

Neutral Citation Number: [2013] EWCA Civ 1228

Case No: A3/2012/1033

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JEREMY COUSINS QC sitting as a Deputy Judge of the Chancery Division
CH2011/0158**

Royal Courts of Justice
Strand, London, WC2A 2LL

14th October 2013

B e f o r e :

**LORD JUSTICE MUMMERY
LORD JUSTICE JACKSON
and
LORD JUSTICE McCOMBE**

Between:

**ERIC WALKER
CAROLE SCOTT**

Appellants

- and -

**PETER BURTON
SUSAN BAMFORD**

Respondents

**MR PAUL STAFFORD and MISS NAOMI WINSTON (instructed by The Law
Partnership Solicitors LLP) for the Appellants
MR JEFFREY LITTMAN (instructed under the Bar's Public Access Scheme)
for the Respondents**

Lord Justice Mummery:

Introductory

The setting

1. Even in the Chancery Division it is rare for the chronology of a case to date back to the mid-13th century. This is one of those rare cases. It is about the impact of recent changes to the modern system of land registration on surviving legal fragments of the social, economic and administrative institution of manorialism. The Lordship of the Manor was for centuries the basic unit in the legal structure of feudal relations and land tenure in England. Now, a Lordship can no longer be registered as “land.” Although classified as an incorporeal hereditament, it remains relevant to what can be registered as land: for instance, in determining what land is registrable as waste of the manor.
2. In 1254 a charter of Henry III granted lands in parts of Lancashire to the Knights Hospitaller of St John of Jerusalem. The case chronology tracks the history of that religious order to its dissolution in 1540 and the confiscation of lands by the Crown. That is followed by the restoration of the Order under Philip and Mary and further changes of fortune in the later Tudor period. Then there is a long history of Lancashire families, notably the Tathams and then the Martons, acquiring, settling and transmitting Lancashire landholdings from the 17th century almost down to the present day.
3. After four pages of dates and events we reach the present century and the outbreak of litigation about manorial rights in the tiny village of Ireby (population 60). It is situated at or near the highest point in Lancashire and close to the county boundary with West Yorkshire. In the history of the Lordship of the Manor of Ireby there are glimpses of the vast and varied landscape of real property law starting with s.1 of Quia Emptores 1290, which, still in force and relevant, forbids the creation of new tenures on the grant of a fee simple (i.e. no sub-infeudation creating new manors); passing through phases of strict settlements of family estates; and finishing with paragraphs 5 and 6 of the 4th schedule (“Alteration to the Register”) to the Land Registration Act 2002 (“the 2002 Act”), which confer on the Registrar power, other than pursuant to a court order, to alter the Land Register for the purpose of correcting mistakes.
4. On this second appeal the court has to consider the circumstances in which the corrective power may be exercised in the case of the mistaken registration under the 2002 Act of 362 acres of moorland. It is described as waste of the Manor of Ireby and is called Ireby Fell. “Waste” in this context refers, in general, to manorial lands that were less fertile than the rest of the manorial holdings and therefore usually open, uncultivated, and unoccupied. The local community enjoyed the manorial waste as a communal resource. The main use was as common pasture for sheep and cattle grazing. Manorial waste was distinct from the demesne land of the Lord of the Manor and from surrounding land held of the Lord by manorial tenants, who cultivated it as arable or laid it down to grass: see *Hampshire CC v Milburn* [1991] 1 AC 325 at 338 B-E per Lord Templeman; *Corpus Christi College Oxford v Gloucestershire CC* [1983] QB 360; and *Crown Estate Commissioners v Roberts* [2008] EGLR 165 at [9] per Lewison J.
5. At the heart of this appeal is a perceived illogicality in the decisions below on rectification of the register. It was held both at first instance and on the first appeal to the High Court that, on the one hand, the mistaken registration of the Lordship of Ireby should be rectified by closing the register, but, on the other hand, the mistaken registration of Ireby Fell, which was identified as waste of that Lordship, should not be rectified. The result was that the rightful owner of the Fell (probably the Crown) was not substituted for the persons mistakenly registered as its proprietors (i.e. the respondents to this appeal, Mr & Mrs Peter Burton). The causal connection between the mistaken registration of the Lordship and the mistaken registration of the Fell is said to be so close and immediate that the appellants were surprised when they were notified that their

application to alter the register had different outcomes in the case of the Lordship (i.e. mistake corrected) and the Fell (i.e. mistake not corrected).

6. Detailed issues arise from the statutory circumstances in which the title of a registered proprietor in possession of land may be protected from rectification of the register, having regard to two particular factors: (a) whether lack of care on the part of the Burtons caused or contributed to the mistaken registration of the Fell; and (b) whether it would be unjust **not** to correct the mistake (i.e. untying the double negative, whether it would be unjust to reject the appellants' application to correct the mistaken registration of the Burtons by closing the Fell title). The appellants failed on the lack of care issue and on the injustice issue at each lower level of decision.

The dispute

7. 14 lever arch files of historical materials were examined at a 10 day hearing in April, July and August 2010 before the Deputy Adjudicator, to whom the application had been referred by the Land Registry. There was a site inspection. Extensive written submissions were generated by the litigation between irate villagers in Ireby (the applicants/appellants) and the Burtons, who are more recent newcomers to the village. The focus of the appeal is on the Fell situated to the north of the village and of the lovely way into West Yorkshire along the A65 from Kirby Lonsdale to Skipton.
8. This unlovely dispute is between the appellants, who live in the village, and the Burtons, who live in Over Hall on the edge of the village. On Mr Burton's retirement from a successful career in banking, the Burtons purchased (along with 39.25 acres of land) and restored the dilapidated 17th century Over Hall Farmhouse. They subsequently registered the Lordship of the Manor as theirs. Then they claimed that Ireby Fell was also theirs as waste of their Manor and they got themselves registered as proprietors of it. They set about asserting and enforcing their newly registered rights in and around the village and over the Fell. The Lordship activities did not make the Burtons popular with some residents in the village, including the appellants.
9. At this point I must underline some critical legal distinctions: first, between the title to the Lordship, which is an incorporeal hereditament (**not** land), and the title to the Fell, which is land: secondly, between those titles and the title to rights of common over the Fell, which are not in issue in this litigation. The rights of common were protected by registration over 30 years ago. The issue in this case was whether the Burtons' sequential registrations of the Lordship of the Manor and of the Fell should be rectified by closing both of them on the ground that those registrations were mistaken and ought to be corrected. So far the appellants have had a measure of success: the title to the Lordship has been closed, but they failed on the Fell.

The appeals

10. This appeal is about whether there was an error of law in the decision of the Deputy Adjudicator on 10 December 2010 not to close the Burtons' registration of title to the Fell. In the same decision he had directed that the registration of their title to the Lordship of the Manor should be closed. The Burtons have not appealed from that decision or from the findings of fact on which it was based.
11. The Deputy High Court Judge, who heard the first appeal over 4 days, dismissed it on 17 April 2012, as he could not find any error of law in the decision appealed.
12. Both the Deputy Adjudicator and the Deputy High Court judge have considerable expertise in this specialised field. I would pay tribute to their learning and to their skilful handling of the historical materials in their judgements. As they appreciated and as, I hope, the parties appreciate, this case is not a local research project in historical scholarship. The Deputy Adjudicator and the Deputy Judge were required to deliver judgements on a legal dispute, in which they had to apply the law to a limited selection of salient historical facts established by evidence on the balance of

probabilities. Nearly all the historical material is interesting. Very little of it is of direct legal relevance. I mention this because both sides have spent a great deal of time, effort and money on investigating the history of the Lordship of Ireby.

Applications to rectify the register

13. At the end of the 800 year time-line of rural, local and family history is the 4th schedule to the 2002 Act. This appeal turns on the construction and application of its provisions to the facts found by the Deputy Adjudicator. There is no longer any issue that registration mistakes were made in the case of both the Lordship and the Fell. The issue on this third round of the appellants' application to correct the mistakes is whether an order should also have been made to close the registration of title to the Fell. If, as was held, the Burtons had no title to the Lordship, it should logically follow, according to the appellants, that the Burtons had no title to the Fell and that the Fell registration should also be closed. The basis of appellants' contention is that the Fell only came to the Burtons as waste of the Lordship of the Manor; that the registration of the Lordship has now gone, because it turned out that the Burtons and the people they bought it from had no title to it; and that, by force of logic, the mistaken Fell registration in the name of the Burtons should also be closed.
14. The resolution of the Fell issue depends on the statutory circumstances in which there is power to rectify the Land Register in the light of the facts found by the Deputy Adjudicator. The three main questions for his decision on that aspect of the case were, first, whether the Burtons were in "possession" of Ireby Fell at the date of the appellants' application; if so, secondly, whether the mistaken registration was caused or substantially contributed to by lack of care on the part of the Burtons; and, thirdly, whether it would be unjust not to close the Fell registration.
15. The appellants take a dim view of the Burtons. In the appellants' eyes they must seem like officious incomers. The appellants accuse them of profiting from a "windfall" of land as a result of an erroneous registration obtained by them. They resent the Burtons' acquisition of manorial rights and their manner of exploiting them. They are irritated by the "Manorial Waste mapping process" undertaken by them (the Deputy Adjudicator described Mr Burton as "an ordered and efficient man" – see [78] of his decision), by the putting up of a gate, by the posting of a printed notice that they were in possession of the Fell, by formal controls over the use of the Fell through agreements for sheep grazing and sporting rights and by sending out letters of objection to the parking of cars on grass verges in the village, which are also claimed as manorial waste, and even by threatening an injunction. None of those things would go down well in any English village. The villagers were convinced that the Burtons had "a phony title resurrected by a 19th century usurper" and that they "posed a threat to the well-being of the village." See [79] and [82] of the Decision.
16. One of the odder aspects of this case is why, personal animosity apart, the appellants go to the lengths of a second appeal for which permission was granted by Arden LJ on 3 August and confirmed on 10 October 2012. The appellants did not advance any claim to an interest in the Lordship of the Manor or the Fell for themselves, or for their fellow villagers, or for the Parish Council. They scored a victory when they established in the course of these proceedings that they were legally entitled to seek alteration of the Land Register without claiming to a legal interest in the Lordship or the Fell. They have had the title to the Lordship closed. It is sometimes better to withdraw from the fray while still winning, but the appellants have fought on about the Fell.
17. They disputed the Burtons' manorial claims. They succeeded on the ground that the Lordship was extinct by the 17th century. There was no manor for the Burtons to acquire by purchase or otherwise. On the appellants' case extinction of the Lordship meant that the Fell was unregistered land which vested in the Crown either as royal demesne land or in right of the Duchy of Lancaster by escheat. (In passing I should record that prior to the hearing Lord Justice McCombe informed the parties of his former position as Attorney-General of the Duchy of Lancaster and of his current involvement as a trustee of a Duchy Housing Trust, but no objection was taken on

either side to him sitting on the appeal.) As the Burtons had no title to the Fell, the appellants say that the mistaken registration should be rectified by closing it.

18. There is an air of unreality in the enthusiasm with which the appellants press claims for Crown or Duchy title to the Fell. The appellants rely on the Deputy Judge's decision that the Crown is the rightful owner of the Fell. They say that Crown title is a factor relevant to the injustice issue and affects the exercise of the power to correct the mistaken registration of the Fell. But the appellants face a credibility problem. They did not join the Crown or the Duchy as parties to the proceedings to rectify the register. Although the Crown and the Duchy have been made aware of the decisions in this case, neither has attempted to take any part in this appeal. Their attitude is that, as they have no knowledge of the facts of the Fell, they are content to leave the evidence and argument to the parties and the decision to those who have heard the evidence and legal argument and are entrusted by the legislation with the decision-making duties. They have not disclaimed title. They have simply "reserved" their position on the Fell awaiting the outcome of the appeal.
19. The appellants rely heavily on Crown title as a factor affecting the injustice of leaving the mistaken registration of the Fell as it is. They contend it was not taken into account by the Deputy Adjudicator, nor was it properly taken into account by the Deputy Judge. This court should take it into account and order the title to the Fell to be closed.
20. The Crown's caution is understandable. It is usually unwise to intervene in other peoples' litigation, especially if it is about property to which you make no claim. The ownership of the Fell had been uncertain for many years. It was considered by Mr GD Squibb QC in a decision of 25 April 1978. He sat as a Commons Commissioner in Lancaster Castle in February 1978. He recorded that nobody claimed ownership of the Fell and that there was no evidence of ownership. He concluded that the Fell should be registered as a common, subject to the protection of the local authority under s.9 of the Commons Registration Act 1965. Thus, until the arrival of the Burtons on the Ireby scene in 2000 and their registrations, the Fell was unclaimed unregistered land used by the villagers and others for grazing and recreation under the informal management of the parish council, or the parish meeting, or a committee of graziers. The legal protection of the registered rights of common over the Fell are unaffected by this case, whichever way it is decided.

Some key dates and events

21. The primary fact in the case is that of the first registration of the Fell at HM Land Registry under Title No LAN6249 on 21 February 2005 in the joint names of the Burtons, who were described as being "Lord of the Manor of Ireby."
22. The events immediately leading up to that first registration began with the purchase of the freehold of Over Hall Farm house, land and buildings by the Burtons from Mr and Mrs Stephen Brown on 1 September 2000 and their registration as freehold proprietors of Over Hall Farm on 28 September 2000. No reference was made in the Sale Particulars or in the conveyancing documents to the existence or sale of either the Lordship or the Fell.
23. On 6 October 2003 Mr Peter Burton made a statutory declaration that a conveyance taken by the sellers of Over Hall (the Stephen Browns) in 1995 had included the "Manor or reputed Manor of Ireby." He believed that, on the purchase from them of Over Hall Farm on 1 September 2000, the Manorial Title was also transferred. The Deputy Adjudicator had doubts about whether Mr Burton believed that at the time of the purchase. However, the conveyance of Over Hall Farm dated 19 May 1995 to the Browns had expressly conveyed with the farm "the manor or reputed manor of Ireby thereto belonging." (There were similar references in an earlier Conveyance of 28 July 1947 and in an Assent of 19 March 1953, as well as in the earlier Marton family Re-settlement of 23 January 1892 which referred in the schedule to Ireby Fell of 360 acres).

24. Mr Burton's declaration, with supporting documentation, was submitted by the Burtons' solicitors (Henmans of Woodstock, who had been recommended to Mr Burton as specialists in manorial law) to the Land Registry on 8 October 2003, along with an application for first registration of the Lordship.
25. It should be noted that under the Land Registration Act 1925, which was still in force at that time, it was possible to register the Lordship of a Manor. That possibility ceased on the coming into force of the 2002 Act on 13 October 2003, very shortly after the submission of the registration application form, in which Henmans had stated that they were not able to give a certificate that they had investigated, or caused to be investigated, the title in the usual way. The papers submitted with the application included documents dating back to 1892.
26. The Land Registry response was that two cautions had been registered against the title. The cautions were subsequently cancelled with the consent of the cautioners. Mr & Mrs Brown consented to the cancellation of their caution after they had executed a conveyance dated 21 September 2004 of the Manor or reputed Manor of Ireby in fee simple to the Burtons in consideration of the sum of £1. The Fell was not mentioned. The Land Registry registered under Title No LA 945262 the "Incorporeal Hereditaments known as the Lordship or Manor or Reputed Lordship or Manor of Ireby" as from 10 October 2003, as it was backdated to the time when the application was received by the Land Registry. The registration was confirmed in a letter to the Burtons' solicitors dated 28 October 2004. The Burtons were thus deemed from 10 October 2003 to have registered title to the Lordship vested in them (see s. 69(1) of the Land Registration Act 1925), pre-dating the coming into force of the 2002 Act under which a Lordship ceased to be registrable.
27. On 3 February 2005 Mr Peter Burton made another statutory declaration prepared by Henmans. That declaration referred to the registration of the Lordship of the Manor and to Ireby Fell as unregistered land adjoining Over Hall Farm. He stated that, to the best of his knowledge, "Ireby Fell has always been in the ownership of the Lord of the Manor of Ireby." That was evidenced by Articles of Agreement dated 16 May 1836, in which it was recited that "the Freehold and Inheritance of and in the soil of the said Common or Fell is vested of right in the Lord of the Manor of Ireby." The 1836 document was a compromise agreement relating to "stinting the Rights of Common on Ireby Fell" (i.e. restricting the number of animals belonging to those with the right of common pasturage on the Fell.) The Agreement involved members of the Marton family, in particular one Oliver Marton (who was mentally incapacitated), the Tenth Clause providing that "nothing herein shall in anywise prejudice or affect any of the rights of the said Oliver Marton as Lord of the said Manor or the rights of the Lord of the Manor for the time being".
28. The Burtons were registered as first freehold proprietors of the Fell as from 21 February 2005, although the Fell had never been expressly transferred to them or to their predecessors in title by name. The conveyance of Over Hall Farm to the Browns in 1995 had included 43 sheep gait appurtenant to Over Hall Farm, a gait being a right to pasture a sheep on common land exercisable in this case on the Fell. That would appear to refer to a right of common over the Fell rather than to ownership of the Fell. The Marton family strict settlement dated 23 January 1892 was the last document to refer to an express disposition of the Fell itself.
29. From 2005 onwards the Burtons granted and renewed annual grazing licences on the Fell. They paid for the erection of gates and posts. On 19 August 2007 they entered into a Sporting Rights Agreement for a term of 10 years.
30. Over the same period the appellants were busy pursuing various lines of attack on the Burtons' claims to manorial rights. They conducted extensive historical research into the ownership of the Lordship and of the Fell. The support of a local MP was enlisted. There was correspondence with and detailed submissions to the Land Registry. On 9 May 2007 the appellants applied to the Land

Registry under paragraph 5 (a) of Schedule 4 to the 2002 Act to alter the register on the ground of mistake by rectifying the title to the Lordship of the Manor and to the Fell by closing them.

31. The first reaction of the Burtons was that the appellants had no standing to bring the proceedings, as they themselves made no claim to the Lordship or to the Fell. The Burtons applied to strike out the proceedings for lack of locus. That move failed, as it was held that there is no legal requirement to claim an interest in the registered land where the application is to the registrar for the alteration of the register as a matter of public law: REF/2007/1124 (HMLR Adjudicator), accepted by the parties in *Paton v Todd* [2012] EWHC 248 (Ch) at [51]; cf where the claim raises questions of private law only: *Wells v Pilling Parish Council* [2008] EWHC 556 (Ch.) at [14]. Anyone could object to the registration of the Fell without asserting a better title to it, or any title to it. See also s. 73 of the 2002 Act on objections to an application to the registrar and Megarry & Wade on the Law of Real Property (8th Ed) at 7-139.
32. The application progressed to a substantive hearing. The decision on the application was that of Deputy Adjudicator to HM Land Registry, Mr Simon Brilliant, dated 10 December 2010. He granted the application to close the registration of the Lordship on the ground that the Burtons had not established title to it, but he refused to close the title to the Fell, having regard to the statutory fetters on rectification in paragraph 6 of the 4th schedule.
33. As for the Lordship, he said that it had either been vested in the Crown by statute in 1540 or had become extinct by the mid-17th century. He pointed out that no new mesne Lordships could be created after 1290 in consequence of the prohibition on subinfeudation in s.1 of *Quia Emptores*: see *Hampshire CC v Milburn* [1991] 1 AC 325 at 337.
34. As already mentioned, the appellants say that the Fell should be dealt with in the same way as the Lordship, as the Fell title depended or was parasitic on the Lordship title and fell with it. As will be seen from the summary of his decision below, the Deputy Adjudicator held that the legal position was not as straightforward as the logic of the appellants' contention might suggest. It was necessary to consider all the surrounding circumstances relevant to paragraph 6 of the 4th schedule in order to decide whether there was power to alter the registration of the Fell. He found against the appellants on both the matter of alleged lack of care on the part of the Burtons and on the claimed injustice of doing nothing about the mistake and refused to grant the order sought by them. He did not decide who had title to the Fell, only that the Burtons' registration of the Fell was a mistake. He made no ruling on whether the Fell was vested in the Crown as royal demesne or in right of the Duchy of Lancaster.
35. On 30 June 2011 Briggs J granted the appellants permission for a first appeal from the refusal to alter the registration of the Fell. That appeal was dismissed by Mr Jeremy Cousins QC, sitting as a Deputy Judge of the Chancery Division on 17 April 2012, on the ground that the decision of the Deputy Adjudicator was not erroneous in law.

The legislation

36. The relevant parts of the 2002 Act are set out in the judgements below and will not be repeated verbatim in this judgement. Their effect is that the Registrar may rectify the register by alteration of it which "involves correcting a mistake": paragraph 5 (a) of the 4th schedule. However, 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, except in certain cases: paragraph 6 (2) of the 4th schedule.
37. There are two relevant situations in which the Registrar may alter the register against the proprietor in possession of the land for the purpose of correcting a mistake.

38. The first in paragraph 6(2)(a) is where the proprietor has by fraud or lack of proper care caused or substantially contributed to the mistake. Fraud does not feature in this case, but lack of care is alleged.
39. The second in paragraph 6(2)(b) is where it would, for any other reason, be unjust for the alteration **not** to be made.

The judgements below

40. The Deputy Adjudicator was the first instance fact-finding tribunal. From his decision there was a first appeal to the High Court on a point of law. Mr Jeremy Cousins QC, sitting as a Deputy High Court Judge, decided the first appeal by reference to the facts found by the Deputy Adjudicator and the grounds of appeal that were said to raise points of law. As he rejected the appeal and was broadly in agreement with the decision of the Deputy Adjudicator, the main points of both judgements can be conveniently summarised together.

Title

41. The appellants pursued various lines of inquiry to demonstrate that the Burtons had no title to the Lordship or the Fell. The Deputy Adjudicator traced the long history of the Lordship in detail. He divided it into two main periods: pre-1600 and post-1600 down to the purported conveyance of the Lordship by Mr & Mrs Stephen Brown to the Burtons in 2005.
42. He rejected the contention that the manorial rights had devolved not with Over Hall, but with another property in Ireby – Netherbeck House. He also rejected the contention that the Lordship was held from 1290 onwards by the Knights of St John of Jerusalem, an order established in about 1100. The claim was that the lordship had remained vested in the Order since the reign of Philip and Mary and had been validly transferred to the appellants in 2008 by the Grand Prior of England of the Sovereign Military Hospitaller Order of St John of Jerusalem of Rhodes and Malta.
43. The Deputy Adjudicator concluded that the Lordship had in fact become extinct over 300 years ago, though he did not decide whether the Fell had passed to and remained vested in the Crown either as royal demesne land or in right of the Duchy of Lancaster by escheat. The Deputy Adjudicator regarded the ownership of the Fell as in limbo. Neither the Crown nor the Duchy had been consulted about the registrations, or joined by the appellants as parties to the proceedings, or had applied to be joined, or had intervened in the proceedings, or had even made claim to the title to the Fell. They had decided to await the outcome of this appeal.
44. It is unnecessary to examine the factual or legal detail in the parts of the decisions on title to the Lordship. The crucial point is that the Burtons did not appeal from the decision rejecting their alleged title to the Lordship. They had not established title. More importantly for present purposes, they had no claim to the Fell independently of the Lordship. It was found that the sellers of Over Hall and of the Lordship, Mr & Mrs Stephen Brown, had no title to the Lordship nor had their predecessors traced back through the Marton family and the Tatham family. Although members of those families and their successors had *assumed* a title to the Lordship, it was not based on any acquisition of lawful title by express conveyance of the Lordship. For the last 100 years or so no-one had even acted as Lord of the Manor.
45. Alternative claims to the Lordship based on adverse possession, prescription and proprietary estoppel were also rejected by the Deputy Adjudicator and were not appealed.
46. Although the decisions below proceeded on the basis that the registration of the Lordship and the consequent registration of the Fell were mistaken, it did not follow, as a matter of the law relating to rectification of registration mistakes, that the same considerations applied to the Fell as applied to the Lordship, or that the outcome was necessarily the same for both.

Possession

47. As regards the Lordship, the question of protecting the registered proprietor in possession of it could not arise, as possession refers to physical possession of “land”, as defined in the 2002 Act. That is not possible in the case of the Lordship: it is an incorporeal hereditament, not land as defined in s. 132 of the 2002 Act; cf the definition of land in s.205 (ix) of the Law of Property Act 1925, which included a manor or lordship. It follows that, as regards the registration of the Lordship, the issues of lack of care contributing to mistaken registration and the injustice of not correcting the mistake did not arise for consideration.
48. The Deputy Adjudicator impliedly accepted that, by not later than May 2007, the Burtons had taken actual physical possession of the Fell. Both issues of lack of care and injustice were therefore material to closing the registration of the Fell against the opposition of the Burtons.

Lack of care

49. The starting point on lack of care is that the Burtons had only been entitled to be registered as proprietors of the Fell because they were proprietors of the Lordship. As it had been decided that they were not proprietors of the Lordship, it followed that they had no title to the Fell and that their registration as proprietors of the Fell had been a mistake.
50. The Deputy Adjudicator dealt briefly in his decision with the contention that there had been lack of care causing or contributing to the mistaken registration as alleged by the appellants. He said:

“238. ...By the time [the Burtons] applied for first registration of the Fell the lordship had been expressly conveyed to them, and they had been registered as proprietors of the lordship. The 1836 stinting agreement was rightly seen at the time as compelling evidence that the fell belonged to the lord of the manor.

239. I have already expressed my view that Mr Burton made the 2005 statutory declaration in good faith believing himself to be the owner of the fell by virtue of being owner of the lordship. His belief at that time was not only honest, it was also reasonable and based on a careful and proper assessment of what was then known to him. It would be unreasonable to expect him at that stage to have gone beyond the 1836 stinting agreement.”
51. The Deputy Judge did not consider that there was any basis for differing from that conclusion of the Deputy Adjudicator. He explained that it would not have been properly open to him to come to any different conclusion, having regard to the manner in which the case had developed before the Deputy Adjudicator and the materials before him.
52. Prior to the hearing before the Deputy Adjudicator, no suggestion had been made of a lack of proper care on the part of the Burtons or of their solicitors Henmans in relation to the registration of title to *the Fell*. It had been raised in relation to the registration of the Lordship, but the lack of care issue regarding the Fell was only raised after the evidence had closed. Had the lack of care issue been raised earlier the Burtons and Henmans might have wished to lead evidence about why it was dealt with in the way it was.
53. That was sufficient to dispose of the appeal on that point, but the Deputy Judge went on to deal with other points raised by counsel in their submissions about further material, such as the 1836 Stinting Agreement, the 1892 Marton Strict Settlement and the standard of care expected of a solicitor when handling a transaction relevant to Schedule 4 to the 2002 Act. The arguments on the lack of care point are discussed in more detail below.

Crown/Duchy title

54. As noted earlier, the Deputy Adjudicator made no express finding on the contention that, as the Lordship had ceased to exist, the title to the Fell had passed to the Crown and that the freehold to the Fell was vested in the Crown or the Duchy. That omission was central to the appellants' appeal to the High Court.
55. The Deputy Judge held that, but for the mistaken registration of the Burtons as proprietors of the Fell, its ownership would have vested and remained vested in the Crown as royal demesne or in the Duchy by escheat. The Deputy Judge held that that was a factor which should have weighed with the Deputy Adjudicator and had to be taken into account when reviewing the decision on paragraph 6 of the 4th schedule.

Injustice point

56. The Deputy Adjudicator decided against the appellants on the injustice point in relation to the mistaken registration of the Fell. The appellants had contended that it would be unjust for the alteration not to be made because the Burtons were obtaining a windfall: 300 acres of fell for £1.
57. The Deputy Adjudicator held that ownership carried responsibilities as well as privileges. He had regard to the Burtons' expenditure of money and time on taking and maintaining control of the Fell. The appellants had notice of the application to register the Fell, but failed to object at the time. They did not take steps to close the title for another 2 years. During that period the Burtons arranged their manorial affairs and spent money in reliance on the registered title to the Fell. He said that it would be inequitable to close the title to the Fell. He noted as a striking feature that the appellants did not claim to have title to the Fell themselves. Their desire to remove the Burtons as proprietors did not carry much weight with him. It would serve no useful purpose to make the alteration. It was better for the Fell to be owned by the Burtons than left in limbo.
58. The Deputy Judge dealt with the injustice point in more detail than the Deputy Adjudicator. Having summarised the rival submissions he concluded that the burden was on the appellants to establish that it would be unjust not to make the alteration. He did not consider that this was a case of "simple justice" where the fact of a mistake, without more, demonstrated that justice required the register to be altered by substitution of the Crown. He rejected the "windfall" objection as irrelevant. He agreed with the decision of the Deputy Adjudicator saying at [133] that the Burtons had:

"...taken possession of the Fell and incurred time and expense in managing it. They have entered into agreements with third parties as to the use of the Fell, at least one of which is for a term of several years, subject to termination provisions. I take into account that they have derived some financial benefit, extending to in time some thousands of pounds each year from doing so."

Grounds of appeal

59. The main issues raised by the grounds of appeal are whether the decisions below erred in law:
 - (1) in holding that it was unjust for the alteration in the register to be made in the case of the Fell where, at the time of the mistaken registration, the Crown had been the rightful owner.
 - (2) in not holding that, because the lord is entitled to all waste within the manor, the second mistake involving the Fell registration in 2005 flowed from the earlier mistake of 2004 involving the lordship registration, and should therefore be treated as part and parcel of the same mistake.
 - (3) in holding that there was no lack of care on their part in the mistaken registration of the title to the Fell

60. The order sought from this court is that the appeal be allowed and that the Register of Title LAN6249 be altered to remove the Burtons as Registered Proprietors of the Fell or the Crown be substituted as Registered Proprietor, or the Register be closed.

Appellants' submissions

61. Mr Paul Stafford appearing for the appellants made very detailed submissions on the three main grounds of injustice, consequential mistake and lack of care. They were prefaced by a reminder of the common law doctrine of relativity of title and a submission that relativity of title was not relevant to the determination of the appellants' application to rectify the register.
62. He also referred to the general nature of the protection conferred by paragraph 6(2) of the 4th schedule to the 2002 Act on the proprietor of registered land in possession. In particular, the protection did not extend to the case of correcting the mistaken registration of the Lordship, because it is incorporeal property and, as such, is excluded from the definition of "land" in s. 123 of the 2002 Act. He accepted that the Fell was "land".
63. Before the Deputy Judge Mr Stafford had argued that the protection of paragraph 6(2) should not apply to the Fell, because the second mistaken registration (the Fell) had followed the first mistaken registration (the Lordship), which was not protected. Mr Stafford had emphasised this "consequential mistake" argument: that is that the land in respect of which protection was claimed (i.e. the Fell) was land which the title holder to the Lordship had claimed to have acquired as waste of the manor. There was therefore a close link between the acquisition of the Lordship, which was mistakenly registered, and the mistaken registration of the Fell, which was acquired in consequence of the (mistaken) claim to the Lordship. Although the two titles went together, they had been treated differently on the appellants' application: one has gone, but not the other. Both related titles should have been closed.
64. If, as I understood Mr Stafford to accept in this court, paragraph 6(2) protection could apply to the Fell, it was submitted that the factors mentioned in it are relevant to the alleged injustice of not altering the register to correct a mistaken registration. In brief, the point is that there is nothing unjust about altering the register to close the title to the Fell, because of the circumstances in which the Burtons' title came to be registered via their registration of the Lordship, so that it should be treated as flowing from the same mistake or as part and parcel of the same mistake.

Injustice

65. Several themes surface on the injustice point. The overall submission was that, in the light of the findings, the exercise of discretion by the Deputy Adjudicator under schedule 4 was flawed and wrong in law for a number of reasons. The principal criticism was of failing to take into account Crown title to the Fell.
66. Mr Stafford raised a preliminary point of practice. He said that the Crown should have been notified earlier that the dispute was about land in which it had a potential interest. That could have been done before or when the Burtons' application for registration of the Fell was made. The Crown should have been joined as a party when the rectification proceedings were instituted rather than notified after a hearing had taken place and a decision reached. The subsequent correspondence in this case with the solicitors for the Crown Estate and for the Duchy of Lancaster took place after the decision of the Deputy Adjudicator was notified to the Crown.
67. The decision of the Deputy Judge that it was not unjust to leave the registration of the Fell title with the Burtons was also flawed in the light of his conclusion on Crown title to the Fell. The Deputy Judge had misunderstood the facts and matters relating to the position of the Crown and the Duchy, as explained in their solicitors' correspondence. The Fell was vested in the Crown. Justice required that the Fell should be returned to its rightful owner and that it should not remain

registered in the names of the Burtons. They were not the rightful owners. It would be unjust to deprive the Crown of the Fell for which the Burtons had given no consideration and to leave them as registered owners, for which there was no legal basis. The registration of the Fell was parasitic on a Lordship that did not exist. It amounted to the creation of a freehold tenure contrary to *Quia Emptores*.

68. The Deputy Judge ought at least to have found that the position of the Crown had been reserved. He ought to have re-examined the exercise of discretion by the Deputy Adjudicator and taken the Crown's interest into account. He ought to have concluded that the register should have been rectified to the *status quo ante* by closure of the Burtons' title.
69. Mr Stafford went back to the consequential mistake point, that is the dependence of the title to the Fell on the title to the Lordship. The Deputy Adjudicator had found that the registration of the Lordship title was a mistake. The Burtons were only entitled to be registered as proprietors of the Fell, because they were proprietors of the Lordship. Their registration as proprietors of the Fell was another mistake in consequence of the earlier mistake. The end result should be no Lordship, no manorial waste, no Fell.
70. The mistake in registration of the Fell in 2005 was part and parcel of the same connected mistake in the registration of the Lordship. Although the Lordship was not within the protection of paragraph 6(2) of Schedule 4 and the Fell was, it was relevant to rectification of the Fell title that that title had rested entirely on a Lordship that no longer existed.
71. Mr Stafford also pressed the "simple justice" approach. The discretion under paragraph 6(2) should be exercised on the basis that the Burtons were never entitled to be registered as proprietors of the Lordship or the Fell and that simple justice required that, in the absence of strong countervailing factors, the party deprived of the title should regain it: *Baxter v Mannion* [2011] 2 All ER 574; [2011] EWCA Civ 120 at [41]. That case was not distinguishable, as the Burtons had sought to contend.
72. Mr Stafford reminded the court that the appellants' lack of a legal claim to the Fell was irrelevant, as anyone was entitled to apply to correct a mistake on the register. There was nothing unjust in rectifying the register to correct the mistaken registration of the Fell, when that registration was consequent on another registration mistake that had been rectified.
73. Finally, on the time, effort and expense that the Burtons claim to have incurred on the Fell, Mr Stafford submitted that it was modest in comparison with the financial benefit they were accruing from its exploitation. They had acquired the Fell for no consideration and adventitiously. There were no countervailing factors in the Burtons' favour.

Lack of care ground

74. According to Mr Stafford the Deputy Adjudicator and the Deputy Judge ought to have found that the appropriate standard of care on the application for first registration of a Lordship was a high one, that the Burtons did not satisfy it and that lack of care caused, or substantially contributed to, the Land Registry's mistake. Title to the Lordship had not been adequately investigated by the Burtons or their solicitors. Insufficient evidence had been adduced on the application for the registration of the Lordship, from which the registration of the Fell had followed.
75. The approach of the Deputy Judge to this point was wrong, as it took insufficient account of the nature and implications of the issues at stake on the first registration of manorial titles and of what action applicants for such titles should take to enable the Land Registry to make a properly informed decision on their application. First registration of a Lordship was a serious matter, because ownership could include further substantial rights.

76. Mr Stafford submitted that the standard of care must be objective. It must focus on the information provided by the applicant to the Land Registry and the steps taken by the applicant to provide it. The applicant was under a duty to take reasonable steps to supply the Land Registry with accurate and sufficient information to enable it to decide whether or not it was satisfied that the applicant's title is such that a willing buyer could properly be advised by a competent professional adviser to accept the title.
77. Mr Stafford made 5 detailed points on why, in this case, the Burtons had failed to meet the proper standard of care:
- (1) The proportionality of costs to subject matter was not as relevant as the implications of first registration and the need for more examination of title documents and manorial records, not less.
 - (2) Only limited significance was given to the absence of manorial records as an indication that the Lordship had ceased to exist and there had been a failure to give proper weight to other matters. Proper care required showing that the lordship was still in existence at the date of the first link in the chain of conveyances from which the Burtons had derived title, and that this required some investigation of the manorial records and the history of the lordship
 - (3) There was a failure on the part of the Burtons to seek specialist advice or to search adequately in the right places for relevant information, instances of which are given in the Land Registry Practice Guide 22 (e.g. The Royal Commission on Historical Manuscripts, the Public Record Office, County Record Offices, Diocesan Boards of Finance, Commons Registration authorities, parish records and the Manorial Society of Great Britain.)
 - (4) Mr Burton had failed to inform the Land Registry of known administration of the affairs of the Fell by the village meeting, parish council or informal committee, which raised questions about the continued existence of the Lordship.
 - (5) The entry of an X placed in Box 13 on Form FR1 on the manorial application for First Registration had informed the Land Registry that the Burtons and their advisers had not investigated title in the usual way on the applicant's behalf on a transaction for value.
78. Further, the Deputy Adjudicator had not dealt in sufficient detail with the issue of causation concerning the lack of care and the mistaken registration. There was a lack of care in relation to the registration of both the Lordship and the Fell. There was a causal link between the lack of care in relation to the mistaken registration of the Lordship and the lack of care in relation to the mistaken registration of the Fell. The lack of investigation and care over the registration of the Lordship caused or contributed to the mistaken registration of the Fell. Mr Stafford emphasised that, in relation to the registration of the Lordship, the Burtons had failed to research information that was readily available and had provided insufficient information to the Land Registry in support the application to register the Manor in the name of the Burtons and that preceded the registration of the Fell

The Burtons' submissions

Preliminary

79. Mr Jeffrey Littman appearing for the Burtons commented on unusual aspects of the appellants' case. They claimed no title to or legal interest in the Fell. They advanced a case of *ius tertii*, in favour of the Crown, even though the Crown has asserted no claim, is not involved in the proceedings, has done nothing to intervene in this appeal and is content simply to await the outcome of this appeal.

Mistake re Lordship

80. Mr Littman seized on the flaw in the appellants' submission that logically the mistake in the registration of the Fell must be corrected in consequence of the correction of the registration of the Lordship. That did not follow, as, under paragraph 6 of the 4th schedule, different considerations applied to the Fell, as land, than applied to the Lordship, as an incorporeal hereditament. The considerations of lack of care contributing to the mistaken registration and the injustice of not correcting the mistake played no part in the decision of the Deputy Adjudicator to correct the mistaken registration of the Lordship.

Lack of care

81. As for lack of care causing or substantially contributing to the mistaken registration of the Fell, the appellants' difficulty was that no such case had been pleaded in relation to the registration of title to *the Fell* and the application to close that title. The alleged lack of care was not put to Mr Burton when he was cross examined. He therefore had no proper opportunity to respond to it. The point was pleaded only in relation to the registration of the Lordship title. The lack of care there was said to consist of the absence of an express conveyance to them at the date of application, failure to research the history of the Lordship and awareness that their title to it was incomplete.
82. The absence of a pleading that there had been lack of care by Mr & Mrs Burton causing or contributing to the mistaken registration of the Fell was a serious matter. As was accepted by Mr Stafford, that point was first raised after the close of evidence, in fact months after Mr Burton had given his evidence.
83. In addition Mr Littman made submissions about the construction of paragraph 6(2)(a). He contended that the "mistake" to be corrected should be as precisely defined as possible and that the omission to take some step, which would have been taken, if proper care had been exercised, must be an omission which it was reasonably foreseeable by the applicant for registration was likely to result in that mistake. Mr Littman accepts that, where the omission in question is that of the applicant's solicitor, the solicitor's lack of care should be deemed to be that of the applicant. However, he challenged the appellants' argument that it was permissible "to chain" mistakes in sequence, so that the "lack of care" provision can be applied by taking account of lack of care regarding the registration of the Lordship, not just of the Fell.

Injustice

84. Mr Littman supported the decisions of the Deputy Adjudicator and the Deputy Judge for the reasons given by them. He contended that the injustice point involved a flexible concept correctly applied by them to the facts of the case and that this court should not interfere in the absence of any misdirection of law, error of principle or plainly wrong decision.

Discussion and conclusions

85. The scenic moorland, the village setting and the historic trappings might inspire an elegiac mood, like Larkin's *Going, Going* (1972): the fields and farms and meadows, the shadows, "the unspoilt dales", the last remains in auctioned England of "land left free" from "concrete and tyres."
86. The truth is more prosaic than Lords, Manors, Knights of Jerusalem and stunning scenery. The Chetham Society's motto printed in Colonel WH Chippendall's *History of the Township of Ireby* (1935) has an authentic ring: *Quod tuum, tene* ("Hold on to what you've got" is roughly how Philip Larkin would have translated the Mancunian motto).
87. Colonel Chippendall described the "township of Ireby" as "the Cinderella of Lancashire County Historians" the history of which was "somewhat difficult to unravel". I am grateful for the

decisions below and to counsel for their assistance with the unravelling, but in the end this case turns out to be a rather old fashioned unneighbourly dispute with some unusual feudal bits and some land registration bits tacked on.

88. This court's appellate functions are limited. It does not usually re-decide the facts found at trial. Its job is to review the papers relating to the decision under appeal for compliance with substantive law and procedure. The only question for this court is whether the decision of the Deputy Adjudicator was wrong in rejecting the application to rectify the registration of Ireby Fell by closure. If it was, then the Deputy Judge should have set it aside and so should this court.
89. I recognise the importance of the appeal to both sides. Despite the centuries of Lancastrian history, the mass of legal learning on manorial rights, and the box of lever arch files of evidence, authorities, decisions and submissions, it is possible to decide it with economy.

Crown title

90. The third party interest of the Crown or Duchy in the Fell, though a relevant factor, has no significant impact of the correction of the Register or on the outcome of this appeal.
91. The first issue in the proceedings was whether it was a mistake to register the Burtons as proprietors of the Lordship and the Fell. The appellants were right: it was a mistake, as the Burtons failed to establish any entitlement to the Lordship or the Fell. That was all that had to be decided on that point.
92. The Deputy Adjudicator did not have to decide who was entitled to the Fell. The decision of the Deputy Judge simply spelt out the legal consequence of the extinction of the Lordship. The Crown was not and is not bound by the decision in this case. The appellants did not join the Crown as a party to their application. Now the Crown knows of the decisions made, but it has not sought to make representations, let alone assert any title to the Fell or taken any step to become involved in the proceedings or the dispute. The Crown, as evidenced by e-mails, reserved its position awaiting the outcome of the appeal to the High Court and presumably the appeal to this court. In July 2012 the Crown Estate wrote saying that the progress of the case was being followed with interest. Although it had not disclaimed ownership, it was content to be bound by decisions based on all the evidence without making its own submissions.
93. In those circumstances I do not think that the appellants are entitled to complain, any more than the Crown could complain, that the Deputy Adjudicator and the Deputy Judge were wrong not to have accorded Crown title significant weight in determining the injustice point under paragraph 6 of the 4th schedule to the 2002 Act.

Consequential mistake

94. I understand the basic logic of the argument that, as there was a mistake in the registration of the Fell, then it ought to be rectified, particularly when (a) the title to the Fell depended on the title to the Lordship; (b) the mistaken registration of the Fell was consequential on the mistaken registration of title to the Lordship; and (c) the mistaken registration of title to the Lordship has been ordered to be rectified by closing that title.
95. Though logical, I do not think that the Deputy Judge was wrong to reject that submission in the face of paragraph 6(2) which requires the court to take the specified factors into account in cases where there is a registered proprietor in possession of the land. That was not the case with the correction of the Lordship registration, because the Lordship does not fall within the definition of "land", it being an incorporeal hereditament. The consequential nature of the mistaken registration of the Fell does not result in the disapplication or downgrading of paragraph 6(2). I must therefore turn to consider the nature and quality of the decisions of the Deputy Adjudicator

under paragraph 6(2) on the alleged lack of care contributing to the mistaken registration of the Fell and the alleged injustice of not correcting the register.

Lack of care

96. Did the Deputy Adjudicator err in law in concluding that the registration of the Fell was not caused or contributed to by lack of care on the part of the Burtons? I agree with the judgement of the Deputy Judge that he did not. It is a question of fact for the Deputy Adjudicator whether there was lack of care and whether it contributed to the mistaken registration of the Fell. This court would only interfere, if there was a misdirection of law, an error of principle or a decision that no reasonable Adjudicator, properly directing himself, could have reached on the evidence. I would make the following particular points
97. First, it was for the appellants to establish that there was power to rectify in this case. The burden was on the appellants to show that lack of proper care caused or substantially contributed to the mistaken registration of the Fell.
98. Secondly, the Deputy Adjudicator was entitled to reach the conclusion on the materials before him and the submissions that this was not a case of lack of care causing or contributing to the mistaken registration of the Fell. The Burtons had behaved reasonably and responsibly in engaging solicitors to advise them and to act for them. The standard to be applied to the solicitors was that of an ordinary competent solicitor undertaking work of that type. The position on the Fell registration was that the Lordship had been expressly conveyed to the Burtons by the sellers of Over Hall Farm. The declaration made by Mr Burton in 2005 was found to be in good faith and in the honest belief that it was true that the Lordship had been acquired by an express conveyance from Mr & Mrs Brown, that the Lordship had been registered and that the Fell went with it as waste of the Manor. That belief of Mr Burton was reasonable having regard to what was known about title to the Lordship, in particular the provisions in the 1836 Stinting Agreement. It was unreasonable to expect him to go back beyond that in order to research the earlier origins of the Lordship.
99. Thirdly, there is the further and, in my view, fatal flaw in the appeal that the lack of care point was not raised in relation to the registration of the Fell, as distinct from the registration of the Lordship, as to which see paragraph 22 of the consolidated statement of case of 18 January 2010 cf paragraph 229 where the case as regards the Fell is put entirely on the consequential loss of title to the Fell on the failure of title to the Lordship. The point was not pleaded. It was not raised by Mr Stafford until after the evidence was closed. Questions about it were never put to Mr Burton in cross examination. There had been no opportunity for the Burtons to deal with the point in their evidence, or to consider whether there was relevant evidence that might have been given by the solicitor, who acted for them on the application to register the Fell.

Injustice ground

100. Did the Deputy Adjudicator err in law in concluding that it was not unjust to leave the registration of the Fell in the name of the Burtons? I agree with the Deputy Judge that there was no error of law in the Deputy Adjudicator's conclusion on this point. 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.
101. Below the injustice point as regards the Fell had been put principally on the basis that to allow the title to remain with the Burtons would deprive the rightful owner of that title and be a windfall to the Burtons. The point was dealt with more fully by the Deputy Judge. There are a number of relevant factors to consider.

102. First, there was no prospect of anyone else except the Burtons being registered as proprietors of the Fell. On the one hand, while the appellants had standing to make the application to correct the mistake in the Register, they did not have, or even claim to have, title to the Fell. On the other hand, the Crown, which in the submission of the appellants and in the view of the Deputy Judge has a valid title to the Fell, showed (and still shows) no sign of asserting title against the Burtons, or wishing to engage in this dispute. In those circumstances it was a relevant consideration that the Fell should be owned by someone rather than left in limbo with continuing uncertainty about title to it.
103. Secondly, there is no substance in the point that the Crown should have been notified by the Land Registry when it received the application for registration, or by the Deputy Adjudicator when it appeared that registration had been made of land in which the Crown had a potential interest. In view of the stance taken by the Crown through its legal advisers such notification would have made no difference: for present purposes the Crown seems to want to steer clear of this dispute about the ownership of the Fell. It did not occur to the appellants to join the Crown as a party to their application to rectify the register.
104. Thirdly, there was a period of inactivity on the part of the appellants in bringing the application in 2007 for rectification of the register.
105. Fourthly, there was relevant credible evidence from Mr Burton that, since entering into physical possession of the Fell, he had invested time, effort and money on improving the Fell and its management, had discouraged harmful practices, such as tipping waste and use of motorised vehicles, had used the property as an amenity and had entered into commitments on which they and others relied. The Burtons had entered into grazing licensing agreements from October 2005 onwards and a sporting rights agreement for a 10 year term and had spent money on gates and posts, for which invoices were produced.
106. Fifthly, as I have explained earlier, the fact that the mistake as to registration of the Fell was consequential on the registration of the Lordship, which was ordered to be corrected, did not mean that the mistaken registration of the Fell also had to be corrected or that it would be unjust not to correct it.

Result

107. I would dismiss this appeal.
108. To sum up, it has not been established that the decision of the Deputy Adjudicator, as upheld by the Deputy Judge on dismissing the appeal against it, was wrong, having regard to the nature of the case pleaded, the evidence adduced, the findings of fact by the Deputy Adjudicator and the correct interpretation and application of the legislation.

Lord Justice Jackson:

109. I agree.

Lord Justice McCombe:

110. I also agree.