Trustees of Morden College v Mayrick [2007] ADR.L.R. 01/12

Chadwick, Hallett LJJ, Lindsay J. Court of Appeal. 12th January 2007

LORD JUSTICE CHADWICK:

1. This is an appeal from an order made on 23 March 2006 by Mr Justice Hart on appeal from an order made on 3 December 2004 by His Honour Judge Cooke on an application for judgment under CPR Pt 24 in proceedings brought in the Central London County Court. Permission to appeal was granted by Lord Justice Neuberger on 1 June 2006. He was persuaded that the appeal raised a point of some general importance.

The underlying facts

2. The respondents to this appeal are the trustees acting in the administration of the charity of Sir John Morden (more usually known as the trustees of Morden College and, hereafter, as "the College"). The charity was founded in 1696. For many years it has owned land, known as the Riverside Estate, in what is now the London Borough of Greenwich. The legal title to that estate was vested in the Official Custodian of Charities pursuant to a scheme established on 12 December 1871 (as varied by a scheme dated 1881). Save in so far as parts of the estate are now registered at H M Land Registry, the College has no documents of title. It relies on long and undisturbed possession of the land, or of the rents and profits thereof, evidenced from time to time by statutory declarations made by the Clerk to the trustees.

3. Old Woolwich Road lies within what was formerly the Riverside Estate. The road is in the form of a crescent. At the eastern end of the crescent the road is aligned east-west: at the western end it is aligned north-south. Orlop Street runs in a north easterly direction from the western end of Old Woolwich Road, forming (in effect) a chord across the arc of the crescent.

4. The property known as 124 Old Woolwich Road is at about the mid-point of the crescent and on the southern side, within the arc. At that point the road is aligned northeast-southwest. 126 Old Woolwich Road is immediately to the north east of No 124. 122 Old Woolwich Road is immediately to the southwest. There is an alley or passage between Nos 122 and 124, over which both properties extend at first floor level and above. I will refer to that as *"the accessway"*. Further to the south and west there are properties known as 116 and 114 Old Woolwich Road. The frontage to the road between No 122 and No 116 - which may once have been intended for dwelling-houses to be known as 120 and 118 Old Woolwich Road - is open.

5. The open frontage to Old Woolwich Road between No 122 and No 116, and the accessway between Nos 124 and 122, give access to land to the south (or at the back) of Nos 126, 124 and 122 which remains undeveloped, save for the erection of two workshops, a building formerly used as a stable and some garages. That land is, itself, bounded on the south by houses on Orlop Street. I will refer to that land as *"the yard"*.

6. By a lease dated 24 February 1972 ("the 1972 lease") the College demised to the appellant, Mr Brian Mayrick, "*All that piece or parcel of land situate at the rear of 122/124 Old Woolwich Road ... which with the dimensions and boundaries thereof is shown and delineated on the plan annexed thereto and thereon coloured pink ... Together with a right of way in common with any others entitled thereto with or without vehicles over the passageway coloured brown*". The appeal bundle contains what purports to be a copy of the plan annexed to the 1972 lease; but that copy plan has no dimensions marked, the boundaries of the land demised are not delineated or coloured pink and the passageway is not coloured brown. Be that as it may, the land demised by the 1972 lease plainly includes the yard; and the reference to a right of way over the passageway suggests that the northern boundary of that land abuts the southern end of the passageway between Nos 122 and 124.

7. The 1972 lease was for a term of 14 years from 25 December 1971. There is a dispute whether, following the bankruptcy of Mr Mayrick in 1981 the lease was disclaimed by his trustee in bankruptcy; or whether it continued for its full term to December 1985. In the event nothing turns on that.

8. Mr Mayrick went into possession of 124 Old Woolwich Road as tenant of the College at about the time of, or shortly after, the grant of the 1972 lease. By a conveyance dated 31 October 1986 the College conveyed the freehold interest in No 124 (and a large number of other properties in the area) to North West Kent Housing Association Limited ("NWKHA"). NWKHA transferred the property to Hyde Housing Association Limited ("Hyde") in 1991; and Hyde sold and transferred the property to Mr Mayrick (as sitting tenant with the right to buy) in 1998. Mr Mayrick was registered under title number TGL155476 as proprietor with title absolute of No 124 on 18 January 1999.

9. By a further conveyance, also dated 31 October 1986, the College conveyed 122 Old Woolwich Road (and many other properties in the area) to Hyde. That conveyance included the accessway between Nos 124 and 122, but subject to an easement of way in favour of the yard to the south. No 122 was registered under title number TGL473976. On 24 November 1994 the property within that title was transferred by Hyde to Mr Michael Moloney; and, on 20 March 1997, the property was transferred on by Mr Moloney to Miss Marisol Gray and Mr Steven Dunne. Included with those transfers was a very small parcel of land immediately adjacent to and to the east of that property within title TGL473976, which (it seems) was occupied with No 122. Miss Gray and Mr Dunne were registered as owners of that land, with possessory title, under title number TGL110440.

10. The conveyances dated 31 October 1986 included, respectively, the gardens of Nos 124 and 122. And, as I have said, the conveyance of that date to Hyde included the accessway between Nos 124 and 122. But neither of those two conveyances of 31 October 1986 included a small parcel of land between the two gardens and immediately to the south of (and, in effect, a continuation of) the accessway. Nor is that small parcel within any of

the titles TGL473976, TGL110440 and TGL155476. For convenience I will refer to that small parcel as "*the accessway extension*". It was part of the land which had been demised by the 1972 lease.

11. Following the termination of the 1972 lease, the same land, together with Nos 116 and 114 and other land between those properties and the yard, was demised by the College to a third party, Mrs Jacqueline Mason-Hamlyn trading as the Chale Motor Company, by a lease dated 14 January 1987 ("the 1987 lease"). The 1987 lease was for a term of 15 years from 24 June 1985. A copy of the plan annexed to that lease, contained in the appeal bundle, shows plainly that the land demised includes what I have described as the accessway extension between the gardens of Nos 124 and 122.

12. On 18 July 2000 Mr Mayrick obtained registration, under title number TGL176377, as proprietor with possessory title of a parcel of land to the rear of 122 Old Woolwich Road. It is, I think, in dispute whether that land (or any part of that land) formed part of the land let to Mrs Mason-Hamlyn under the 1987 lease. Mr Mayrick's contention is that the whole of the land now within title TGL176377 was within the land conveyed to Hyde in 1986; and so was formerly within Hyde's title TGL473976. Registration of the land within title TGL176377 was effected pursuant to a statutory declaration made by Mr Mayrick on 29 March 2000.

13. On 16 October 2001, in proceedings brought by the College against Mrs Mason-Hamlyn, in the High Court (under reference HC0100062) the College obtained an order, by consent, for possession of "the land described in the particulars of claim as 114 and 116 Old Woolwich Road and land at rear of 122 and 124 Old Woolwich Road".

14. At or about the same time the College lodged with H M Land Registry a statutory declaration made on 27 September 2001 by the then Clerk, Major General Sir Iain Mackay-Dick. It is reasonably clear that the statutory declaration was made with a view to obtaining registration of parts of the Riverside Estate then in the ownership of the College. Those parts of the estate are shown on a plan annexed to the statutory declaration. The plan includes land behind and to the south of 126, 124 and 122 Old Woolwich Road, the two properties known as 116 and 114 Old Woolwich Road and the land between those properties and the yard. Broadly, the plan shows the land demised by the 1987 lease. But the land shown on the plan does not include the land within title TGL176377; it does not include the land within title TGL110440; and it does not include what I have described as the accessway extension. The land shown on the plan to Major General Mackay-Dick's statutory declaration of 27 September 2001 was subsequently registered under title TGL204146. The effect was that the accessway extension was not within that title. It remained unregistered land.

The 2002 proceedings

15. On 13 July 2002, having determined the 1987 lease by forfeiture and obtained an order for possession against the lessee, Mrs Mason-Hamlyn, the College commenced proceedings against Mr Mayrick in the Woolwich County Court (under reference WO202610). The relief sought in those proceedings was possession of land described in the particulars of claim as "*the Green Land*", "*the Red Land*" and "*the Blue Land*", an order for rectification of the register so as to remove the Red Land from title TGL176377, a declaration that the College remained the owner of the Blue Land, an injunction requiring Mr Mayrick to remove the fence enclosing that land with the garden of No 124 Old Woolwich Road and damages for trespass.

16. It is, I think, common ground that the Green Land (which, unhelpfully, has been edged blue on the relevant plan in the appeal bundle) is the yard demised by the 1972 lease and, subsequently, part of the land demised by the 1987 lease. It was land in respect of which the College had obtained the order for possession against Mrs Mason-Hamlyn. It includes the land within title TGL204146 (registered following the September 2001 statutory declaration) and it includes the unregistered accessway extension. It was alleged, in the particulars of claim, that Mr Mayrick was in occupation of part of the Green Land.

17. The Red Land (for the purposes of the 2002 proceedings) includes land which is within title TGL176377, to which I have already referred; and to which, as I have said Mr Mayrick had obtained registration of a possessory title notwithstanding the 1987 lease (if and to the extent that that land formed any part of the land demised by that lease). The Blue Land, which is part of the accessway extension, had been enclosed and incorporated as part of the garden of Mr Mayrick's property at 124 Old Woolwich Road.

The compromise agreement

18. Following mediation, those proceedings (WO202610) were compromised by an agreement ("the compromise agreement") the terms of which are set out in a letter dated 4 April 2003 from the College's solicitors and countersigned by Mr Mayrick on 9 April 2003. Paragraphs 1 and 2 of that letter were in these terms:

    "1. *Our client, ("Morden College"), to transfer to your client, Mr Brian Mayrick, workshop 1 and the land to the rear of 122 Old Woolwich Road in the trustees' ownership to the north of the boundary of the new fence to be erected between points X and Y on the attached plan.*

    2. *Mr Mayrick to transfer to Morden College the land at the rear of 122 Old Woolwich Road comprised in the title TGL176377, save for the part lying to the north of the new fence.*"

    The plans attached respectively to the particulars of claim in proceedings WO202610 and the compromise agreement show two workshops lying immediately to the south of the land within title TGL155476 (124 Old Woolwich Road). Workshop 1 is the northerly of those two workshops: that is to say, it is on the boundary of the land within that title. Workshop 2 abuts workshop 1, but the western wall of workshop 2 extends a short distance to the west of the western wall of workshop 1. Point X on the plan attached to the compromise agreement is at

the northwest corner of workshop 2. Point Y is at the southeast corner of the garden of 122 Old Woolwich Road (the northeast corner of the land within title TGL176377). The land to the north of the boundary line X - Y includes land within title TGL204146. It also includes what I have described as the accessway extension (which, as I have said, includes the Blue Land). As I have said, the accessway extension is not within title TGL204146.

19. The effect of the compromise agreement - put broadly - is that the dispute between the parties was to be settled by treating the agreed boundary as lying along the northern wall of workshop 2, the line X - Y and the eastern boundary of the land within title TGL110440 and the eastern boundary of No 122. Land to the north of that boundary was to belong to Mr Mayrick: land to the south of that boundary (and to the south of the garden of No 122) was to belong to the College. The Red Land (or, at least, so much of that land as was within Mr Mayrick's title TGL176377) was to be transferred to the College. The Blue Land (incorporated within the garden of No 124) was to be transferred to Mr Mayrick. Mr Mayrick was to have the accessway extension and a parcel of land (within the College's title TGL204146) which lay between the accessway extension and the boundary X - Y and which was immediately to the west of workshop 1. Paragraphs 1 and 2 of the compromise agreement provided for effect to be given to that settlement by appropriate land transfers. The transfers were to be completed on 1 June 2003.

Events following the compromise agreement

20. It seems that in preparation for completion on 1 June 2003 - or within a few weeks thereafter - the College erected the new fence on the boundary line X - Y (as the compromise agreement required) and submitted to Mr Mayrick's solicitors a draft transfer of land to the north of that boundary, based on the assumption that all the land to be transferred was within the College's title TGL204146. On 3 July 2003 Mr Mayrick's solicitors took the point (in a letter of that date) that title TGL204146 did not include the land (or all the land) that the College were obliged to transfer under the compromise agreement. They wrote:

"*We have to date proceeded on the basis that your clients own the piece of land which they purported to own in the Particulars of Claim in the proceedings and which they have stated throughout they own and which they intended to transfer to our client as part of the terms of settlement of this dispute. The current situation is that your clients have not proved title to that piece of land. ...*

So far as we can gather that piece of land is not registered to anyone, and we have had no explanation from you as to the current situation. It is clear that what has been suggested about that piece of land being included in that title was inaccurate, and we think that our client is entitled as a matter of urgency to a full explanation."

That letter was followed by another, dated 24 July 2003:

"*The question we raised about the strip of land which your clients purported to own is simply that you have not proved title to it. We fully appreciate what you are saying about ownership, but so far, despite requests, your property department has failed to give any proof of title. All they have done is to submit a Land registry title which clearly has no relevance to that piece of land which your clients have agreed to transfer to ours.*

We must say that we are a little concerned that your clients have failed to register the 'ancient title to the property' which they maintain they hold, because the matter is not quite as simple as you are suggesting. We must tell you that the Hyde Housing Association is maintaining that it owns the land and a simple Statutory Declaration is unlikely to suffice particularly where there appears to be a dispute as to ownership and it would seem that there must be a different consideration to that part of the land which is currently a pathway.

We think your clients must set out in clear and unequivocal terms the basis on which they purchased the land or how it came to be in their possession. We assumed it was by deed of gift, and if that deed is not available, to give some kind of an explanation. Certainly we will wish the Land registry to confirm their approval to the title before completion. ..."

21. Following those letters there was a meeting between solicitors at which the College agreed to provide a further statutory declaration. On 29 August 2003 the solicitors for the College wrote: "*I enclose a copy of the plan amended at our meeting upon which I understand you are to take your client's instructions together with an amended transfer in respect of the lands to be transferred by my client to yours and a further copy of the (unamended) transfer from your client to mine. "I have prepared a statutory declaration which is presently with my client for approval and I hope to revert to you shortly for your consideration.*"

The copy plan enclosed with that letter shows that the land which the College intended to convey pursuant to the compromise agreement comprised workshop 1, land to the west of workshop 1 (and north of the line X - Y) and the accessway extension. That land is coloured red on the plan.

22. Although there is no copy in the appeal bundle of the statutory declaration to which reference is made in that letter, it was described by Mr Mayrick at paragraph 33 of the defence which he filed in these proceedings: "*The second draft Statutory Declaration to be sworn by the Claimants' Estate Manager Mr David Boyne was forwarded to the Defendant for his approval. This document claimed that the Claimants had been for a period considerably in excess of 40 years in continued and undisputed possession of the property and that no other person was in possession or occupation of the property.*"

Mr Mayrick was not content for the matter to proceed in that way. His position was set out in the same paragraph: "*The Defendant was informed by way of a recorded telephone conversation that his former solicitors had agreed to accept the second Declaration without challenge which would result in the Land registry recording the*

Claimants as freehold owners of this parcel of land without the necessary proof of title. The defendant refused to be party to this further attempt at misrepresentation and insisted on proof of title by some other means. The Claimants have failed to provide such evidence. . . . This [the claim that the College had been in possession of the property to be transferred] was a clear contradiction of the previous Statutory Declaration of 2001 where Major General Sir Iain Charles Mackay Dick had excluded the same parcel from his Declaration."

23. By a conveyance dated 2 October 2003 Hyde purported to convey to Mr Mayrick, without consideration, (inter alia) the accessway extension. Mr Mayrick applied to be registered as proprietor of the land conveyed to him. He supported that application by a statutory declaration dated 30 September 2003. The College objected to registration. By way of opposition it lodged a statutory declaration made by Mr Boyne, the property manager to the trustees, and dated 18 November 2003. Mr Boyne stated that, from his knowledge and the records available to him, he could confirm that the trustees had, for a period considerably in excess of 40 years prior to that date, been "*in continued and undisputed possession of the property and of the rents and profits known to Morden College as the land to the rear of 122 Old Woolwich Road, London, SE10 ('the Property') for the benefit of Morden College.*" The Property was said to be shown edged red on a plan. No copy of that plan has been included in the appeal bundle; but it is, I think, reasonable to assume that it must (at the least) have included within the land edged red the land conveyed by the conveyance dated 2 October 2003 and that (probably) it included the land coloured red on the plan sent with the letter of 29 August 2003.

24. On 24 December 2003, Mr Mayrick - who was, by that date, acting in person - wrote to the College:

"Throughout our property dispute, the Morden College solicitors have clearly indicated, both in the Caution application and in subsequent correspondence to the Land Registry, that the trustees had in their possession unregistered documentary evidence which would prove title to the land they claimed. In paragraphs 4 & 5 of Major General Sir Mackay-Dick's Statutory Declaration, and that of Mr Boyne's recent Declarations, it has been clearly admitted that there are no deeds or documents relating to the disputed strip of land as previously claimed or to the rear parcel of land subject to an agreement for a land swap. ...

In the circumstances I now realize that the Morden College have always known throughout the litigation that they did not have any rights over the land they claimed and that Hyde Housing Association had good title to the land by way of adverse possession. Most importantly as from 1 November 1998 the Morden College have been debarred by statute from reclaiming the land which they have ignored since the conveyance of October 1986.

It is now clear that I was induced by misrepresentation at the Mediation hearing to enter into a contract which involved a land swap of two parcels of land which in law were both rightfully mine and not in the ownership of the Morden College....

As you know I have reclaimed my land and declared the agreement arising from the Mediation to be rescinded. Please accept this letter as formal notice that as from 29 December 2003 I will resume my normal working use of the land with title no TGL176377."

On 5 January 2004 the solicitors for the College replied to that letter. They wrote:

"For the avoidance of doubt, neither our client nor this firm have ever claimed that our client had a paper title to any of the land in question. This is not claimed in the proceedings and was not stated at the mediation. Nevertheless, it is not correct to say that our client does not have title, having been in possession, and/or in receipt of rents and profits for a period of over 100 years. Therefore, as such, there is indeed evidence by way of the various leases that our client has been in receipt of rent and profits in respect of what your client describes as "the disputed strip of land" and "the rear parcel of land subject to an agreement for a land swap."

These proceedings

25. The present proceedings were commenced by the College in the Central London County Court. The claim is for specific performance of the compromise agreement of 9 April 2003 and for injunctions to restrain Mr Mayrick from occupying any part of the Green Land and the Red Land (as described in proceedings WO202620) other than such parts thereof as were to be transferred to him under the compromise agreement. In his defence to that claim, dated 8 May 2004, Mr Mayrick asserted (so far as material in the present context) that the College "misrepresented their freehold interest in the premise subject to the dispute and the Defendant was induced by the Claimants' representation to enter into the agreement of 9 April 2003".

26. By an application notice dated 31 August 2004 the College sought summary judgment under CPR Pt 24. The application came before His Honour Judge Cooke. By his order of 3 December 2004 he gave the College the order which it had sought.

27. In the course of his judgment the judge rejected Mr Mayrick's contention that the compromise agreement did not sufficiently identify the land to be transferred - and so did not meet the requirements of section 2(1) 0f the Law of Property Act 1989. He held that, when construed in the light of the facts known to the parties - and, in particular, with the knowledge that the agreement was made in order to compromise the disputes which were the subject of the litigation in proceedings WO202620 - the land to be conveyed by one party to the other was be identified by reference to the claims made in the proceedings. So the land to be conveyed or transferred by the College under paragraph 1 of the compromise agreement was workshop 1 and such land to the rear of 122 Old Woolwich Road and to the north of the new fence as the College had, in the proceedings, claimed to own.

28. Second, the judge rejected Mr Mayrick's contention that the fact that the statutory declaration made in September 2001 did not include all the land to the north of the new fence line which the College was required to convey (as, clearly, it did not) was determinative of the issue whether the College did own any land not so included; and so prevented the College from relying on the statutory declaration made by Mr Boyne in November 2003. In particular, he rejected the contention that the second statutory declaration was inconsistent with the first. As the judge put it, it could not be inferred, from the statement in the first statutory declaration that the College owned the properties identified in that declaration, that the College did not own any other property in the area. The judge thought that the second statutory declaration "would normally fully support an application to register (absent anybody with a better title)".

29. It has been shown, by subsequent events, that the judge's view on that point was correct. In a letter dated 12 July 2006 the Land Registry confirmed that: *"Land registry treats applications by Morden College, supported by a statutory declaration in a similar form to that declared by Mr Boyne on 18 November 2003, as part of ancient possessions, held by Morden College for very many years. Normally Land registry is prepared to grant Absolute title to applications supported by such a declaration. In this particular case, Absolute freehold title would have been granted for the land edged red on the plan marked "DJB1" with Mr Boyne's declaration, all the more so if the transfer formed part of an agreed resolution of the dispute between Mr Mayrick and the College."*

30. Third, the judge rejected Mr Mayrick's contention that the College had lost whatever title it might have had to what I have described as the accessway extension (but to which the judge referred as "the Rear land") by reason of the adverse possession of Hyde, as had been alleged by Mayrick in his statutory declaration of September 2003. The judge explained his understanding of that contention in the following words: *"It is claimed by Mr Mayrick that Hyde let the Rear land to him, received the rents and profits and thereby barred the College's title if any by adverse possession. So it followed that the College lost their title and Hyde were able to convey the title (as they have now purported to do) to Mr Mayrick."*

    The judge pointed out that the accessway extension (the Rear land) had been included both in the demise made by the 1972 lease and in the demise made by the 1987 lease. It followed in his view, for the reasons that he set out, that time could not have begun to run against the College, as freeholder, until the determination of the 1987 lease in October 2001.

31. Fourth, the judge rejected Mr Mayrick's contention that he had been induced to enter into the compromise agreement by a misrepresentation on the part of the College or its agents. The judge identified the representations on which (as he thought) Mr Mayrick relied in the following passage of his judgment:
    "It was not clear until Mr Mayrick started to address me precisely what the misrepresentation was. As matters emerged there appear to be two grounds
    (a) that in the course of negotiation the agents told Mr Mayrick that the College owned the Rear Land. This induced the making of the contract (Mr Mayrick relying upon it) and it turned out to be wrong....
    (b) Mr Mayrick says that when he went in to the mediation the agents told him that the College's title to all its land in the area was an ancient undocumented title. In fact by the time of the mediation this statement, as regards all the land except the rear Land was historical because the General's declaration had led to registration of the remainder."

    The judge recognised that, on an application by the College for summary judgment, he should accept that Mr Mayrick would be able to establish, at trial, the two representations which he had alleged. But he was not persuaded that either representation gave rise to grounds for rescission of the compromise agreement. As to the first, he said this: *"This is however no stronger than the allegation (dealt with above) that the College did not own the rear Land. I have already come to the conclusion that there is no real prospect of being able to show that they did not. There is therefore no real prospect of showing that the representation was false."*

    As to the second representation, he said: *"... in the context of an allegation of false representation which should lead to the avoidance of the contract it has some very odd features thus*
    (i) the representation breaks down as follows (a) that the college owned the land (all of it) (b) that they could make title to it but (c) they could only make title by statutory declaration
    (ii) as regards the Rear Land the representation remained completely accurate because it was never registered
    (iii) as regards the remainder, title could indeed be made but by a more satisfactory route. (because the land had since been registered, though on the footing of the ancient possessory title).

    Thus representations (i)(a) and (b) remained, and remain, true, representation (i)(c) remains true as regards the rear Land the only difficulty is with representation (i)(c) as regards the rest. Even if the representation was fundamentally true, that there was never a paper title, all that had changed was that the 'non-paper' title had been used as the basis of registration.

    It seems to me to be a fundamentally fallacious argument to say that a purchaser is entitled to refuse performance because he contracted on the basis that title would be made by a less satisfactory method and it now turns out that title can be made by a more satisfactory way (albeit based completely on the old way). It is slightly more complex to rationalise this in terms of strict legal principle but to my mind the easiest approach is to day that the inaccuracy of the representation is not a material inaccuracy. It simply does not matter."

The appeal to the High Court

32. Mr Mayrick appealed to the High Court. That appeal came before Mr Justice Hart in December 2005. Mr Mayrick was then represented by counsel. The judge dismissed the appeal for the reasons which he gave in the judgment which he handed down on 23 March 2006, [2006] EWHC 574(Ch).

33. After describing the position on the ground and the inter-relationship of the various parcels of land, analysing the issues in the earlier proceedings WO202620 and setting out the relevant terms of the compromise agreement, Mr Justice Hart summarised (at paragraph [21] of his judgment) the three issues which (as he thought) had been raised by Mr Mayrick at the hearing before Judge Cooke:

> *"[21] The defendant appeared in person at the hearing below. His contention was that the issues which he had raised were not fit to be determined by a summary process. Those issues were, in essence, whether the contract complied with section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989, whether he had been induced to enter into the contract by a false representation that the College had a possessory title to the land agreed to be transferred, and whether the College was entitled, under the contract, to force on to the appellant a title based solely on the evidence as to possession before the court."*

34. In addressing the second and third of those issues, the judge said this, at paragraph [22] of his judgment:

> *"[22] The misrepresentation allegation took two forms before the judge. One was that the representation as to the College's possessory title was false in that part of the land to be transferred was in fact registered. The other was that it was false because possessory title could not be shown to the unregistered part. Before me only the second of those points is taken. Accordingly the second and third issues involve exactly the same point of substance, namely as to the quality or sufficiency of the [respondent's] title to the Rear land for the purposes of the contract. It is convenient to deal with that issue first."*

In that context the judge adopted the meaning which had been given to the phrase "the Rear land" by Judge Cooke: it is the land which I have described earlier in this judgment as the accessway extension.

35. The judge observed that there was no reason to doubt that, prior to 1972, the College was the owner of the Rear land by virtue of an ancient undocumented title. As he put it, at paragraph [23] of his judgment:

> *"[23] It owned what I have described as the yard, it owned No. 124, it owned No. 122 and it owned the Accessway land. That unity of ownership left the Rear land completely enclosed by land owned by the College. There is absolutely no reason to doubt that the Rear land was in the College's ownership along with the rest."*

He thought that the land demised by the 1972 lease had included part (but not all) of the Rear land: paragraph [24]. He referred to the evidence of Mrs Mason-Hamlyn (in a witness statement dated 24 October 2004 which had been before Judge Cooke) that, between 1981 (when Mr Mayrick had been declared bankrupt) and 1986 the Rear land *"beyond the 'boundary gates"'* had been under the control of the tenants of 122 and 124 Old Woolwich Road. But he pointed out, at paragraph [29] of his judgment, that:

> *"[29] ... For so long as those tenants were tenants of the College no acts of possession by them in relation to the Rear land could have operated to bar the College's title to the Rear land. The presumption is that a tenant who encroaches on adjoining land of his landlord for the relevant period of limitation does so for the benefit of his landlord. The effect is that the landlord's freehold title to the land is not barred but the land is treated as an addition to the tenancy: see* ***Smirk v. Lyndale Developments*** *[1975] Ch. 317, C.A., approving at 337H and 340E the judgment of Pennycuick V.C at first instance (ibid. at 321 and in particular 326H and 332H-333A)."*

He noted that, from 31 October 1986, the tenants of Nos 122 and 124 had become, respectively, tenants of Hyde and of NWKHA. On the basis that the tenants continued to have control of the Rear land (or any part thereof) "their encroachment enured for the benefit of their respective landlords": judgment, paragraph [32].

36. The judge then referred to the grant of the 1987 lease, to the sale by NWKHA of the freehold of No 124 to Hyde in March 1991, to the purchase of that freehold by Mr Mayrick in 1998 and to the forfeiture of the 1987 lease in 2001. He noted that it was Mr Mayrick's evidence (supported by Mrs Mason-Hamlyn) that his use of the Rear land had continued (in common with the tenant of No 122) until the sale of No 122 to Mr Moloney in 1994; and that, after the sale to Mr Moloney of the small parcel of land in title TGL110440 to which I have referred earlier in this judgment and the enclosure of the garden of No 122 to incorporate that parcel, Mr Mayrick had had exclusive use of the Rear land. He explained that, on those facts, it was Mr Mayrick's case that : *"... that from 31st October 1986 Hyde, by its tenants at No. 124 and 122, was in possession of the Rear land adversely to the College and that, accordingly, by 31st October 1998 the College's title had become barred."*

37. The judge then set out the College's case. As first put, it was said on behalf of the College that its title could not have become barred by acts of dispossession by the tenants of Nos 122 and 124 (or by Hyde) because the Rear land had always been subject to a tenancy, and time could not run against the College until the tenancy had expired. But, as the judge observed, it was conceded in the course of argument by counsel for the College that *"if time had started to run against [the College] in 1986 it would continue to run as against [the College] notwithstanding the grant of the 1987 lease unless the tenant under the 1987 lease dispossessed the squatter so that the latter was no longer in occupation and control."* So, if time had started to run against the College by reason of the possession by Hyde (through its tenant) in 1986, the grant of the 1987 lease to Mrs Mason-Hamlyn was no answer to a claim that the College had lost its title by 1998.

38. The judge had pointed out, however, (at paragraph [30] of his judgment) that, on Mr Mayrick's own evidence, the acts of dispossession which had occurred were not the acts of one tenant in relation to other property of his landlord, but acts by the tenants of two different properties. And he had asked, rhetorically: "If the acts of the two tenants, viewed collectively, were sufficient in principle to have the effect of adding the land to their respective tenancies, to which tenancy is the land to be added?" At paragraph [44] he said this:

> *"[44 ... I find it difficult to see how time can have started to run in favour of Hyde as against the College until at the earliest 1995 when, on the appellant's case, he as Hyde's tenant of No. 124 claims first to have obtained exclusive possession of the Rear land. Before that time the position appears to have been:*
>
> *i) during the period 1986 to 1991 he was tenant of NWKHA and shared possession of the Rear land with Hyde's tenant at No. 122. That shared possession cannot have had the effect of starting a period running in favour either of Hyde or NWKHA as against the College for the simple reason that it was not, from the point of view of either of the tenants, exclusive;*
>
> *ii) during the period from 1991 to 1995 the position in relation to possession does not change save that Hyde is now the freeholder in respect of both Nos. 124 and 122. Even if it could be argued that the shared possession of its tenants during this period can be ascribed to Hyde as freeholder of one or other of the two properties (or perhaps both), a period of 12 years such possession had not elapsed before the College issued its claim form in the county court proceedings (23rd July 2002) in which it sought possession (inter alia) of the Rear land...."*

He expressed his conclusion at paragraph [45]:

> *"[45] My conclusion is, therefore, that nothing had happened between 1972 and the date of the contract to bar the title which the College undoubtedly had to the Rear land in 1972. It follows that any representation made by the College in the negotiations leading to the contract was a true representation."*

39. The judge then turned to the question whether the College had sufficiently proved its title for the purposes of the compromise agreement. He noted that counsel for Mr Mayrick had advanced two reasons why the attempt by the College to prove its title by statutory declaration had failed: (i) that the statutory declaration did not satisfy the obligations implied in an open contract for the sale of land and (ii) that the title proffered was unreliable.

40. The College did not challenge the general proposition that, under an open contract, title must be traced from a good root to the point when the then legal owner was dispossessed. But it was submitted that that general proposition must yield to the circumstances of the particular case. In the present case, it was said, Mr Mayrick's own evidence was that representations had been made to him in the course of the negotiations that the College's title was an *"ancient"* title or *"an unregistered ancient title"*. Mr Mayrick's own case - in relation to the representation which he said had been made to him - was quite inconsistent with any expectation on his part that the College would prove title by showing a good documentary root of title and then some ancient act of dispossession by the College of the notional paper owner.

41. The judge accepted that submission. He accepted that, having regard to what Mr Mayrick himself asserted he had been told about the College's title in negotiations leading to the compromise agreement, the obligation on the College under that agreement was to prove possessory title to the land conveyed. And that was what it had done.

42. The judge went on to say this, at paragraphs [57] and [58] of his judgment:

> *"[57] In any event the suggestion that the title offered left the appellant at risk that it might be upset is inconsistent with the case advanced by the appellant himself as to the potential source of any attack on the College's title. On his case the only person who could attack the College's title was the appellant himself, since his case (supported by Hyde) was that Hyde had acquired a possessory title to the Rear land and that, as between himself and Hyde, the Rear land ought to have been included in the conveyance to him of No. 124. That factor, not necessarily relevant in the same way to the misrepresentation claim, seems to me fatal to any argument that the title offered by the College put him at any risk.*
>
> *[58] The short answer to the point, however, is that as between the College on the one hand and Hyde/the appellant on the other, the College did have good title to the Rear land. It may very well be that, if the College had been contracting with a third party to sell the land, the third party with notice after contract of Hyde/the appellant's claims might have put himself in a position to rescind the contract by requiring the College, within some reasonable time, to provide evidence that those claims were bad ones. In those circumstances the College might have found difficulty in providing the requisite proof within the requisite time. However in the present case the appellant did not rescind the contract on the ground of any delay by the College in proving its title but on the assertion that the College had no title which it could prove. That was, in my judgment, a misconception."*

43. The judge then addressed the submissions made in relation to what he had identified as the first of the three issues before him: whether the compromise agreement complied with section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. He held that it did. At paragraph [62] of his judgment he said this:

> *"[62] I agree with the judge that when one considers, as one is entitled to, the factual matrix, there can be no doubt whatsoever as to the identity of the land which the College was to convey. It was common ground in that litigation that the College owned the Green land. The College made no claim to own anything beyond the Green land. The Green land included the Rear land. There were unresolved disputes in that litigation as to the precise*

> *boundary of the Green land on the East (the Blue land) and the West (the Yellow land). Both those disputes related to land north of the line X-Y and to the rear of No. 122 and were thus resolved by the College's agreement to transfer the land described in clause 1 of the contract to the appellant.... Nor can I see that the fact that, on a literal reading, not all of the Rear land is in fact to the rear of No. 122 causes any uncertainty. Against the background of what was agreed, and what was in dispute, in the county court litigation it is perfectly clear what the description meant...."*

The point is not pursued on this appeal and I need say no more about it.

This appeal

44. The appellant's notice was (I think) settled by the counsel who had appeared on his behalf before Mr Justice Hart; although, in the event, Mr Mayrick was not represented by counsel at the hearing of the appeal. It is said that the grounds of appeal which give rise to an important point of practice or principle, or which provide a compelling reason why this Court should entertain a second appeal in this matter, are: (i) that the judge wrongly conducted a mini-trial on an appeal in relation to an application for summary judgement in a highly complex conveyancing dispute; (ii) that the judge wrongly made findings of fact on such an appeal; (iii) that, in arriving at those findings of fact, the judge made a plain and obvious error; and (iv) that the judge failed to take account of evidence that could reasonably be expected to be available at trial.

45. In giving permission to appeal Lord Justice Neuberger thought that there was nothing in the first of those grounds. He observed ([2006] EWCA Civ 840, [3]) that: "*That argument, if too readily acceded to, encourages respondents to Part 24 applications to try and make the case seem as complicated as possible, with a view to persuading the judge not to decide it. In my view, this court should be very slow indeed to interfere with a judge who is prepared to delve into a case with a view to avoiding a trial if it is just to do so.*"

I respectfully agree with that view. There is no basis for the criticism that either Judge Cooke or Mr Justice Hart went beyond the proper scope of the task which had been set by the application made under CPR Pt 24. They were each scrupulous in avoiding a decision on contested facts. Where necessary, each made assumptions in favour of Mr Mayrick, based on the premise that he would succeed in establishing, at trial, the facts which he had alleged. Although a decision that the College should have the summary judgment which it sought required a careful analysis of the transactions which had taken place - by reference to the plans annexed to the leases, the 1986 conveyances and the particulars of claim in the earlier proceedings and to the various registered titles - that analysis was well capable of being made without a trial. There is, indeed, nothing in the first of the grounds advanced on behalf of the appellant.

46. The two points which persuaded Lord Justice Neuberger to grant permission for a second appeal were (i) that the College should not be allowed to force on Mr Mayrick a possessory title in circumstances where the College could not show who had a good paper title - that is to say, could not show who had been dispossessed by the College when the College itself first went into possession - and (ii) that the judge was wrong to conclude, on the evidence before him, that Mr Mayrick had not shown 12 years adverse possession of the accessway extension by Hyde during the period that he had been Hyde's tenant of No 124.

The claim to adverse possession of the accessway extension

47. It is pertinent to have in mind, in relation to the second of those points, that the judge's conclusion was not based on submissions which had been made to him by the College. The judge explained the position at paragraph [46] of his judgment:

> "*[46] The point noted at paragraphs 30 and 44 above had played no part in the submissions made by counsel before me at the hearing, and I thought it right to give Mr Clark an opportunity to indicate whether he adopted it and Miss Holland to reply by further written submissions. Mr Clark did adopt it, and Miss Holland did not seek to argue that on the basis of the factual assumptions on which it was based that it was ill-founded as a matter of law. She did, however, seek to introduce, under the guise of the further written submissions which I had invited, entirely new evidence to the effect that the appellant's possession of the Rear land north of the points F-G had not been shared with the tenant of 122 from May 1988 onwards. No explanation was, however, given as to how this could be reconciled with paragraphs 14 and 17 of the appellant's own witness statement, or as to why this evidence had not been adduced before the judge. Insofar as Miss Holland's further submissions can be interpreted as an application to adduce fresh evidence on the hearing of this appeal, there do not seem to me to be good grounds for its admission.*"

Lord Justice Neuberger, when granting permission for the appeal to this Court, observed ([2006] EWCA Civ 840, [7]) that: "*As to the second point, it may be that the judge was entitled to base his decision on what was said in particular in paragraph 17 of the defendant's witness statement ... and to refuse to admit further contradictory evidence on the point. However, the point at issue was only thought of by the judge, had not been thought of by Judge Cooke, who first decided it, and the statement in paragraph 17 was not made with that point in mind, and was corrected, with significant evidence, when the judge invited further submissions on the point, albeit that he refused to admit the further evidence. Particularly as the defendant had been in person until shortly before the hearing before the judge, that may be said to be a little harsh, especially on a Part 24 application and in relation to a point thought up by the judge at the hearing.*"

48. The witness statement to which the judge refers at paragraph [46] of his judgment was made by Mr Mayrick on 25 October 2004 - that is to say, in opposition to the application for summary judgment which was to be heard

by Judge Cooke. Paragraph 17 is in clear and unambiguous terms: "*The 1987 lease clearly purported to demise to Mrs Mason-Hamlyn, the premises and adjacent premises and most importantly the accessway from the boundary gates of the premises at the rear of 122 & 124, right through to the road entrance. The Claimants could not and should not have included any part of the accessway in the 1987 lease as firstly the tunnelled archway land had been sold to Hyde Housing Association and* ***secondly the disputed land was at all material times in the control and possession of first the tenants of 122 & 124 and later after 1995 in the exclusive possession of myself as tenant of 124....***" [emphasis added]

In that context "*the premises*" means the land demised by the 1972 lease and claimed by the College in the earlier proceedings (the yard): see paragraphs 1 and 8 of the witness statement. The reference to "adjacent premises" is to the additional land demised by the 1987 lease. The disputed land is that part of the land demised by the 1972 lease which was not within the College's registered title TGL204146 (the accessway extension or the Rear land): see paragraph 2(c) of the witness statement.

49. As Mr Justice Hart observed, in paragraph [46] of his judgment, the new evidence which Mr Mayrick wished to adduce, through his counsel's written submissions following oral argument, was to the effect that, from May 1988 onwards, his control of the accessway extension or Rear land had not been shared with the tenant of 122 Old Woolwich Road. It was said that, in May 1988, the tenant of No 122 (Mr Richard Hudson) was re-housed because that property was out of repair, that No 122 was then boarded up and that, from 1988 to 1995, that property was unoccupied. That contention was supported by documentary evidence; including, in particular, a notice under section 76 of the Housing Act 1984 and confirmation from the local authority's electoral office that Mr and Mrs Hudson had changed address in 1989. For my part, I would accept that the new evidence (supported, as it is, by documents) is prima facie credible. But, as the judge pointed out, no explanation was offered as to how the new contention could be reconciled with the clear statement in Mr Mayrick's own witness statement; nor why the evidence had not been adduced before the judge.

50. That remains the position. There is nothing in the skeleton argument prepared by counsel for the oral hearing of the renewed application for permission to appeal which explains how the new contention could be reconciled with Mr Mayrick's earlier evidence. In the course of that hearing (transcript, 1 June 2006, page 7A) counsel offered the explanation that Mr Mayrick "*forgot the date*" on which the Hudsons had moved out of No 122.

51. Were the appeal to Mr Justice Hart an appeal from an order made after a full hearing, I would have no doubt that the judge would have been entitled to refuse to admit the further evidence first advanced in closing submissions. There was no good reason why that evidence could not have been adduced before Judge Cooke. It cannot be said that Mr Mayrick was taken by surprise; he knew that the facts in relation to control of the accessway extension between 1986 and 1998 were relevant; he had, himself, addressed those facts at paragraph 17 of the witness statement on which he had relied before Judge Cooke. But I do not think it right to decide this appeal on that basis. I have in mind the observations of Lord Justice Aldous in ***Royal Brompton Hospital NHS Trust v Hammond and others*** [2001] EWCA Civ 550, [19] and [20], with which the other members of the Court (Lord Justice Clarke and Lord Justice Laws) agreed. On an application for summary judgment a court must take account of evidence that can reasonably be expected to be available at trial, if the matter were allowed to go to trial. In the present case the judge knew that the totality of the evidence on which Mr Mayrick wished to rely was not contained in his witness statement. He could not rule out the possibility that, at trial, Mr Mayrick would persuade a court that he should be allowed to contradict what he had said in paragraph 17 of his witness statement. I think that the judge should have addressed the matter before him on the basis that it was (at the least) possible that Mr Mayrick would be able to establish, at trial, that he had had exclusive control of the accessway extension from May 1988.

52. If the judge had addressed the matter on that basis, he would, I think, have reached the conclusion that it was possible that Mr Mayrick would be able to establish at trial that, for the purposes of a claim by Hyde to adverse possession of the accessway extension, time began to run against the College in May 1988. On that basis NWKHA was in possession of the accessway extension from May 1988 to March 1991 through the exclusive control exercised by Mr Mayrick, as tenant of No 124; Hyde, as successor in title to NWHKA of No 124, was in possession of the accessway extension from March 1991 through the exclusive control exercised by Mr Mayrick as its tenant from March 1991 until December 1998; and, thereafter, Mr Mayrick was in possession as successor in title to Hyde. By the date that the College commenced proceedings WO202620 in 2002, it had been out of possession for more than twelve years.

53. Nevertheless, as it seems to me, the point does not assist Mr Mayrick - for the reason which the judge gave at paragraph [57] of his judgment. As the judge pointed out, it was Mr Mayrick's case that whatever title Hyde had acquired to the accessway extension had been acquired by way of accretion to its title as freehold owner of No 124 - through encroachment by its tenant - and ought to have been transferred to him on the transfer of that title in December 1999. As the judge put it, in the passage to which I have already referred: "*On his case the only person who could attack the College's title was the appellant himself, since his case (supported by Hyde) was that Hyde had acquired a possessory title to the Rear land and that, as between himself and Hyde, the Rear land ought to have been included in the conveyance to him of No. 124.*"

54. It must be kept in mind that the accessway extension was part of the Green Land for the purposes of the 2002 proceedings. The question whether the College had title to the accessway extension, as between the College and Mr Mayrick, could have been raised as an issue in those proceedings. But it was not. Paragraph 2(d) of the

amended defence and counterclaim, endorsed by Mr Mayrick with a statement of truth on 25 November 2002, was in these terms:

"*(d) It is admitted that the Claimants are the freehold owners and entitled to possession of the Green Land (as delineated on the Defendant's Plan ...)*"

The Defendant's Plan shows the accessway extension within the land edged green. It, together with other land to the south, is shown cross-hatched purple. The significance of the cross-hatching is explained in paragraphs 3(g) and (h) of the amended defence:

"*(g) The Defendant, as owner and registered proprietor of 124, is entitled to a right of way with or without vehicles over that part of the land cross-hatched purple which lies to the north of the gates at points F1-G1 ('the northern Purple Land') on the Defendant's Plan for the purpose of access to and egress from the rear of 124.*

(h) The Defendant, as the owner and registered proprietor of the Yellow Land, is entitled to a right of way with or without vehicles over all of the land cross-hatched purple ('the Purple Land') on the Defendant's Plan for the purpose of access to and egress from the Yellow Land"

In that context the Yellow Land is the land within title TGL176377. The gates at points F1-G1 appear to mark the southern boundary of the accessway land; that is to say, they are "*the boundary gates*" which separate the accessway extension from the land within the College's title TGL204146. Mr Mayrick did not claim title (by adverse possession or otherwise) to the accessway extension. His claim was to a right of way over that land, which he accepted was owned by the College.

55. The College's claim to specific performance, in the present proceedings, arises out of a compromise of the 2002 proceedings. That compromise was made on the basis that Mr Mayrick admitted that the College was owner of the accessway extension. He set up no adverse title of his own to that land; nor any adverse title in Hyde. His interest in the accessway extension (as claimed) was limited to a right of way. But the facts on which he now relies to assert an adverse title were known to him in 2002 and at the time of the compromise agreement in April 2003. He chose not to raise, then, the claim which he seeks to raise now. And he obtained, under the compromise, an undisputed title to the accessway extension. In my view it is not, now, open to Mr Mayrick (in those circumstances) to assert, in effect, that he will not get what he bargained for under the compromise on the ground that, on a true understanding of the position at the time of the compromise agreement, he already had title by adverse possession to the accessway extension.

The need for the College to show documentary title to the land which it was to convey under the compromise agreement

56. As I have sought to explain, the obligation assumed by the College under the compromise agreement was to convey so much of the land to the north of the boundary X - Y on the plan annexed to that agreement as, in the proceedings WO202610, it had claimed to own. The land north of that boundary which the College had claimed to own was the Green Land. Part of the Green Land was within the College's title TGL204146; the remainder was unregistered. Mr Mayrick claimed that the Blue Land was within his title TGL155476 as part of the garden of No 124; but, in so far as it was not, it was within the unregistered part of the Green Land. And, as I have said, the College's title to the Green Land had been admitted by Mr Mayrick in the proceedings.

57. In those circumstances (absent some representation upon which Mr Mayrick could rely) it seems to me that the obligation assumed by the College under the compromise agreement was to convey such title as it had to the land which it had claimed to own. In so far as part of that land was registered, it could satisfy that obligation by a transfer of land out of the registered title. As to the remainder, it could satisfy the obligation by a conveyance accompanied by a sufficient statutory declaration as to long possession: that is to say, by a statutory declaration sufficient to enable Mr Mayrick to obtain registration. In my view the judge was plainly correct to hold that, on the basis of the representation which (as both he and Judge Cooke thought) Mr Mayrick was asserting had been made to him - that the College's title was an "*ancient*" or an "*unregistered ancient title*" or an "*ancient undocumented title* - the College had done what was necessary.

The representation alleged

58. Both Judge Cooke and Mr Justice Hart proceeded on the basis that Mr Mayrick was asserting that the representation made to him at the time of the negotiations leading to the compromise agreement was that the College's title was "*an ancient undocumented title*" (Judge Cooke) or "*an ancient unregistered title*" (Mr Justice Hart). Indeed, Judge Cooke thought that Mr Mayrick's complaint was that he was being offered a registered title to part of the land to be conveyed when he was entitled to an unregistered title to the whole - see the passages to which I have referred at paragraph [31] of this judgment. The basis for Judge Cooke's understanding (as appears from that passage) is that that is what he thought he was told by Mr Mayrick in the course of the hearing. The basis of Mr Justice Hart's understanding is found at paragraphs 5 and 21 of Mr Mayrick's witness statement of 25 October 2004; at paragraph 7 of an affidavit of Peter McBryer, sworn on the same day (to which Mr Mayrick refers in his witness statement) and in what he was told by counsel (transcript, 15 December 2005, page 4C): "*so as to be clear about my case, it is an undocumented, ancient title which was the representation*".

59. In this Court, Mr Mayrick was not represented by counsel. Submissions were made on his behalf by Mr Silverman, his solicitor, whose firm had been on the record at the time of the hearings before Mr Justice Hart and Lord Justice Neuberger. I should add that we refused an application by that firm, made on the day before the hearing of this appeal, to come off the record; on the basis that to leave Mr Mayrick without any representation at the hearing would be unreasonable. We had already refused an application to adjourn, to enable counsel to be instructed.

We took the view that the hearing had been fixed for some months and that Mr Mayrick had had ample time (if he wished to do so) to put the solicitors in funds to instruct counsel.

60. Mr Silverman submitted that the representation on which Mr Mayrick wished to rely was not that which had been in the minds of Judge Cooke and Mr Justice Hart. It was said that Mr Mayrick had been told that the College had an unregistered documentary title. There is some hint of this in Mr Mayrick's letter of 24 December 2003 (to which I have referred earlier in this judgment) where he wrote that: *"Throughout our property dispute, the Morden College solicitors have clearly indicated, both in the Caution application and in subsequent correspondence to the Land Registry, that the trustees had in their possession unregistered documentary evidence which would prove title to the land they claimed.*

And the suggestion that Mr Mayrick had been told that he could expect a documentary title is made at paragraph 3.1 of the grounds of appeal in the appellant's notice and in paragraph 5.1 of counsel's skeleton argument - despite the fact that assertion had been expressly disavowed by counsel before Mr Justice Hart in the passage that I have mentioned.. But it is not pleaded by Mr Mayrick in his defence - where the representation relied on is that the College claimed to be freehold owner of the land to be conveyed under the compromise agreement - and it is not mentioned in his witness statement (to which I have referred), And it is, as it seems to me, inherently very unlikely that the College - whose advisers must have been well aware that it did not have documentary title to its unregistered land - would have claimed that it did. In that context I note the letter dated 5 January 2004 from the College's solicitors to which I have referred.

61. In those circumstances Mr Silverman was pressed to identify with some particularity the occasion on which it was said the representation on which Mr Mayrick now seeks to rely was made. He accepted that there was no evidence that a representation in those terms was made at the mediation. He assisted us by identifying the basis for the sentence in Mr Mayrick's letter of 24 December 2003. It comes from a letter to Mr Mayrick from the Assistant Land Registrar, dated 7 February 2002. The Assistant Land Registrar wrote, in connection with an objection by the College to the registration of a possessory title to the Red Land (TGL176377): "*Although I have not seen formal evidence of the Trustees unregistered documentary title to the land in question,* ***their solicitors have clearly indicated, both in the Caution application and in subsequent correspondence, that they do have unregistered title to that land****. On that basis it appears that the Trustees may have the right to apply for rectification of your registered possessory title if they so wish, on the grounds that the land in question was the subject of the two Leases and any adverse possession was not in respect of the freehold title.*" [emphasis added]

The similarity of the words which I have emphasised with those which appear in the letter of 24 December 2003 suggests that the letter of 7 February 2002 is indeed the source of the assertion in the later letter. But the letter of 7 February 2002 (which, in any event, is not a representation made by the College to Mr Mayrick) provides no basis for the assertion, in the letter of 24 December 2003, that the College's solicitors had claimed to have in their possession "unregistered documentary evidence which would prove title to the land . . ."

62. In my view, even giving the most generous ambit to the approach indicated by this Court in ***Royal Brompton Hospital NHS Trust v Hammond and others*** [2001] EWCA Civ 550, this matter should not be allowed to go to trial so that Mr Mayrick can advance a case based on a representation which is unsupported by any evidence, which is raised for the first time in this Court and which was expressly disavowed by his counsel before Mr Justice Hart.

Conclusion

63. The facts in this matter require detailed analysis. But when analysed on the basis of the unchallenged documentary evidence, and after making all proper assumptions in favour of Mr Mayrick on matters which are in dispute, it can be seen that there is no real prospect of a successful defence to the College's claim for specific performance of the compromise agreement. The conclusion reached, in turn, by Judge Cooke and Mr Justice Hart was correct. I would dismiss this appeal.

LADY JUSTICE HALLETT:

64. I am indebted to Chadwick LJ for his detailed analysis of this case. For the reasons which he gives, I too would dismiss this appeal.

MR JUSTICE LINDSAY:

65. If, by way of a compromise of disputed issues as to ownership between two or more parties, one of the parties becomes, as between them, the undisputed owner, can he later seek to undo the compromise between the parties to it by claiming (or even proving) that, properly examined in the light of facts which he knew of at the time of the compromise but had chosen not then to have raised, his ownership had been indisputable? Unless a firm negative answer is given to that question countless compromises intended to avoid further litigation would prove to be little more than an irresistible invitation to yet later proceedings. For my part, I would thus single out for particular emphasis paragraph 55 in Chadwick LJ's judgment. I agree both with the conclusions reached by Chadwick LJ and his reasons for them; I too would dismiss this appeal.

Jason Silverman of Rokeby Johnson Baars LLP for the defendant.
Wayne Clark (instructed by Wedlake Bell for the claimants.