Neutral Citation Number: [2025] UKUT 144 (LC)

Case No: LC-2024-553

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
Ref: 2022/0396

Royal Courts of Justice, Strand,
London, WC2A 2LL
16 May 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – ALTERATION AND RECTIFICATION – rectification - whether the applicant to HM Land Registry had shown that there was a mistake on the register – burden and standard of proof of mistake – consequences of the FTT's finding that the appellant was in possession of part of the disputed land

BETWEEN:

MR KAYALAIPILAI SUHITHARAN

Appellant

and-

MR HENRYK JAN IWASKIEWICZ

Respondent

2 and 4 Beancroft Road,
Marston Moretaine,
Bedford, MK43 OPY

Upper Tribunal Judge Elizabeth Cooke
Date of hearing: 6 May 2025

Mr Harrison Denner for the appellant, instructed by Wayne Leighton Solicitors
Mr Matthew Feldman for the respondent, instructed by Neves Solicitors

The following cases were referred to in this decision:

Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563

Introduction

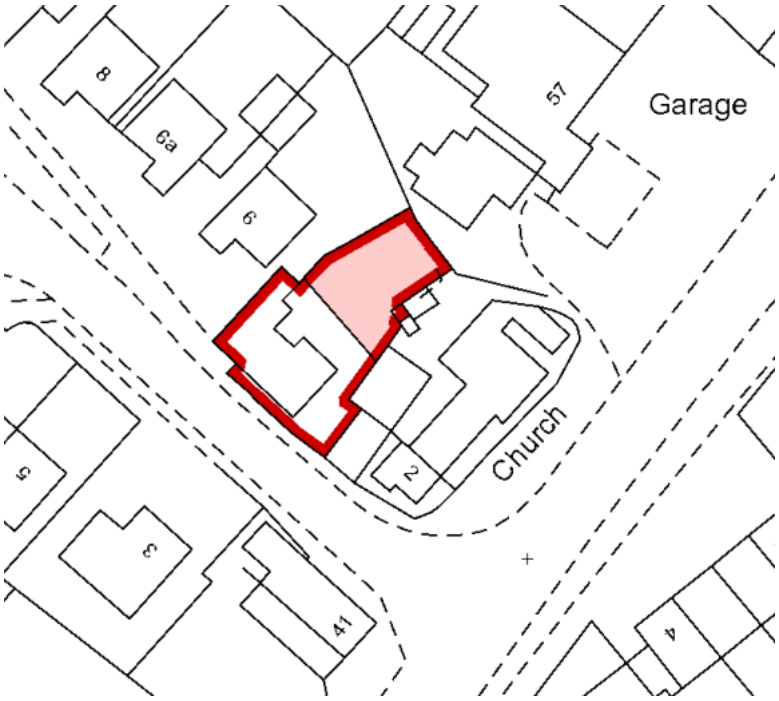
1. Title to registered land in England and Wales depends upon the register, not upon deeds. Nevertheless the register can be altered if it contains a mistake, and sometimes pre-registration deeds can be evidence of a mistake on the register. This appeal is about what amounts to proof of such a mistake.

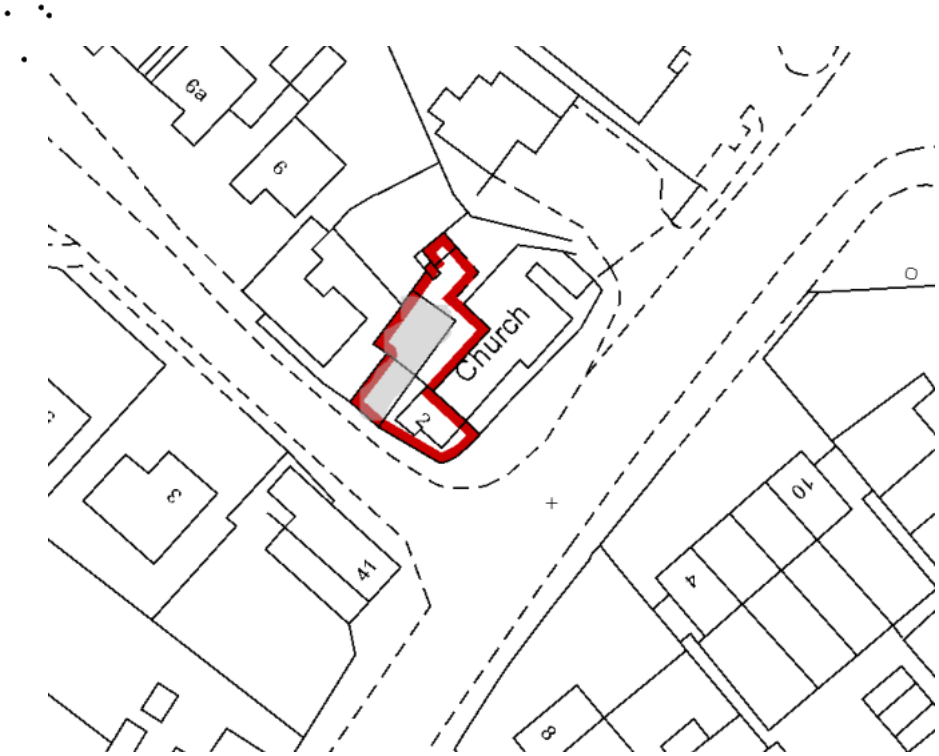
2. The appeal arises from an application made to HM Land Registry by the respondent, Mr Iwaskiewicz, to alter the register of title to his property, 4 Beancroft Road, Bedford, and to the property of the appellant Mr Suhitharan, number 2 Beancroft Road, by removing a garage and driveway ("the disputed land") from the title to number 2 and including the disputed land in the title to number 4. The appellant objected and the matter was referred to the First-tier Tribunal pursuant to section 73 of the Land Registration Act 2002. The FTT found that there was a mistake on the register and directed the registrar to give effect to the application.

3. Mr Suhitharan appeals with the permission of this Tribunal. He was represented in the appeal by Mr Harrison Denner, and the respondent by Mr Mattthew Feldman, both of counsel; I am grateful to them both.

The factual background

4. The two plans below show, first, the title plan to number 4 as it stood before the registrar gave effect to the respondent's application (the shading represents an area added to the title in 1996) and, second, the title plan to number 2 with the disputed land shaded, again before the alteration. The disputed land comprises a garage with an "up and over" door, and a drive in front of it on which a car can be parked. The garage has a side door into the garden of number 4.





5. Mr Iwaskiewicz bought number 4 in 2000. His evidence was that when he bought the property he believed that the disputed land was part of it; the estate agent's brochure, which is in the appeal bundle, stated that number 4 included a "driveway for 1 car with detached garage leading to up and over door". Mr Iwaskiewicz said that he parked on the drive and made use of the garage for storage without objection until 2019, when Mr Suhitharan bought number 2. Mr Suhitharan objected to Mr Iwaskiewicz parking on the drive, and in May 2019 put up a retractable bollard to prevent him from doing so. In June 2019 Mr Iwaskiewicz made his application to HM Land Registry.

6. Mr Iwaskiewicz did not produce the deed transferring title to him. Nor did he produce his solicitors' conveyancing file from 2000. His argument before the FTT was that pre-registration deeds from the 1940s and before show that the disputed land was part of the title to number 4 and that therefore there must have been a mistake on first registration when the disputed land was omitted from his title. He offered no information as to when first registration took place.

The provisions of Schedule 6 to the Land Registration Act 2002

7. Schedule 6 to the Land Registration Act 2002 makes provision for the alteration of the register. Paragraph 1 defines "rectification":

> "In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—
>
> (a) involves the correction of a mistake, and
>
> (b) prejudicially affects the title of a registered proprietor."

8. Paragraph 5 says:

"The registrar may alter the register for the purpose of—
(a) correcting a mistake …"

9. Paragraph 6 provides:

"(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."

10. It is not in dispute that the alteration that Mr Iwasciewicz sought was a rectification, because taking land out of the title to number 2 and adding it to number 4 would prejudicially affect the title of the registered proprietor to number 2, Mr Suhitharan. Accordingly, for Mr Iwaskiewicz to succeed in the FTT he had first to show, on the balance of probabilities, that the inclusion of the disputed land in the title to number 2 and its exclusion from number 4 was a mistake on the register. If he succeeded in proving that, the FTT then had to address the provisions of paragraph 6.

The evidence in the FTT, and the FTT's decision

11. Mr Iwaskiewicz's argument in the FTT was that a mistake must have been made on first registration of his title. At the hearing in the FTT Mr Feldman in his skeleton argument sought also to argue that Mr Iwaskiewicz had been in adverse possession of the disputed land. However, he conceded that he could not pursue the adverse possession argument since it had not been the basis of the application to HM Land Registry. So only mistake was in issue. Mr Iwaskiewicz produced the following documents of title to number 4:

a. A conveyance of number 4 dated 1 July 1903. It does not contain a plan; the property is described as being "eight poles more or less" in area, and having a frontage to the road of "sixty six feet or thereabouts." He also produced the advertisement for the auction that preceded that conveyance which referred to the property as including a dwelling house together with builder's workshops, office and outbuildings.

b. A conveyance dated 18 August 1944; again it has no plan but refers to a frontage of 66 feet.

c. A conveyance dated 27 July 1946, again with no plan and reference to a frontage of 66 feet.

12. Mr Iwaskiewicz gave evidence that the frontage of his property together with the disputed land measures 65 feet, and the FTT accepted that.

13. No document of title to number 4 more recent than 1946 was produced. No information was offered as to when first registration took place; nor was the FTT told when registration became compulsory for properties in Bedford. It is apparent from the register of title that land at the rear of the property was acquired by the owner of number 4 in 1996 by transfer not by conveyance, and therefore it can be inferred that title to the land at the rear was registered by that date; but it is not known whether the rest of number 4 was registered by then. It was not suggested by Mr Iwaskiewicz that he was the first registered proprietor.

14. Mr Iwaskiewicz also produced documents relating to number 2. A conveyance in 1929 contains a plan "for the purposes of identification" which shows the property having a zig-zag shape, consistent with the disputed land not being included. By a deed dated 13 January 1971 the trustees of the neighbouring Methodist church granted a right of way, and an easement to connect to drains, to the owner of number 2; the plan to that deed again appears to show a shape consistent with the disputed land not being part of number 2. There is reference on the register of title to number 2 to a conveyance dated 9 April 1973, but that conveyance was not produced to the FTT. A print-out of a Zoopla "property history" for number 2 in 2011 did not mention that it had a garage.

15. Mr Iwaskiewicz offered no information as to when title to number 2 was registered; nor did Mr Suhitharan.

16. The FTT found as a fact that Mr Iwaskiewicz used the garage for storage and parked on the drive throughout his ownership until Mr Suhitharan prevented him. The FTT made no finding as to whether that use was opposed at any time before 2019.

17. Mr Suhitharan has never lived at number 2 although he has stayed there on occasion; it has been tenanted throughout most of his ownership. His case in the FTT was simply that he bought number 2 in 2019 and that the title to the property included the disputed land. When he found Mr Iwaskiewicz parking on the drive in 2019 he took steps to prevent that, first in correspondence and then by installing a retractable bollard in May 2019. He referred in his witness statement to having inspected the garage; in its decision the FTT found that he had not been into the garage before the site visit conducted by the FTT, and had not been aware of the side door in Mr Iwaskiewicz's garden.

18. Mr Suhitharan pointed out that the 1973 conveyance, referred to on his register of title, had not been produced, and that it might be that the disputed land became part of number 2's title by purchase from number 4 at that date.

19. Mr Suhitharan's predecessor in title, Ms Ruffhead, made a witness statement in which she said that she bought number 2 in 2007. She regarded the drive and garage as hers but said that Mr Iwaskiewicz protested when she parked there, and that eventually she stopped doing so in order to avoid conflict with him. She said the garage was full of items left behind by her predecessor (who used to rent out the property), but that she did not go into the garage to clear it for fear of reprisal by Mr Iwaskiewicz. Ms Ruffhead attended the

hearing, but did not give evidence and was not cross-examined, because – according to the FTT's decision – her evidence was regarded as relevant to the adverse possession argument, which was not pursued. The FTT therefore made no finding on her evidence.

20. On the basis of the documents of title, and of its finding of fact that Mr Iwaskiewicz made use of the garage for storage and the drive for parking throughout his ownership of number 4, the judge in the FTT accepted that the at the time of the 1903, 1944 and 1946 conveyances number 4 had included the disputed land and that the plans to the 1929 conveyance and to the 1971 deed of easement did not show the disputed land within number 2's title. He noted the estate agent's particulars in 2000 which he said indicated that the vendor and the estate agent believed that the disputed land belonged to number 4, and a Zoopla property history in 2011 which did not mention the garage or drive in the context of number 2. He noted that number 4 in 2000 had no other off-road parking, although Mr Iwaskiewicz has since created an additional space by removing a wall and a tree from the space between the disputed land and the house. He found that Mr Iwaskiewicz had used the disputed land since his purchase and has access to the garage through a door into his garden. He said "I am, just, persuaded that on the balance of probabilities the Disputed Land was included in number 2's title by mistake".

21. The judge said that it was not possible to say when or how the mistake was made, "but these are not questions I have to answer". He added that he had considered whether at some unknown point the owner of number 2 bought the disputed land from the owner of number 4 "but there is nothing that remotely suggests such a transaction took place and the Applicant's evidence from 2000 is to the contrary."

22. The judge then turned to paragraph 6 of Schedule 4 to the 2002 Act, and considered whether Mr Suhitharan was in possession of the disputed land. He found that he was in possession of the drive but not of the garage; and there is no appeal, from either party, against either of those findings of fact. He therefore concluded that the provisions of paragraph 6(2) were not relevant, that there was power to order alteration of the register, and that pursuant to paragraph 6(3) he must do so unless exceptional circumstances justified not making the alteration. He found that there were no exceptional circumstances and directed the registrar to give effect to Mr Iwaskiewicz's application as if Mr Suhitharan's objection had not been made.

23. However, he went on to consider paragraph 6(2) in relation to the driveway only, in case he was wrong in finding that he did not have to apply paragraph 6(2) in relation only to that part of the disputed land. He found that Mr Iwaskiewicz had not shown that it would be unjust not to alter the register, because when he bought number 4 in 2000 he and his conveyancer had the opportunity to ensure that what he bought included all the land that was advertised and that he expected; moreover, he now had another parking space next to the disputed land, and so he would not be left without a parking space if his application failed in relation to the drive.

The appeal: ground 1

24. The first ground of appeal is that the FTT was wrong to find that there was a mistake on the register, for a number of reasons:

a. The judge in the FTT had ignored the need to find two mistakes: both the omission of the disputed land from the title to number 4 and its inclusion in the title to number 2.

b. The judge failed to establish the nature (including the timing and the manner) of the mistakes.

c. In dismissing the possibility that there had been a sale of the disputed land between 1971 and 2000 the judge effectively reversed the burden of proof.

d. For there to have been two mistakes was inherently improbable and therefore there was a need for "cogent evidence" before that could be found to have happened, relying on the House of Lords' decision in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

e. The judge should have drawn an inference adverse to Mr Iwaskiewicz because of his failure to carry out proper disclosure: his evidence of title was incomplete, and the 1903 and 1946 conveyances were only unearthed by Mr Iwaskiewicz during the FTT hearing.

25. Pausing there, I can begin by dismissing points d and e above, neither of which were pursued by Mr Denner at the hearing of the appeal. There is no enhanced standard of proof or any special need for "cogent" evidence where two mistakes rather than one are alleged. The decision in *Re H* has no relevance to proof of title to land. As to disclosure, it is not said what inference should have been drawn. In my judgment the late disclosure of the 1903 and 1946 deeds is irrelevant to this appeal. Whether he has adduced sufficient evidence to prove that one or more mistakes were committed is another matter.

26. Points a and b above are the crux of this ground: Mr Suhitharan says that in order to succeed Mr Iwaskiewicz had to show that not one but two mistakes had been made, and he had to show what those mistakes were.

27. The judge in the FTT in refusing permission to appeal said: "It is unsurprising, on the facts of this matter, that if the Disputed Land was mistakenly omitted from [Mr Iwaskiewicz's] title, it is to be found mistakenly within [Mr Suhitharan's] title."

28. I do not understand that. Certainly there are instances where a mistake on the register affects two titles, for example on a sale of part where too much or too little land is included in the sale. But this is not such a case because number 4 and number 2 are separate titles. As the judge said, there is no evidence going back to a time when they were in common ownership, if ever they were. They were two separate unregistered titles, and (barring implausible coincidence) they must have come to first registration on different dates. If number 4 was registered first without the disputed land as a result of a conveyancer's error, there is no reason why on a later first registration of number 2 another conveyancer would make the converse error and include the disputed land as part of number 2. Such a mistake could have been made but it would be an odd coincidence; and the inclusion of land to which the owner of number 2 had no title would be unlikely to be overlooked by a purchaser or by the registrar. Likewise, if number 2 was registered

first, its registration with the disputed land included by mistake (even if that got past the purchaser's scrutiny) would not cause a different, later conveyancer to get the plan for number 4 wrong by omitting the disputed land.

29. In other words, the omission and inclusion are not two sides of the same coin as they would be on a sale of part; neither mistake makes the other one "unsurprising" so that they can be regarded as the same mistake. Mr Iwaskiewicz had to prove not that there was one mistake on the register but that there were two separate mistakes.

30. Mr Iwaskiewicz had to prove that on the balance of probabilities, i.e. he had to show that it was more likely than not to have happened. And in a situation where there are other possible explanations for the omission of the disputed land from number 4 and its inclusion in number 2, some information about the two suggested mistakes on the register is required to show that that is the most probable of the possible explanations.

31. One such possible explanation is that the disputed land was sold to number 2. That could have happened in 1973 or at any time before Mr Iwaskiewicz bought in 2000, either at the same time as a transfer of whole or as a separate transaction. The judge said there was "nothing that remotely suggests such a transaction took place"; but it was not for Mr Suhitharan to prove that it had (as he said in his grounds of appeal - point c at paragraph 24 above). Rather, it was for Mr Iwaskiewicz to show that the mistake (which as I have said was actually two independent mistakes) was more likely to have happened than a sale.

32. Another possible explanation is that number 4 was indeed registered first, that the disputed land was omitted by mistake, and that later the disputed land was acquired by the owner of number 2 by adverse possession and then incorporated in the registered title of the whole. There is plenty of time for that to have happened between 1946 and 2000, and there is no reason why there would be any trace of it on the register as it stands today (there is no information as to what the register looked like in 2000).

33. In either case, the estate agent in 2000 could have included the garage in the text of the advertisement in error (I note that the photograph on the advertisement was correct in that it did not include the garage; only the text was wrong). Whether the vendor was aware of that error is not known; Mr Iwaskiewicz did not say that he had been told by his vendor that the disputed land was part of the property. Why is it more likely that two conveyancers made independent and complementary errors (a matching omission and inclusion) than that an estate agent made a mistake in 2000? Why was it more likely that two such errors were made than that the two neighbours at some stage before 2000 agreed a sale of the garage?

34. I have considered carefully whether Mr Iwaskiewicz's use of the garage and drive since 2000 is itself evidence of a mistake on the register. But Mr Iwaskiewicz explained his belief that he owned the disputed land by reference only to the estate agent's particulars. He did not suggest that a previous owner had told him that the disputed land was within the title, nor that he had legal advice to that effect. His belief and his activity add nothing to the information available about the title because they are explained by the estate agent's particulars. Moreover, the judge made no finding that either Ms Ruffhead or her

predecessor in title acquiesced in or failed to protest about Mr Iwaskiewicz's use; he made a finding of fact only about what Mr Iwaskiewicz did, not about what his neighbour thought about it.

35. Accordingly the judge's finding that there was a mistake, without any finding as to what happened and when, mean that his conclusion was unexplained. Moreover, and for the same reasons, on the evidence before him there was no basis on which the judge could have found that these two mistakes happened on the balance of probabilities.

36. Accordingly the first ground of appeal succeeds.

37. That means that ground 2 does not arise, but since it was argued (and in case I am wrong about ground 1) I go on to make a finding about it in any event.

Ground 2

38. Paragraph 6(2) of Schedule 4 to the Land Registration Act 2002 provides a potent protection for the registered proprietor in possession of land. Unless he has caused or substantially contributed to the mistake by fraud or lack of proper care, or it would be for any other reason unjust for the alteration not to be made, the title cannot be rectified without his consent.

39. The judge found that, because Mr Suhitharan was in possession only of the drive and not of the garage, he was not in possession of the disputed land and paragraph 6(2) need not be considered. Mr Suhitharan's second ground of appeal is that it should have been considered in relation to the drive even though it was not relevant to the garage. There is no suggestion that Mr Suhitharan caused or contributed to the mistake by fraud or lack of proper care, and the judge found (on his "in case I am wrong" basis, see paragraph 23 above) that it would not be unjust for the alteration not to be made. Mr Suhitharan argues that he should therefore remain the registered proprietor of the garage.

40. Much of Mr Feldman's argument was addressed to the idea that it cannot be right that possession of part of disputed land, of whatever size, brings paragraph 6(2) into play as regards the whole of the disputed land. But that was not what was argued for Mr Suhitharan. His point was that paragraph 6(2) was relevant to the drive by itself since he was in possession of the drive alone. The judge did not explain his "all or nothing" approach and I cannot understand why Mr Suhitharan's argument might be wrong. Mr Feldman's answer was that it was unrealistic to separate the two parcels; the disputed land was one whole, and without the drive there was no access to the garage. The short answer to that is that on these facts the argument does not work, because there is no access to the garage through the front door and Mr Iwaskiewicz has never attempted to drive a car into the garage. He has used the garage for storage, and dealing with the two parts separately would enable him to continue to do so. There is no principle that a person who is not in possession of a garage cannot be in possession, for the purposes of paragraph 6(2), of the drive or of any other space in front of it.

41. Accordingly, if I had not set aside the FTT's finding that there was a mistake on the register, I would have found that paragraph 6(2) of Schedule 4 to the 2002 Act applied to

the drive, although not to the garage. That being the case the drive could not be removed from Mr Suhitharan's title unless it would be unjust not to alter the register.

42. Mr Feldman sought to argue that it would be unjust in that event not to alter the register, and pointed to the timing of Mr Suhitharan's taking of possession of the drive – just before the application was made to HM Land Registry. He saw it as a cynical taking of possession in order to take advantage of section 6(2). Reading Mr Suhitharan's witness statement, which the judge appears to have accepted in this respect, it appears that after his purchase of the property he protested at Mr Iwaskiewicz's parking on the drive, and when his emails had no effect he put up a bollard. He had not at that stage taken legal advice and the first he knew about his neighbour's application to HM Land Registry was the notification from the FTT in December 2019. If that was correct – and the judge made no contrary finding – then the allegation of a cynical taking of possession cannot be right. The bollard was installed to prevent Mr Iwaskiewcz from parking and to enable Mr Suhitharan to park, so as to retain possession of land to which he had recently acquired a registered title. There is nothing there to take Mr Suhitharan out of the protection of paragraph 6(2). Accordingly, without going into the question whether it would be right for Mr Feldman to make that argument without any formal cross-appeal, the argument would have no prospect of success.

43. Therefore, if I had not found for the appellant on ground 1 the judge's finding that it would not be unjust not to alter the register so as to remove the drive from number 2's title would take effect, and the alteration of the register would be partially reversed so that Mr Suhitharan kept the drive.

Conclusion

44. Ground 2 has no practical effect in light of the success of ground 1. The FTT's decision is set aside, and I shall direct the registrar to reverse the alteration made in response to the FTT's order and to reject Mr Iwaskiewicz's application to alter the register.

45. It is important to note that I have not found that that there was no mistake on the register; only that Mr Iwaskiewicz has not proved in these proceedings that the disputed land was omitted from his title by mistake and included within Mr Suhitharan's title by mistake. He failed to prove that because he did not have enough information about the titles to the two properties. He did not look at historic copies of the register of title, which are available for inspection. He did not find out when first registration of the two properties took place. He did not even find out when registration became compulsory for Bedford. It is most unlikely that the information he provided was the limit of what could possibly be found. Proper research into the two titles might well have either provided an explanation for the state of the two titles in the form of a sale or adverse possession, or have enabled him to demonstrate that two mistakes actually happened. As it is, all that he proved was that the state of the register in 2019, and presumably when he bought in 2000, was inconsistent with the state of his title in 1946. That was nearly eighty years ago and much may have happened to change the title legitimately since then. To put the matter more generally: title to registered land depends upon registration and not on deeds, and the fact that the registered title is inconsistent with pre-registration deeds some decades old is not by itself evidence that there is a mistake on the register.

Upper Tribunal Judge Elizabeth Cooke
16 May 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.