stamp *"Received -5.04.1967 Charity Commission'*. I infer the deed was submitted to the Charity Commission at that time with a view to seeking consent to the proposed sale. I am told that despite enquiries the Charity Commission was unable to locate any correspondence surrounding the lodging of the deed with it. It is common ground that no consent can be found and it is common ground that no subsequent conveyance took place. It is also common ground that subsequent minutes of trustees' meetings do not make any further mention of the proposed transaction. From this evidence (or rather lack of it) I can only conclude that if consent was sought from the Charity Commission it did not give consent and the proposed transaction was aborted. It is only speculation on my part but it may be that before giving consent the Charity Commission required to see some independent valuation evidence and perhaps the trustees concluded it was not cost effective to obtain that evidence given the proposed consideration of only £50.

5.17 I also conclude it is right to bear in mind that when the 1936 deed of gift re-surfaced in 2014 Mr Edward's initial reaction was to claim that he and/or Mr David had acquired title to the disputed land by dint of adverse possession. When it was clarified that time does not run in favour of a trustee against a beneficiary, the claim changed to reliance on the 1967 agreement – see the paper at [264] and postscript to the minutes of the meeting held on 2 October 2014 at [238]. Sole reliance on the 1962 alleged agreement did not emerge until Mr Edward signed his statement of case on 22 August 2016 [13].

5.18 In the light of this evidence I am unable to find that an oral agreement was entered into by the Charity and Mr David in 1962 for him to acquire the land in consideration of carrying out certain fencing work. I find that for whatever reason the transaction contemplated in 1962 did not proceed. I also find that the transaction contemplated in 1967 did not proceed either. It was common ground that no conveyance was ever executed in respect of either of the proposed transactions.

Part-Performance

5.19 In case it be held elsewhere that I am in error in this finding, it is sensible that I address the question of part-performance. My attention was drawn to the 1984 5th edition of Megarry & Wade: *The Law of Real Property* and to pages 591-2.

5.20 In terms of evidence there is only that of Mr David. There is no independent or documentary evidence to corroborate what he says. For the reasons given above I am reluctant to rely solely on Mr David's oral evidence. I do not find as a fact that fencing work was carried out around or adjacent to the disputed land in the spring of 1962. Even if it was it was not necessarily and obviously carried out pursuant to the agreement alleged. Mr David was and is a prominent local landowner. He was trustee of a trust set up by his grandfather, he owned or farmed adjacent land which may well have required fencing and upkeep from time to time. I got the strong impression that if some fencing or clearing up needed to be done Mr David was the sort of person who would get on and get it done for the good of the local community of which he and his family had served for many years. I gained the impression that he would not be looking for a return or a reward for carrying out such a community service. Thus, if

fencing work was carried out in the spring of 1962 it was not unequivocally referable to the alleged agreement.

If there was a 1962 oral agreement was it void or voidable?

5.21 Before leaving this topic I ought to deal with the s29 Charities Act 1960 (CA 1960) point. If it be held that I was wrong in my findings above and that there was a binding and enforceable agreement entered into in 1962, was that agreement void? Mr West submitted it was not whereas in contrast Mr Oram submitted that it was. The answer to the rival contentions turns on whether the disputed land formed part of the' permanent endowment' of the Charity.

5.22 S29 CA 1960 was repealed in 1993 and my attention was drawn to p613 *Tudor on Charities* 6th edition (1967) and I summarise that section as follows:

"29. (1) Subject to the exceptions provided for by this section, no property forming part of the permanent endowment of a charity, shall without an order of the court or of the Commissioners, be mortgaged or charged.... nor, in the case of land in England and Wales, be sold, leased or otherwise disposed of.

(2) Subsection (1) above shall apply to any land which is held by or in trust for a charity and is or has at any time been occupied for the purposes of the charity, as it applies to land forming part of the permanent endowment of a charity; but a transaction for which the sanction of an order made under subsection (1) above is required by virtue only of this subsection shall, notwithstanding that it is entered into without any such order, be valid in favour of a person who (then or afterwards) in good faith acquires an interest in or charge on the land for money or money's worth.

(3) ...

5.23 The expression 'permanent endowment' is defined in ss45(3) and 46 CA 1960 as follows:

"(3) Subject to subsection 9 of section twenty-two of this Act, a charity shall be deemed for the purposes of this Act to have a permanent endowment unless all property held for the purposes of the charity may be expended for those purposes without distinction between capital and income, and in this Act 'permanent endowment' means, in relation to any charity, property held subject to a restriction on its being so expended."

5.24 Mr West submitted that the wide powers granted by paragraph 4(a) of the 1922 trust deed do not impose any restrictions on distributions of capital and income. Equally the 1936 deed of gift did not impose any restrictions. He submitted that the disputed land was not part of the permanent endowment of the charity and the acquisition of the disputed land by Mr David in 1962 fell within s29(2) CA 1960. He also submitted that the transaction was entered into in good faith for money or money's worth. He said that there was no element of bad practice on the part of Mr David and there was no commercially unacceptable behaviour on his part.

5.25 Mr West invited me to consider two points.

The first was that I was to assume consent was required for the 1962 disposition. He submitted that at that time the Charity was loss-making, the disputed land was overgrown and of no use to the Charity which was keen to off-load it in the same way it had sold off other loss-making properties. If the trustees had reneged no their bargain and had sought the consent of the Charity Commission, the Commission would have said that the bargain was legitimate and the disposal can go ahead.

The second was the position of the trustees. At least three were in post in 1962 and 1967 and Col Neve was chairman during that period. He submitted that in March 1967 all the trustees were aware of the land and were keen to off-load it. He asked the question – In 1967 could the trustees have asked for the land back? He said the answer was: No – they had waived any right they might have had to the recovery of the land.

Mr West submitted these were points to bear in mind when exercising discretion.

5.26 Mr Oram submitted that it was necessary to look not just at the 1922 trust deed and the 1936 deed of gift but also the Scheme approved in August 1923. Clause 5 of the trust deed always envisaged that a scheme would apply. The detail of the Scheme was known at the time of the 1936 deed of gift. Paragraph 1 of the Scheme provided that it was to apply to all endowments to be administered in accordance the Scheme and paragraph 23 of the Scheme clearly provided that no trustee shall take or hold any interest in property belonging to the Charity.

5.27 Mr Oram also submitted that paragraph 4 of the 1922 trust deed did not just grant a power of sale but also directed how the proceeds were to be deployed, and did not permit trustees to use the proceeds of sale as if they were income from trading.

5.28 Mr Oram acknowledged that there was little authority directly on point, but in his submission the disputed land was part of the permanent endowment of the charity and there are no records of any consent to the sale being sought or granted. In 1962 Mr David knew everything he needed to know; he knew the 1936 deed of gift, he knew of the Scheme and he knew that no consent had been sought. He cannot bring himself within s29(2) CA 1960.

5.29 Mr Oram submitted that what view the Charity Commission might have taken was conjecture and irrelevant. It was not for the tribunal to second guess what the Charity Commission might have decided. That is a submission I have sympathy with. I am not aware of the 'usual procedure' adopted by the Charity Commission when considering such applications for consent, but I infer that good governance would require some level of independent advice on the underlying value of an asset proposed to be disposed of.

5.30 Mr Oram also raised the question whether if the transaction was not void, was it voidable? He agreed that the disputed land was functional land and that it had been let to Mr Gwyther. The transaction was a breach of the Scheme, and there was a conflict of interest he said.

5.31 My attention was drawn to *Bayoumi v Women's Total Abstinence Educational Union Ltd* [2004] Ch 46.

In this case the Women's Total Abstinence Educational Union was a charity incorporated in 1851 as a company limited by guarantee. Its memorandum of association expressly provided that it shall not sell any property subject to the jurisdiction of the Charity Commissioners which it may from time to time hold 'without such authority, approval or consent as may be required by law. The charity was registered at Land Registry as the proprietor of a freehold property in London W2. By a contract dated 16 November 2001 the charity contracted to sell the property to a Mr Perkins for £3.2m of which £200,000 was paid by way of deposit and released to the vendor on exchange. Mr Perkins assigned the benefit of the contract to Mr Bayoumi; the consideration being £450,000 + repayment of the £200,000 deposit. The contract mentioned that restrictions on disposition of property imposed by s36 Charities Act 1993 applied but was silent as to compliance with them. In the event the charity declined to complete arguing that the contract was void for non-compliance with s36 CA 1993 requirements.

In the course of his judgment, Chadwick LJ summarised the legislative history of restrictions on the sale of a charity's property. In paragraph 22 he explains that s29 CA 1960 relaxed the previous restrictions to some extent.

In paragraph 23 he said:

"The reason why it was thought necessary to give the protection to a purchaser in good faith of functional land fir which section 29(2) of the 1960 Act provided is explained by the editors of Tudor on Charities, *7th ed (1984), p559 in a note to the subsection:*

> *'Protection is given to a purchaser who unwittingly acquires an interest in or a charge on land within this subsection. The reason for this is that in the case of sales of land coming within this subsection the purchaser has to rely virtually entirely upon what he is told as to the function of the land, particularly in the past; and the fact that it is functional land of a charity – which mere inspection of the documents will not necessarily reveal – may be concealed from him. On the other hand, in the case of a sale under subsection (1) of land which is permanent endowment, the purchaser will be able to look at the deed under which the trustees hold the land, which will indicate this (see Settled Land Act 1925, section 29(1)), and accordingly special protection for the purchaser is not needed: Hansard (Commons, Standing Committee A 28 June 1960, col 324, Solicitor General (Sir Jocelyn Simon).'*

In paragraph 25 he said:

"The scheme established by the 1992 Act and adopted in the 1993 Act which have set out earlier ... may be summarised as follows:

(1) Where land is held by or in trust for a charity – and whether or not the land forms part of the permanent endowment or is functional land – the charity trustees must, before entering into an agreement for the sale of that land, comply with the requirements of section 36(3) of the 1993 Act. In particular, the charity trustees must satisfy themselves, after consideration of a written

report from a qualified surveyor instructed by them and acting exclusively for the charity, that the proposed sale is on terms which are the best that can reasonably be obtained; section 36(3)(a) and (c)."

(8) ... But, in order to rely on the provisions of section 37(4) of the Act, the purchaser must show he is a person who 'in good faith' acquires an interest in the land'.... it is difficult to see how a person who makes no inquiry as to the matters which such a certificate should disclose could establish good faith. But there may be cases where there is no section 37(1) statement and the purchaser is unaware that the land is charity land. In such cases the purchaser in good faith will need the protection which the proviso to section 29(2) of the 1960 Act – now re-enacted as section 37(4) of the 1993 Act – was intended to provide.

I derive assistance from this authority and, of course, in the present case Mr David was perfectly well aware that the disputed land was charity land.

5.32 The expression 'permanent endowment' was considered in *London Borough of Hounslow v Hale* [1990] 24 HLR 9 (Ch) at pp 22-23. This case concerned the 'right to buy' provisions set out in the Housing Act 1985. Paragraph 1 of Schedule 5 to that Act provided that the right to buy does not arise if the landlord is a housing trust or a housing association and is a charity.

A property owner divided her substantial home in Chiswick into seven flats. She lived in flats 3 and 4 and the remaining flats were let, mainly to elderly persons. On her death, in 1976, she devised the property to the local authority – *"for the purpose of accommodating old people where they can have some of their belongings and where husband and wife shall not be separated."* The gift was a charitable gift for the purposes of the CA 1960. In 1977, the local authority was registered as proprietor at Land Registry and was informed by the Charity Commission that the testatrix's will had been registered under the CA 1960.

The first defendant lived in flat 7 and was informed by the local authority that she had become a council tenant. In 1984 that tenant purported to exercise the right to buy, the local authority gave her an offer notice and duly granted her a lease for a term of 125 years. The proceeds of sale were paid into the local authority's housing revenue account.

In 1988, the second defendant gave notice to exercise the right to buy and the claim was admitted. In 1989, the local authority became aware of the existence of the charitable will trusts, and issued proceedings seeking a determination whether the right to buy was excluded by paragraph 1 of Schedule 5, whether the lease granted to the first defendant was valid, and if not whether the land register should be rectified.

5.33 Knox J held that neither of the defendants had vested in them the right to buy. At page 22 he sets out s29 CA 1960 and the definitions and goes on to say:

"In the Charities Act that expression 'permanent endowment' in relation to any charity means 'property held subject to a restriction of its being so expended'. The property, as I shall call it, in my judgment clearly was a permanent endowment;

whatever may be said about residue, the property itself under the terms of the testatrix's will was directed to be held for the purposes of the charity and not to be disposed of. Mr Meares made a gallant attempt to suggest that the possibility of impracticability might have brought an end to that state of affairs ... that could not happen short of a scheme ... and I proceed on the basis that this house was part of the permanent endowment and therefore. prima facie, section 29(1) of the Charities Act applied.

It is accepted by Mr Meares, very properly on the authorities that a failure to obtain the consent, where it is needed under section 29(1), renders the transaction void rather than voidable."

5.34 I have given careful consideration to the rival submissions. On balance, I prefer those of Mr Oram. Whilst the 1936 deed of gift did not expressly specify a particular use for the land, it was to be applied to all or any of the objects set forth in clause 3 of the 1922 trust deed and thus to have some degree of permanence. The gift was of a specific parcel of land adjacent to a much larger parcel already in the ownership of the Charity which was expressly being used for social and recreational purposes and I infer it was gifted to enhance and expand those purposes. At the time of the gift there was a suggestion (but not a direction) that it might be used for the purposes of a bowling green. I accept this position is slightly different to that in *Hounslow v Hale* but it is along those lines. The fact that the trustees had a power of sale does not preclude the land being part of the permanent endowment. I am reinforced in this conclusion by the fact of the Scheme which was approved in 1923. There was to be some control over disposition of the Charity's property and this would have been in the mind of the donor at the time of the 1936 deed of gift.

5.35 I therefore hold that if there was a 1962 agreement, that agreement is void.

5.36 In the light of this finding I do not intend to spend too much time on the 'voidable' point, that would arise if Mr Edward could squeeze into s29(2) CA 1960. I do not consider the 'good faith' criteria is satisfied. Mr David plainly was aware that the disputed land was charity land, he must be taken to have been aware of the Scheme and paragraph 23, and if not ought to have asked the question or suggested that advice be taken. Mr David was not a layman as regards property matters and affairs.

The need for independent advice (and perhaps valuation) and an arms' length transaction must have been apparent to him. Apart from the scheme there is the general law as exemplified in *Brudenall-Bruce, Earl of Cardigan v Moore and anor* [2012] EWHC 1024 (Ch).

5.37 If there was an enforceable 1962 agreement effected in breach of paragraph 23 of the Scheme that would not divest the Charity of its equitable title and the current trustees would be entitled to follow the title of the Charity into the hands of, and assert a claim against Mr Edward unless he qualifies as a bona fide purchaser of a legal estate for value. See *Re Diplock* [1948] Ch 465 (CA) and *Re Sharman* [1954] Ch 653.

5.38 What amounts to a bona fide purchaser for value was discussed in *Lewin on Trusts* 19th edition at para. 41-118 et seq. I need not set out the detail. Mr Edward received

the property by way the 1988 deed of gift – for 'love and affection' and thus he is not a purchaser for value.

5.39 I also reject Mr West's submission that the present trustees would be estopped from claiming that the 1962 agreement should be set aside on the grounds that it is voidable.

6. Correcting a mistake

6.1 The mistake relied upon by the Charity is the 2008 first registration of the disputed land in favour of Mr Edward.

The statutory scheme

6.2 As regards voluntary registration s3(1) Land Registration Act 2002 applies to any unregistered estate which is an interest in land and by s3(2) a person may apply to the registrar to be registered as the proprietor of an unregistered legal estate to which the section applies, if the estate is vested in him, or he is entitled to require the estate to be vested in him.

6.3 The Act gives the registrar power to alter the land register only for the purpose of (so far as material to this case) correcting a mistake. The detail is set out in Schedule 4 to the Act. Material are paragraphs 5 and 6 which read as follows:

> *5*
> *The registrar may alter the register for the purpose of—*
>
> *(a) correcting a mistake,*
> *(b) bringing the register up to date,*
> *(c) giving effect to any estate, right or interest excepted from the effect of registration, or*
> *(d) removing a superfluous entry.*
>
> *6*
> *(1) This paragraph applies to the power under paragraph 5, so far as relating to rectification.*
> *(2) No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor's consent in relation to* ***land in his possession*** *unless—*
> ***(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or***
> ***(b) it would for any other reason be unjust for the alteration not to be made.***
> *(3) If on an application for alteration under paragraph 5 the registrar has power to make the alteration,* ***the application must be approved, unless there are exceptional circumstances which justify not making the alteration.***
> *(4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.*
>
> (Emphasis added)

6.4 It was not in dispute that first registration of a person as proprietor who was not then entitled to apply for first registration is a mistake within the meaning of Schedule 4 –

see *Baxter v Mannion* [2011] 1 WLR 1954 (CA). In a sense the error may have originated in 1936 when the 1936 deed of gift was prepared and executed. It may have been that the retained title deeds were not sufficiently marked to record that disposal of part. That error (or omission) may have led to the error in the 1949 conveyance which incorrectly included the disputed land and which error was replicated in the 1958 conveyance and the 1988 deed of gift. I note that the 1949 and 1958 conveyances were not arm's length commercial transactions but rather re-arrangements of Barham family assets for tax or succession planning purposes and I speculate that they may not have undergone the rigorous pre-purchase due diligence exercises that generally takes place with commercial transactions. But whatever errors or mistakes may have occurred they were not the errors or mistakes of Mr Edward and he did not cause or substantially contribute to them.

6.5 It was also not in dispute that in 2008 Mr Edward was in possession of the disputed land and that he does not consent to rectification of the mistake.

The gateways

6.6 In these circumstances Mr Oram realistically acknowledged that he need pass through the gateways to rectification, namely:

6.6.1 Fraud, lack of proper care or substantial contribution; and
6.6.2 It would be unjust for the alteration not to be made;

If those were passed through Mr West accepted that he would have to make out:

6.6.3 Exceptional circumstances which justify not making the alteration.

Lack of proper care/ substantial contribution

6.7 There is no suggestion here of fraud. As to lack of proper care Mr Oram submitted that Mr Edward must have been aware of the 1962 agreement at the time of first registration in 2008. He says because at that time Mr Edward was a trustee of the Charity, had full access to the Charity records kept in the Hole Park estate office and was in a position to know that the 1962 agreement was unenforceable. Thus, his lack of proper care lies in his failure to properly investigate the basis of his title before applying for first registration. Mr Oram also submitted that a review of the Charity's accounts in the years prior to 1962 would have revealed the payment of rent to the Charity by Mr Gwyther for his use of the disputed land.

6.8 I reject Mr Oram's submission. I have found as a fact that Mr Edward did not know of the 1962 agreement until sometime after 2014 when the 1936 deed of gift re-surfaced and was drawn to his attention. That led to a detailed review of the Charity's records and papers from which the possible transactions in 1962 and/or 1967 emerged. Mr Edward was appointed a trustee of a long-established trust formed, in large part by his great-grandfather. At the time of appointment his father, Mr David, was chairman and no doubt managed the affairs of the trust with style and dignity and briefed Mr Edward on what he needed to know. In those circumstances, I do not find it was incumbent (or a lack of care) on the part of Mr Edward not to have undertaken a detailed review of the papers, records and accounts of the Charity going back decades. I am far from convinced that a review of the accounts and the fact of receipt of a modest rent from Mr Gwyther would have given a clear indication that the Charity

owned the disputed land. The fact that such records were kept at the Hope Park Estate office and might have been accessible to Mr Edward, if he had chosen to search them out, does not, in my judgment, impose a duty or obligation on him to do so.

6.9 I find that it such a circumstance it was sufficient for a new in-coming trustee to acquaint him or herself with the current business and affairs of the Charity. Such an overview might well be obtained by reading the minutes of relatively recent meetings of the trustees. Further, by reason of his family connections and his estate management role Mr Edward may have been broadly aware of the business and functions of the Charity prior to his appointment.

6.10 I have also found as a fact – see para 3.15 above, that it was not unreasonable for Mr Edward to have left the application for first registration and the assembly of the relevant title deeds to support it to the solicitors, Buss Murton, which firm had acted for the Barham family for generations with regards to the Hole Park Estate. In these circumstances, I find that it was not a lack of proper care on the part of Mr Edward not to have supervised more closely the application for first registration and supporting title deeds.

Unjust and Exceptional Circumstances

6.11 To some extent it is helpful to consider these two gateways together because there is some overlap.

6.12 As regards it being unjust for the alteration not to be made, Mr Oram submitted at the time of registration Mr Edward was a trustee and thus owed a fiduciary duty to the Charity. He had no legal entitlement to have the land registered in his name and if, before registration the trustees had learned of the 1936 deed of gift and sought the return of the land to the Charity Mr Edward would have had no defence to the claim.

6.13 Mr Oram emphasised that one of the core fiduciary obligation of a trustee is not, without the fully informed consent of the beneficiaries, to make a profit out of the trust. Mr Edward had no title to the disputed land and profit or benefit he obtained was the very land which belonged to the Charity and which had been gifted by his great-grandfather. In those circumstances the effect of registration was to convert Mr Edward into a constructive trustee of the disputed land. In support of this submission, Mr Oram relied upon *Williams v Central Bank of Nigeria* [2014] AC 1189 CA and *Lewin on Trusts* Second Supplement to the 19th edition at para. 7-019. Mr Oram argued that the present case was stronger because at the time of registration the Charity was the legal owner of the disputed land and Mr Edward had no independent right to be registered. In these circumstances, Mr Oram submitted that rectification should not be refused where the effect of doing so is to confer on Mr Edward a significant gratuitous benefit which, as a trustee, he would be receiving in breach of trust. He said it be unjust that the Act to be applied in such a way as sanction a breach of what the law says about a fiduciary obligation. Further, that it is unconscionable that Mr Edward should assert his beneficial interest against the Charity of which he is a trustee when he has no independent title to the land.

6.14 Mr Oram submitted that there are now competing proposed uses for the disputed land. On the one hand Mr Edward has secured a planning permission the implementation of which requires him to relocate two football pitches on his land and provide access to

them. He proposes to use the disputed land as part of the access to the re-located pitches. In contrast the Charity wishes to build a new multi-purpose sports pavilion that would serve various sports facilities (tennis, football and cricket among others) on the Cricket Ground and the relocated football pitches. The Charity considers such use of the disputed land would enhance the existing facilities and it has been advised that if land is community owned it would be easier to obtain grant funding from funding bodies such as Sports England, the Football Association, the Lawn Tennis Association, the England and Wales Cricket Board and the Lottery Fund and more easy to obtain planning consent from the local planning authority. The evidence of Mr Hindley on these points was not challenged and contrasted with the evidence of Mr Edward in paragraph 12 of his note of 19 June 2015 [246] in which he said:

"12. If it should be proved that the plot should be returned to the Trust (again a situation I do not currently accept), then it should be borne in mind that I have no need of it in order to provide the football pitches. They can be located marginally to the north with the access road diverted around the plot at fairly small cost to myself."

In his witness statement dated 30 December 2016 Mr Edward restated that the new pitches are an enabling development but he does not resile from what he said in the above note.

Mr Oram submitted that the disputed land was insignificant to Mr Edward and in terms of planning he can do everything he wants even of the Charity gets the disputed land back. In contrast, there is a real adverse effect on the Charity if it does not get the land back.

6.15 In his rival submissions Mr West urged that the mistake should not be rectified. Mr Edward was unaware of the of the 1936 deed of gift; he did not solicit the 1988 deed of gift and that deed purported to convey the land to him, albeit that legally it did not do so.

6.16 Mr West cited several authorities on the 'lack of care' issue, but as I have found in favour of Mr Edward on the point I do not propose to rehearse them.

6.17 As regards the 'unjust' point Mr West submitted that since 1962 Mr Edward and his predecessors in title have been in occupation and possession of the disputed land and have invested time, effort and money in its management and has used it as part of Windmill Farm. He cited *Walker v Burton* [2014] EWCA Civ 1228 and [2014] 1 P.& C.R. 9 in support and in that case, one of the factors for it being held unjust to alter the register was that the registered proprietor had invested time, money and effort in improving the subject land and that those efforts had discouraged certain harmful practices. In the present case, at I am not sure that there was much evidence before me as to the time, effort and money invested in the disputed land, but I do accept that it has, from time to time, been farmed as part of Windmill Farm. I am not sure that it still is. Mr West argued that far from being unjust not to alter the register, it would be unjust to do so. He submitted that twice the trustees sought to off-load the disputed land, in 1962 and 1967 and even if the legal formalities were not then fully complied with, the fact is they divested themselves of the possession of the disputed land and responsibility for its upkeep and it would now be unjust for the current trustees to get

the land back just because it now suits them to have it. Mr West urged that the current trustees should not be in a better position than their predecessors.

6.18 Mr West also argued that to alter the register in the present case would, in effect, drive a coach and horses through the effect of Schedule 4, would nullify it and give rise to substantial claims to indemnity under Schedule 8. Mr Oram countered that arguing that Schedule 4 amounted to a qualified defeasibility with a high threshold. Here it would be plain unjust not order rectification.

6.19 In *Walker v Burton* Mummery LJ discussed the question of 'injustice' in paragraph 100. In that case, the party applying for rectification did not have, or even claim to have, title to the subject land. The case concerned other, perhaps more emotive neighbour issues. Also, one of the factors was that there was evidence the registered proprietor invested time, effort and money in the subject land and had entered into commitments which the registered proprietor and others had relied upon. Mummery LJ said that:

"Whether or not there would be an injustice is an assessment to be made by the fact-finding tribunal in the light of all the relevant data. An appellate court should not interfere with that assessment, unless there has been a self-misdirection of law, or an error of principle, or the assessment is one which no reasonable Adjudicator, properly directing himself, would have made."

6.20 My attention was also drawn to *MacLeod v Gold Harp Properties Ltd* [2014] EWCA Civ 1084. Underhill LJ summarised the general scheme of the Act so far as material and in paragraph 23 explained that Schedule 4 provides only for qualified indefeasibility. The register may be altered to correct a mistake even where that will prejudicially affect the title of a registered proprietor. The court (or the registrar) has a discretion whether to make such an alteration. The guidance as to the exercise of that discretion given in paragraph 3 (which is in the same terms as paragraph 5) makes it clear that a proprietor in possession is protected to a much greater extent than a proprietor who is not. He went on to explain that either way there will be a loser but he or she will be entitled to compensation under Schedule 8.

6.21 In paragraphs 66 – 84 Underhill LJ summarised several cases decided by the courts and the Adjudicator to HM Land Registry and then in paragraphs 86-90 he reviewed some text books, but the main focus was on the implications of priority. In paragraph 102 the judge discussed the question of financial loss. The trial judge held that was not an exceptional circumstance in the case before him where, evidently there was little evidence that the planning question had been tested. On appeal Underhill LJ held that the trial judge was entitled to come to that conclusion. He went on to explain that:

"Judgments of this kind are matters for the trial judge which only in a clear case can be said on an appeal to be wrong."

6.22 The above authorities are of some assistance to me but they do spell out guidance as to the approach to exercise of discretion on the points on the 'unjust' point. 'Exceptional circumstances' were considered by Morgan J in *Paton v Tod* [2012] EWHC 1248 (Ch) at para. 67:

"'Exceptional' is an ordinary, familiar English adjective. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered: See R v Kelly [2000] 1 QB 198 at 208 C-D (*a decision from a different context but nonetheless helpful as to the ordinary meaning of 'exceptional circumstances'). Further, the search is not for exceptional circumstances in the abstract but those which have a bearing on the ultimate question whether such circumstances justify not rectifying the register."*

6.23 Each case is fact sensitive.

The registration was a mistake. Mr Edward was recorded as being the proprietor of a parcel of land to which he did not have title.

It was conceded Mr Edward was in possession of the land. Paragraph 6(2) directs that in those circumstances the register should not be altered unless it would be unjust not to do so.
The burden is on the Charity to show that it would be unjust for the alteration not to be made.

6.24 On the question of 'unjust' I prefer the submissions made by Mr Oram for the reasons he gives and which I have summarised above. The disputed land was trust property given to the Charity to enhance and extend the social and leisure facilities in the village. It lay immediately adjacent to what is called 'the Cricket Ground' and is of particular utility to that site. I find it was given with the express purpose of enabling those facilities to be extended, if it was considered by the trustees appropriate to do so. That is quite different to donating a sum of money to be applied to the purposes of the Charity.

The Charity did not divest itself of the disputed land. It remained the owner of unregistered land until Mr Edward sought to effect first registration of Windmill Farm. Due to an error in the proper keeping of his title deeds, which probably occurred decades ago Mr Edward became the registered proprietor of the disputed land, by dint of the Land Registration Act. It seems to me that is an unjust outcome which is emphasised by the fact Mr Edward is and was a trustee of the Charity.

6.25 Given Mr Edward's role as a trustee (with the fiduciary duty that entails) and as great-grandson of the donor I do find that it would be unjust to deprive the Charity of the land. The fact that in 1962 and/or 1967 the Charity may have contemplated disposing of the disputed land does not affect that position and, as it happens, no legally enforceable disposition was effected.

6.26 If the disputed land is handed back to the Charity it will not have any material impact on Mr Edward's proposed use of his land and, as he said, he could re-jig his planning consent *"at fairly small cost to myself."* In contrast the Charity would not be able to acquire other land at a similar small cost to achieve its expansion plans. If it comes down to indemnity it seems to me apt that the additional small costs which Mr Edward might incur are, on the balance of convenience, a more appropriate way to redress the problem.

6.28 I am reinforced in this conclusion by the fact the consequence of Mr Edward mistakenly becoming the registered proprietor of the disputed land is that he becomes the owner of it and in a sense, there is a deemed or statutory transfer of the land from the Charity to him. Such a transfer falls foul of paragraph 23 of the Scheme and should, in my judgment, be regarded as void.

6.29 For all of these reasons I hold that it would be unjust for the alteration not to be made.

6.30 Having arrived at that conclusion and that the registrar has power to make the alteration I then have to consider whether there are exceptional circumstances which justify not doing so. I find that there are none. I have rejected the submissions made by Mr West on this point. In the outcome, Mr Edward is in the same position as he was before the registration of Windmill Farm. I do not see how his position has been adversely affected.

7. Order

7.1 For the reasons set out above I propose to make an order that the Chief Land Registrar gives effect to the applicants' application dated 30 July 2015 to alter the register as if the respondent's objections had not been made.

8. Costs

8.1 In this jurisdiction, as with the civil courts, costs follow the event save in exceptional circumstances. I am therefore minded to make a costs order in favour of the Charity. I will, however, give careful consideration to any applications for costs that may be made.

8.2 If the parties are unable to reach agreement on costs, any applications for costs shall be made in accordance with the following directions:

8.2.1 Any application for costs shall be made in writing by **5pm Friday 30 June 2017**. The application shall be accompanied by a schedule of the costs and expenses incurred/claimed supported by invoices/fee-notes where appropriate. A breakdown shall be given of the work carried by solicitors and the charge-out rate and grade of the fee-earner(s). A copy of the application and supporting schedule shall be sent to the opposite party at the same time as it sent to the tribunal.

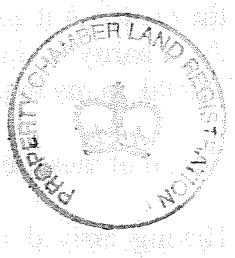
8.2.2 The recipient of an application for costs shall by **5pm Friday 21 July 2017** file with the tribunal and serve on the applicant for costs representations on the application and on the amount of the costs claimed and any points of objection they wish to take.

8.2.3 The applicant for costs shall by **5pm Friday 28 July 2017** file with the tribunal and serve on the opposite party representations in reply, if so advised.

8.3 In the absence of any objections I propose to make a determination on any application for costs, and if appropriate, to assess any costs ordered to be paid, without a hearing and on the basis of the written representations filed and served pursuant to the directions set out in paragraph 8.2 above.

Dated this 26 day of May 2017

John Hewitt



By Order of the Tribunal