PROPERTY CHAMBER
FIRST–TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO:2015/0208

BETWEEN

Mr Mark Law
Mrs Annabel Law

Applicants

and

Mrs Elizabeth Leonie Haider

Respondent

Property address: Land Associated with The Stables, Main Road, Narborough, Kings Lynn PE32 1TE

Title number: NK171471

Before: Judge John Hewitt
Sitting at: Kings Lynn County Court and Family Court Hearing Centre
On: Wednesday 16 December 2015

DECISION

KEYWORDS Right of pre-emption – restriction in the register

Decision

1. The Decision of the Tribunal is that:

   1.1 The Chief Land Registrar shall cancel the application by the applicants dated 19 September 2015 to enter a restriction in the register; and

   1.2 Any application for costs shall be made in accordance with the directions set out in paragraph 105 below

2. The reasons for the decisions made are set out below.

NB later reference to a number in square brackets ([ ]) is a reference to the page number of the trial bundle provided to me for use at the hearing. The prefix 'A' refers to the applicants' trial bundle and the prefix 'R' refers to additional documents provided by the respondent.

The application and the background to it

3. This reference concerns an application to enter in the register a restriction to protect a claimed right of pre-emption.

4. The applicants (Mr and Mrs Law and together the Laws where the context permits) are the registered proprietors of Narborough House and an adjacent large parcel of land known as the Park. Evidently the Laws purchased Narborough House in or about 2001. The Park was purchased later as I will explain shortly.

5. The respondent (Mrs Haider) together with her husband, Mr Ghulam Haider, (Mr Haider, and together with Mrs Haider, the Haiders where the context permits) are the registered proprietors of four adjacent or close by parcels of land one of which comprises the former stable block to Narborough House which has been adapted to comprise residential accommodation. The Haiders purchased most of their quite substantial estate of land in or about the mid 1990's. The titles to the Haiders properties are as follows:

Narborough Stables (the Haiders' home)	NK209611
The Woodland (or Whin Close) – the subject of these proceedings	NK171471
Sovereign Meadows	NK211881
Boundary Wall between Narborough Stables and Narborough House	NK376336

   The Woodland comprises some 20 acres or so of ancient woodland, largely unmanaged in recent years. Sovereign Meadows, on the opposite side of the highway, Main Road, comprises some 10 acres of ancient woodland, also largely unmanaged in recent years.

6. Unfortunately the Laws and the Haiders do not get along as neighbours. They are mistrustful and distrustful of one another.

7. In 2003 the Haiders commenced court proceedings against the Laws part of which concerned a dispute over the location of a boundary between their respective parcels of land. Following mediation those proceedings were compromised in 2004 by way of an order in Tomlin form [A1]. The terms of compromise were set out in the schedule to the order. Material for present purposes is paragraph 4 which is in these terms:

"4. In the event the Claimants [the Haiders] *or their estates selling any or all of the remaining land currently comprised in title number NK171471 and/or Sovereign Meadows they shall give the Defendants* [the Laws] *the first option to purchase that land."*

It was not in dispute that the expression 'Sovereign Meadows' as used in the paragraph 4 is a reference to title number NK 211881 [A51].

8. It may also be noted that other terms of the compromise agreement included:

8.1 The transfer by the Laws to the Haiders of a wall along a common boundary. The transfer was dated 12 June 2008 and on 3 July 2008 the Haiders were registered at Land Registry as proprietors of that parcel of land [A63]; and

8.2 The sale by the Haiders and the purchase by the Laws of the Park at a price to be determined in accordance with paragraph 3, if not agreed. That sale duly went through (eventually) and on 14 July 2008 the Laws were registered at Land Registry as proprietors of the Park under title number NK376690 [A65].

9. During the course of 2014 the Laws heard in a roundabout way that the Haiders had or may have put up their home for sale. It was not clear to them whether any such sale might include all or part of the Woodland or Sovereign Meadows which are the subject of the pre-emption agreement.

10. On 17 September 2014 the Laws entered a unilateral notice on the title of The Woodland (Whin Close) [A38] and 27 October 2014 they entered a unilateral notice on the title of Sovereign Meadows [A51]. The applications for those notices claimed that the Laws were intending purchasers under the terms of the Tomlin order dated 9 August 2004 [A33 - as an example].

11. On 19 September 2014 the Laws made an application to Land Registry to enter a restriction in form L on the title of the Woodland. Mrs Haider objected to that application by letter dated 30 October 2014 [A69]. The gist of the objection was that 'no documentation to support the notice has been supplied by the applicant and none exists' and 'paragraph 4 gives a first option to Mr & Mrs Law for which the remedy is to put in an offer when the land is put up for sale, but nothing more'.

12. Land Registry, in its administrative capacity, could not dispose of the objection by agreement and on 18 March 2015 the Chief Land Registrar referred the application to the tribunal pursuant to section 73(7) Land Registration Act 2002 (the Act). Directions were duly given and reference was duly listed for hearing.

13. Evidently by an application dated 21 October 2014 the Laws made an application to Land Registry to enter a similar restriction on the title to Sovereign Meadows [A30]. It

appears that in the absence of an objection to that application Land Registry has entered the restriction on the title.

14. On the afternoon of 15 December 2015 I had the benefit of a site visit to the Woodland. Present were Mr Andrew Gore, counsel for the Laws, and Mrs Haider. Whilst of general interest to me no physical features of the land relevant to the matters I have to decide were drawn to my attention.

The Hearing

15. The hearing took place on 16 December 2015. The Laws were represented by Mr Andrew Gore of counsel. Mrs Haider represented herself and was accompanied and supported by Mr Haider.

16. Oral evidence was given by Mrs Law who was cross-examined by Mrs Haider. Mr Law had filed and served a witness statement which, in effect, simply agreed with all that was said in Mrs Law's witness statement. Mr Law was tendered as a witness but Mrs Haider said that she did not wish to cross-examine him.

17. Oral evidence was given by Mrs Haider who was cross-examined by Mr Gore.

18. Following the giving of oral evidence Mr Gore and Mrs Haider each made closing oral submissions.

19. On 8 January 2016 I made a directions order inviting the parties to make written submissions on four specific points which had occurred to me whilst preparing the first draft of my decision. In response to those directions I have received submissions as follows:

    Those points were:

    1. The subject right of pre-emption and whether it may be protected by a restriction on the register;
    2. Is the right of pre-emption void for uncertainty?
    3. If the subject right of pre-emption is not void for uncertainty but as drafted does not provide for a workable scheme or process should a court imply such terms as may be necessary to give business efficacy to it? And
    4. If the pre-emption were to be found to be void, spent and/or otherwise unenforceable would it be reasonable to exercise the power under rule 40 and direct the Chief Land Registrar to cancel the unilateral notices entered on the registers of title numbers NK171471 and NK211881 and the restriction entered on the register of title number NK211881?

20. In response to that order I have received:

    1. Submissions on behalf of the Laws dated 4 February 2016, prepared by Mr Gore;
    2. Submissions in answer on behalf of Mrs Haider dated 18 February 2016 (the covering letter stated these had been drafted by counsel but they do not bear his or her name, but that is not of any significance); and
    3. Submissions in reply dated 14 March 2016 prepared by Mr Gore.

Those submissions were very helpful to me and I am grateful to the persons who drafted them.

21. On or about 15 March 2016 the tribunal office received an application by the Laws for permission to adduce a further witness statement of Mrs Laws dated 11 March 2016 and the documents exhibited thereto. That was copied to Mrs Haider. By letter dated 31 March 2016 a direction was issued inviting Mrs Haider to make representations on the application. Mrs Haider did not, in terms, oppose the application but she did submit a further witness statement dated 4 April 2016 dealing with the points raised in Mrs Laws witness statement dated 11 March 2016. Both of those witness statements contain a statement of truth.

22. In these circumstances I grant permission:

    1. To the Laws to rely on Mrs Laws' witness statement dated 11 March 2016, which I have page numbered [A117-127]; and
    2. To Mrs Haider to rely upon her witness statement dated 4 April 2016, which I have page numbered [R32-33]

23. I will make findings on that rival further evidence in the appropriate chronology below.

The issues

24. The issues, as identified by Mr Gore in his skeleton argument presented at the hearing were:

    24.1 Are the Laws entitled to seek the entry of a restriction in respect of the Woodland (Whin Close)?

    24.2 How and when is the right of pre-emption agreement triggered?

    24.3 What stance have the Haiders adopted?

    24.4 Did the Laws lose their right to make an offer for the Woodland?

    24.5 What are the Laws' future rights?

25. In her closing submission Mrs Haider made a plea for guidance on whether the Laws still have a right of first refusal, if so how does it work and when does it all stop?

Findings of fact

26. Before addressing the issues it may be helpful for me to set out my findings of fact based on the written and oral evidence before me.

27. I have put the background matters set out in paragraphs 4-13 above as neutrally as I can such that they are not, or should not be, controversial.

28. In 2003 the Haiders commenced court proceedings against the Laws. I have not seen the pleadings in those proceedings but I am told the focus of them was a boundary dispute concerning a dividing wall. I infer some or part of the dispute concerned the

boundary wall which was conveyed by the Laws to the Haiders and which is now registered with title number NK376336.

During the course of those proceedings the parties agreed to enter into a mediation agreement. Mediation duly took place. Mr Gore said, and Mrs Haider did not dispute, that the mediation was lengthy and fractious.

29. Both parties were legally represented at the mediation but Mrs Haider was unhappy about the way in which her representative conducted and/or was treated during the course of the mediation and felt that she and Mr Haider had been put under undue pressure.

30. Late in the day compromise terms were arrived at. The Haiders were not and are not content with those terms and it may be that the Laws are equally unhappy with the outcome but both parties signed up to it. The terms of the agreement are what they are and it is not now open to either party to resile from them.

31. The terms of agreement were set out in a schedule to a consent order in Tomlin form which is dated 9 August 2004 [1]. The order provides that upon the said terms having been implemented and carried into effect the claim and counterclaim do stand dismissed with both parties bearing their own costs. The order does not recite a 'liberty to apply' provision and there is no express stay of proceedings save for the purposes of giving effect to the matters set out in the schedule which provisions are commonly to found in Tomlin orders, but it may be that those provisions are to be implied.

32. Paragraph 1 of the schedule provided for the transfer by the Haiders to the Laws of the Park. The consideration for that transfer is set out in paragraph 2, being market value of that land less £15,000 plus the transfer by the Laws to the Haiders of a wall marked on the plan. Paragraph 3 set out the method to ascertain the market value of the Park, namely the average of the figures recommended by three named independent and jointly instructed valuers.

33. Paragraph 4 – which is the subject pre-emption agreement (set out in paragraph 7 above) was, evidently brought into the discussion at a fairly late stage of the mediation process. It is noted that the title number of the Woodland is cited but reference to Sovereign Meadows is by name only. I infer from that that none of the parties present had the title documents to Sovereign Wood to hand because that property was not originally the focus of much attention. Mr Gore submitted, and it was not in dispute, that the clumsy and inept drafting of the clause was consistent with the product of a long and difficult day.

34. Implementing paragraphs 1-3 of the schedule did not go too smoothly. It was not until 12 June 2008 that the Laws executed a transfer of the wall to the Haiders and it was not until 13 June 2008 that the Haiders executed a transfer of the Park to the Laws. Evidently this was due to disagreements over the market value of the Park and in the event it was necessary to jointly instruct three valuers and to calculate the average of the figures recommended by them. Even now the Haiders still feel aggrieved that one of the valuers was improperly influenced by the Laws (or someone on their behalf) in the result that the average price was distorted in favour of the Laws. However, be that

as it may, the transfers were duly executed and registered at Land Registry with the result paragraphs 1-3 of the schedule have been implemented and carried into effect.

35. Although the relationship between the Laws and the Haiders continued to be fraught over other issues as regards the schedule not much of note occurred until 2014 when the Haiders instructed agents, Bedfords, to market their property, The Stables and the Boundary wall. The sales particulars at [77] are headed:

"*A most impressive conversion of a Grade II listed stable block with around 20 acres of ancient woodland"*

I infer that reference to the 20 acres of ancient woodland is a reference to the Woodland. Mrs Haider said, and I accept, that they had given verbal instructions to Bedfords to the effect that they would only take offers for the house and would deal with the Woodland separately. In cross-examination Mrs Haider confirmed that reference to 'Lot 2' on the coversheet of the sales particulars was a reference to Sovereign Meadows. I accept that evidence.

36. I find as a fact that the Haiders did not inform the Laws that Bedfords had been instructed in relation to The Stables and/or the Woodland. I do not say that they should have done so, I simply record that they did not. Mrs Haider did not explain why they did not and she simply stated that they (the Laws) found out soon enough. That is correct the Laws did find out the property was on the market within a few days. This was because one of their staff who lived in the village was thinking of selling her home and went onto the Rightmove website and happened to come across reference to The Stables and she mentioned it to the Laws.

37. Mrs Haider alleged that within a few days of the property being on the market Mrs Law called Bedfords and spoke with the selling agent stating that the Woodland was subject to a right of first refusal and that the caller had refused to give her name. The agent then called Mrs Haider to report the call to her. Mrs Haider said that the caller was obviously Mrs Law and she said that the agent had invited Mrs Law to submit an offer. Mrs Haider said that she was unable to call the agent to give evidence because he had moved on.

38. Mrs Law denied making the call referred to but she did accept in her oral evidence that she called into Bedfords office on 2 August 2014 and explained to them the right of first refusal which she had in respect of the Woodland. She said that the agent suggested she write to Mrs Haider reminding her of the right of first refusal. Mrs Law denied that the agent invited her to make an offer for the Woodland. Mrs Law said that as a result of that conversation she wrote a letter to Mrs Haider; it is dated 3 August 2014 [116]; but she had not received a reply. Mrs Haider denied receiving the letter. The first part of the letter dealt with other matters then in dispute. The final paragraph is possibly material to these proceedings and is in the following terms:

"On the subject of land, we would be pleased to discuss the purchase of any of your land should you be considering a sale, under our right to first refusal agreed by the Court."

39. In Mrs Law's witness statement dated 11 March 2016 she says that having checked her documents she had on 9 September 2014 prepared a fax to send to the Burnham office of Bedfords, but she did not send it and instead took it into the Bedfords office on 12 September 2014 on which occasion she handed the fax to Mr Ben Marchbank and discussed it with him. A copy of that fax which is dated 12 September 2014 is at [A127]. The gist of it is that it states the Laws were aware The Stables, the Woodland and Sovereign Meadows has very recently been put on the market, they presume to gauge interest. The fax made mention of the pre-emption agreement and attached a copy of the order dated 9 August 2004. The fax states that they will send a brief letter to the Haiders reminding them of the order and the agreement. Then curiously it ends with the sentence: *"We look forward to your informed response."* Given that the fax was evidently intended to put Bedfords on notice of the matters set out in the fax, it is not clear was response the Laws expected to receive.

Mrs Laws said that in discussion with Mr Marchbank on 12 September 2014 he told her that he had spoken with Mrs Haider about the earlier telephone message and she had told him that the matter had been cleared up.

In support of that evidence Mrs Laws has exhibited an email from Mr Marchbank to which he has attached the fax dated 12 September 2014 and the court order [A125]. Mr Marchbank also attached a copy of a letter dated 19 September 2014 (see para 40 below) which he said had also been delivered to his office by hand, but Mrs Laws says he is error about that because she is certain only the fax dated 12 September 2014 was delivered by hand.

40. Mrs Laws has produced a copy of a letter dated 19 September 2014 which states it was delivered by hand (and a copy sent to Bedfords) [A120]. The letter states:

"We are writing to Bedfords concurrently as we understand from particulars we first saw on the Rightmove website that land has recently been put on the open market with Narborough Stables.

As a reminder, enclosed is a copy of the court order agreed to in 2004.

We would like to confirm that we would like to exercise our right to acquire all the land offered for sale comprising title number NK17471 and Sovereign Meadows.

We would be prepared to assist you in the sale of Narborough Stables by your retaining a piece of land within title number NK17471.

Please could you confirm that you are prepared to sell the land by Thursday 24th September 2014

Yours …"

41. In paragraph 11 of her witness statement dated 11 March 2016 Mrs Laws says that she did not receive a reply to the letter dated 19 September 2014 and she submits that the letter shows that they did try to set the ball rolling and that the absence of a reply led them to conclude that later letters they received form the Haiders inviting an offer were not genuine requests for an offer.

42. In her witness statement dated 4 April 2016 Mrs Haider does not deny receipt of the letter dated 19 September 2014 and she does not say that she replied to it. Mrs Haider does however make some observations about the letter. She says it was simply informing Bedfords of the court order.

43. At the hearing Mrs Haider submitted that the invitation by the agent to submit an offer made during the August telephone call was compliant with the pre-emption agreement and that the Laws had not made an offer and thus she and her husband were free to sell elsewhere.

44. As to the 2 August 2014 telephone call to Bedfords I find that Mrs Law did make that call. I infer from paragraph 8 of Mrs Law's witness statement dated 11 March 2016 [A118] that the 'message' referred to was the 2 August 2014 telephone call. I am reinforced in that finding because the evidence is quite clear that the Laws were anxious that Bedfords, as the selling agents, should be aware of the pre-emption agreement.

Mrs Haider had no direct evidence about the call and relied solely on what she says the agent told her. I do not know if the agent Mrs Haider refers to is Mr Marchbank but I infer that it was because in paragraph 8 of Mrs Law's witness statement dated 1 March 2016 she says that Mr Marchbank told her that he had spoken to Mrs Haider about the 'message'. At the time, on 2 August 2014, it was speculation on the part of Mrs Haider that the anonymous caller was Mrs Law, but I find that has now been confirmed. I am reinforced in this conclusion by the matters set out in paragraphs 48 and 61 below.

I find that if in the course of that telephone call an invitation was made to the caller to submit an offer it was not made by the agent on behalf of his principal (the Haiders) to Mrs Law direct and pursuant to the pre-emption agreement. On Mrs Haider's own evidence at the time of the call Bedfords were not aware of the right of pre-emption and they had not been given a direction or instruction by the Haiders to invite the Laws to make an offer for the Woodland, or indeed, Sovereign Meadows.

I infer it is more likely than not that a selling agent would say to anyone who called about a property 'write in with an offer' or words to that effect. To my mind that is an agent saying to the world at large: 'I have a property on my books please make an offer to buy it and I will pass it on to my principal.' Something along those lines is far different from the grantor of a right of pre-emption inviting the grantee to submit an offer pursuant to it.

45. In any event in the light of later developments, the outcome of this case is not going to turn on exactly what was said in the course of the telephone call.

46. As to the letter dated 3 August 2014 [116] I find that evidence of Mrs Law in her witness statement dated 11 March 2016 puts into this into doubt. It is now clear from the more recent evidence that Mrs Law called into Bedfords' office on 12 September 2014 and as a result of that visit wrote a letter to the Haiders on 19 September 2014. It seems to me unlikely that there were two visits to Bedford's office resulting in two letters being sent.

I find it more likely than not that Mrs Law made one telephone call to Bedfords on 2 August and made one visit to them on 19 September 2014 which resulted in the 19 September 2014 letter being sent.

In so far as it may be relevant I find that if the letter of 3 August 2014 was sent to the Haiders, which I doubt, it was not received by them.

For avoidance of doubt I record that at this time the position of the Haiders was that they were only seeking offers for The Stables and the Boundary Wall and in their instruction to Bedfords had 'parked' the sale of the Woodland and Sovereign Meadows.

47. In the event Bedfords were unable to introduce a purchaser for The Stables and in early 2015 the Haiders instructed Chewton Rose, whose sales particulars are at [83].

What was offered for sale was the Haiders home, The Stables. At [84] it is recorded, amongst other things, that:

"Twenty Acres (Subject to Measured Survey) of Ancient Wet Woodland by Separate Negotiation

Ten Acre Meadow also Available by Separate Negotiation"

I infer that the brochure was intended to invite prospective purchasers of The Stables also to make a bid for one or other of those parcels of land if they wished to do so.

48. By an email dated 23 March 2015 [96] a representative of Chewton Rose reported several things to Mrs Haider, including:

"We also have had a [sic] *anonymous call today from a lady stating there is a court order on the land. We obviously take our instructions from yourselves but just wanted to make you aware. We tried to press the lady for some details but she just hung up on us."*

In an email in reply the same day Mrs Haider said:

"Thanks for the information RE anonymous lady. Her name is Anabel [sic] *Law and she is our next door neighbour. They have 'first option' on the land but haven't got the funds and are creating mischief. If and when the house is sold we have to give them the valuation price and a time limit of about 14 days. We are under no obligation to accept."*

That exchange of email was not challenged by the Laws.

I find on this evidence that by this time, March 2015, the Haiders were seeking offers for the Woodland and Sovereign Meadows and that if they received an offer they would then put it to the Laws. I am reinforced in this finding by what is set out in paragraph 49 below.

49. The Haiders sent to the Laws a three-page letter dated 9 April 2015. Most of it concerned other matters in issue and dispute between them. So far as material to these proceedings and in the context of The Stables being on the market the final paragraph said [101]:

"The land will not be sold until the house is finalised. After that we will consider if we are to put the land on the market or not. If or when we decide to sell will very much depend on how you behave towards us."

In cross-examination on that passage Mrs Haider said that by the expression 'the house is finalised' she meant 'when we had an offer for the house'. I accept that evidence.

50. By letter dated 7 May 2015 [97] the Haiders wrote to the Laws' solicitors, Hawkins Ryan Solicitors. It would appear the letter was in reply some documents having been served by them. In that letter the Haiders made several points:

50.1 That the Laws have been aware for 8 months or so that the property was on the market but have not made an offer;

50.2 Stated: *"In any event, without prejudice to what is said above, Clause 4 of the Agreement sated 4th* [sic] *August 2004 has neither been breached nor ignored by us. The Order refers to 'selling', it is our understanding that until we have received an offer as a result of placing the property on the market we are not 'selling' the property. We do not therefore believe (assuming that the Clause 4 obligation has not been extinguished) that our obligation to offer to sell to the Laws arises until we have received such an offer, not least because there is neither an offer to match nor an offer to beat."*

50.3 Put forward a proposal: *"3. In the hope that matters can be resolved we are proposing that the Laws have 14 days to make an offer for us to consider. We do not regard this timeframe unreasonable in view of them already having had 8 months to make an offer."*

50.4 Suggested that the tribunal proceedings be stayed pending dealing with the matters raised in the letter.

Mrs Law said in evidence that the solicitors did not reply to that letter on instructions and I accept that evidence but she did not explain the reason(s) why her solicitors had been so instructed.

51. By letter dated 15 June 2015 [113] the Haiders wrote to the Laws in the following terms:

"Dear Mr & Mrs Laws

Re: Land associated with The Stables, Main Road, Narborough

We are now in a position to decide what to do with the land. We invite you to put in your offer within 14 days of this letter.

Yours sincerely" etc

That letter was copied to Hawkins Ryan Solicitors.

On the same day a separate letter was sent to Hawkins Ryan Solicitors [111]. It is in these terms:

"Dear Sirs

Re: Land associated with The Stables, Main Road, Narborough

We are now in a position to decide what to do with the land. We invite Mr & Mrs Law to put in their offer within 14 days of the date of this letter.

Yours" etc

52. In evidence Mrs Law said that she and her husband remained very keen to buy the land. Mrs Law confirmed that she received the letter addressed to her and her husband but did not reply to it. Mrs Law was unable to give me an explanation that I could understand as to why not. She also said that they had not been approached about a sale since September 2014. They had received the letter dated 9 April 2015 in which the Haiders had said that they would not sell the land until the house was finalised and she said that correspondence showed that they would not sell to the Laws. When asked what correspondence she was referring to Mrs Law mentioned instructions to Bedfords in August 2014 copied to Chewton Rose in March 2015 [R9] but she acknowledged that she had only recently seen that instruction and she agreed it could not have formed part of her conscious decision not to reply to the letter of 15 June 2015. I find that in April 2015 the Laws were not aware of what progress, if any, had been made as regards the prospective sale of The Stables.

53. Mrs Law went on to say that they believed the invitation to make an offer in the letter of 15 June 2015 was not a genuine invitation, evidently because of the delay since September 2014 and because they believed the Haiders would not sell to them because of the history between them. She said she felt the letter was a sham and that if they had made an offer and it was rejected they would have lost their one and only right to make an offer. They considered it best to ignore it and wait for the proceedings concerning the restriction to be concluded. Mrs Laws said in re-examination that she was unaware that the fact of the application for the restriction gave interim protection pending the outcome of the proceedings. Of course even if there is a restriction on the register the Laws still have the one opportunity to make an offer and are still at risk if it were properly declined.

54. In her witness statement dated 11 March 2016 Mrs Laws now says that the Haider's failure to reply to the 19 September 2014 letter is further justification for the conclusion that they came to, to the effect that the invitation to make an offer set out in the letters dated 7 May and 15 June 2015 were not genuine invitations, but part of some scheme to lure them into a trap in order to deprive them of their rights under the pre-emption agreement. I cannot accept that. At worst what happened in September 2014 the Haiders did not respond to a request: *"Please could you confirm that you are*

prepared to sell the land by Thursday 24th September 2014." Not only was the response time very short it may well be that at that time with no, or little progress with the sale of The Stables, the Haiders were simply not in a position to answer one way or the other.

55. Mrs Haider in her evidence said that the invitations were genuine ones and that she and her husband were keen to sell up and emigrate to New Zealand to be near their son and his family. Mrs Haider said that things had moved on and had changed.

56. I accept Mrs Haider's evidence on this point and I find that the invitations to make an offer were genuine ones. These invitations were made some eight or nine months after the 19 September 2014 letter. By the time of these invitations the Haider's position had changed both as regards their personal circumstances and interest shown from the marketing of The Stables by Chewton Rose. The Haider's had made it clear from quite an early stage that further consideration would be given to the sale of the Woodland and Sovereign Meadows once there was progress with the sale of the Stables.

57. I find that Mrs Law's evidence as to why the invitation to make an offer set out in the letters of 7 May and 15 June 2015 were not replied to unconvincing. It did not appear rational to me in the light of the apparent keenness on the part of the Laws to purchase both parcels of land.

In response to a question from me Mrs Law agreed that as a matter of courtesy her solicitors could have written to the Haiders explaining why the Laws were not able to make an offer at that time, but on instructions they did not do so. Mrs Law did not say that the decision not to reply to the letter was based on legal advice sought and received.

I reject the explanation put forward by Mrs Law. I find that there was no correspondence from the Haiders from which the Laws could reasonably have concluded that the Haiders would not sell to the Laws under any circumstances such that it was appropriate or reasonable to ignore the two invitations to make an offer.

58. I do however accept that part of Mrs Law's evidence to the effect that she was unaware of the interim protection available due to the fact of the application for a restriction, because that is fine legal point which a lay person may well be unaware of.

59. By letter dated 26 June 2015 [R17] Chewton Rose wrote to the Haiders confirming that an offer of £590,000 made on 24 June 2015 had been rejected on instructions and that an improved offer of £605,000 made on 25 June 2015 had, on instructions, been accepted subject to contract. It is not clear to me what parcel or parcels of land were the subject of that offer. I note that the letter was headed: *"Re: NARBOROUGH STABLES, MAIN ROAD, KING'S LYNN NORFOLK PE32 1TE"*

60. By letter dated 16 July 2016 [R18] Chewton Rose wrote to the Haiders a further letter adopting the same heading. That letter stated that contracts had been issued to the buyer's solicitor. It also made reference to title number NK171471 and stated: *"... there appear to remain two pending actions on the title."* and went on to make reference to the subject proceedings before this tribunal. I infer from that reference to title number NK171471 that that property was included in the proposed transaction.

61. By letter dated 6 October 2015 [R19] the Haiders conveyancing solicitors wrote to them in the following terms:

"Dear Mr & Mrs Haider

Your sale of Narborough Stables Main Road Narborough

I am writing following our conversation.

The selling agents Chewton Rose called (Anna-Marie) to inform me that their head office got a call from someone, they did not confirm who they were, but that person insisted on telling them that they were marketing a property that they should not market.

Anna-Marie from Chewton's then got a call herself from a Mr Singh of Hawkins Ryan on behalf of the Laws trying to ask her lots of questions. She confirmed that she cannot divulge the information he was asking for. She asked him if he wanted to put forward an offer on behalf of his clients, which he did not.

Following the call from Hawkins Ryan she suspects that it may have been the Laws who contacted their head office.

If I hear anything further I will update you accordingly."

I find that on the balance of probabilities the person who made the first call mentioned in the letter was Mrs Law. I find it was her practice to make calls to the selling agents to try to dissuade them from achieving a sale or, at the least, with a view to putting a spanner in the works. That call was evidently followed up quite quickly by a call from the Laws' solicitor who may have been trying to achieve a similar objective and/or obtain evidence to support an application for an injunction which was threatened at around that time.

62. By letter dated 7 October 2015 [R20] Hawkins Ryan (on behalf of the Laws) wrote to Chewton Rose. The letter is fairly long. The gist is that it made reference to the right of pre-emption and sought information as what land was included in the proposed sale. In one paragraph it stated:

"As our Clients have 'first-refusal' please would you confirm whether the woodlands are also being sold and if not, the price your Clients would be willing to accept."

The letter also sought details of the Haiders solicitors so that they could correspond with them directly to notify them of the dispute between the parties.

Finally, the letter demanded a reply by 4pm 8 October 2015 failing which the Laws would be advised to make an application to the court for an injunction to restrain the Haiders from selling The Stables (including the woodlands) and an injunction to restrain Chewton Rose from marketing the property.

63. Any reply to the above letter was not put in evidence.

64. In a letter to the tribunal dated 19 October 2015 [R26] Mrs Haider said:

"Since our last letter to you our buyer has withdrawn just a few days before exchange of contracts as they could wait no longer. This is a huge blow to us as the price agreed for the land was the full asking price of £50,000 for the meadows and £100,000 for the woodland. The offer inclusive of the house was £605,000. The estate agent has informed us that due to the aggressive phone calls by Mrs Law to their head office and their solicitor's intimidating phone call to their branch manager plus the threat of further action they will no longer market our property. Plus our solicitors will not allow their name to be given to Mr & Mrs Law as they fear their staff would be at risk given the severe harassment previous solicitors have had to endure."

Mrs Haider was not cross-examined on the above correspondence. It was not in dispute that the Laws through their solicitors had written to the Haiders making a threat of injunction proceedings.

65. Thus as at the date of the hearing the Haiders did not have any of the properties on the market and Mrs Haider said that the house is unsaleable at the moment because of this dispute.

66. From the above evidence I infer that the Laws deliberately decided to ignore the approaches made by the Haiders in the letters dated 7 May and 15 June 2015 so as not to engage with them and decided to make things as difficult for them as they could on the pre-emption front whilst at the same time doing what they could to scupper any prospective offers to purchase which the Haiders might achieve, whether by way of legal initiatives or calls to the selling agents. Given Mrs Law's assertion that she and her husband are keen to buy as much of the Haiders' land as they can I find their approach and style quite extraordinary.

67. Mrs Haider said, and I accept, that whilst she and Mr Haider remain keen to sell The Stables at least and relocate to New Zealand they are equivocal about selling the Woodland and/or Sovereign Meadows. The impression I gained is that they would prefer to sell both of those parcels of land but would not do so under duress or if it was problematic or impractical for them to do so. The Haiders accept realistically that if they were to receive an offer for The Stables which was conditional on them also selling the Woodland and/or Sovereign Meadows, they would be unable to accept such an offer until these proceedings were resolved and the notices and restriction(s) on the titles sorted out.

Discussion of the issues

Are the Laws entitled to enter the restriction?

68. The first issue I need to address is whether the terms of the subject right of pre-emption entitles the Laws to enter the restriction sought in the register.

69. It was not in dispute that a right of pre-emption is an interest in land (section 115 of the Act) and that such a right is capable of protection by way of a notice in the register.

70. The question is whether the right granted can also be protected by way of a restriction.

Of course, notices and restrictions are intended to serve very different purposes. In brief a notice is an entry in the entry in the register in respect of the burden of an interest affecting a registered estate. A notice is entered in the charges section of the register. The notice confers priority on the interest to which it relates. Notices play a central role in the Act. Third party interests are vulnerable on the occasion of a disposition of an estate by reason of the priority rules set out in sections 29 and 30 of the Act. Notices may be 'agreed' or 'unilateral'. A unilateral notice will confer priority if the interest is valid under the general law having been effectively granted or created and is not vitiated by some factor such as misrepresentation or undue influence. The entry of a notice does not necessarily mean that the claimed interest is valid – see section 32(3)

71. On the other hand a restriction affords a more indirect protection. It regulates the circumstances in which a disposition of the estate may be the subject of an entry in the register. It imposes terms which must be complied with before Land Registry may enter a specified disposition in the register. In short it regulates the circumstances in which a specified disposition of a registered estate may be completed by registration. A restriction that is entered to regulate dispositions of a registered estate is entered in the proprietorship register.

72. Section 42 of the Act provides that the registrar may enter a restriction if it appears to him that it is necessary to do so for the purpose of:

(a) Preventing invalidity or unlawfulness in relation to dispositions;
(b) Securing that interests which are capable of being overreached on a disposition are overreached, or
(c) Protecting a right or claim in relation to a registered estate.

73. The manner in which an application to enter a restriction and the process to be followed are set out in Land Registration Rules 2003, rules 91- 94. Standard forms of restriction are set out in schedule 4 to the rules. It is common ground that none of the 33 standard forms listed refers to or mentions rights of pre-emption. Mr Gore has correctly submitted that the list in schedule 4 is not exhaustive.

74. Both parties accept that a right of pre-emption can, in principle, be protected by a restriction on the register, in addition to a notice.

75. Mr Gore submitted that the subject right can and should be so protected. He argued that no distinction is to be drawn between an express promise not to make a disposition and the grant of the pre-emption itself. He cited *Megarry & Wade: The Law of Real Property* paragraph 15-063 and the passage: *"These rights differ from an ordinary option in that they entitle the holder to be offered the land on certain terms only if the owner decided to dispose of it.* He further argued that the giving of a promise by the grantor not to dispose of the land without first offering it to the grantee is inherent in the concept of the grant of a right of pre-emption. As he put it, the Haiders are obliged to offer the land to the Laws before they can sell it to a third party, and put the other way, the Haiders cannot sell it to a third party without first giving the Laws the opportunity to buy it. He said whatever way you look at it the Haiders agreed their normal dispositive rights as freeholders should be restricted.

76. Mr Gore accepted that the form of restriction applied for was too widely drawn, because it applied to all dispositions, not merely the sale of the freehold.

77. Counsel for the Haiders took a contrary view. He argued that the normal starting point is section 42(2) which provides that: *"No restriction may be entered under subsection (1)(c) for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice.* Counsel also relied upon *Rouff and Roper* at paragraph 44.005.

He does however accept that there may be special circumstances where it may be appropriate to protect a right of pre-emption by both a notice and a restriction. He relied upon two passages from paragraph 44.005:

"… there may still be situations in which the entry of a restriction and a notice is possible."

"There may be other situations where protection by a notice and a restriction is appropriate. For example, where a third party wishes to protect the priority of, and to prevent a breach of, a contract, as in the case, of a right of pre-emption."

78. Both parties brought to my attention *Barnsley's Land Options (5th edition)*, which in chapter six discusses rights of pre-emption. Having discussed protection by a notice, there is one sentence:

"In addition, a restriction should be entered against the grantor's title. Again, provision for this should ideally be made in the pre-emption agreement."

I prefer the Haiders' counsel's submission that the above sentence does not support the Laws' submission that *Barnsley* proceeds on the assumption that all rights of pre-emption should be the subject of a restriction

79. Counsel for the Haiders submitted that by the subject right of pre-emption the Haiders gave the Laws the 'first option' to purchase the land in the event of them selling any or all of the land in question. The words used by the parties did not include that the Haiders *"will not sell or otherwise dispose of"* the land before giving the Laws that option. Thus, it is argued there is no express restriction on the disposition of the property in the right granted.

80. Having given careful consideration to the rival arguments put forward I come to the conclusion that the subject right of pre-emption is not capable of being protected by a restriction in the register.

81. I reject the submission on behalf of the Laws that all rights of pre-emption are capable of protection by a restriction and that the subject right should be so protected.

82. In general terms I prefer the submissions advanced on behalf of the Haiders. I hold that ordinarily rights of pre-emption will be protected as to priority by way of a notice. In special circumstances further protection may also be given by way of a restriction. Those special circumstances might include where the grantor expressly agrees to the

entry of a restriction or expressly agrees not to effect a disposition. Neither of those apply in the present case.

83. I am reinforced in this conclusion by the wording in paragraph 6.6 of *Land Registry Practice Guide 19* which concerns Option agreements and rights of pre-emption where it states: *"If the agreement expressly limits the registered proprietor's powers to make a disposition you may also be able to apply in form RX1 for the entry of a restriction to prevent a breach of this provision."* The paragraph goes on to give guidance on the completion of an application form which includes: "*Give details of the agreement, including the date …. and identify the provision in the contract limiting the registered proprietor's ability to make any disposition."*

Although I drew attention to this guidance in the further directions dated 8 January 2016 neither counsel commented on it expressly in their written submissions.

84. I am further reinforced in that conclusion by the brief reference in *Barnsley* paragraph 6-039 where the editors suggest that a restriction should be entered on the grantor's title and that *"… provision for this should ideally be made in the pre-emption agreement."* I acknowledge that point is not the subject of a detailed analysis by the editors but what they do say chimes with Land Registry guidance and the Act.

85. Accordingly, on this point I find that the Laws application to enter a restriction on the title should be cancelled and I will make an order directing the Chief Land Registrar to do so.

86. That of itself is sufficient to dispose of these proceedings. However, other issues have been argued and in case it may be held that I have erred in my main finding I make relatively brief comments on some of those issues.

Is the right of pre-emption void for uncertainty?

87. Both parties agree that the right is not well drafted, it is ambiguous and lacks any mechanism or process.

88. My starting point is that the right is part an agreement to resolve or compromise several land issues between the parties. It was incorporated into a schedule in a court order substantially in Tomlin form. I thus assume that both parties had intended that it should have some meaning and relevance.

89. I am also conscious that in those circumstances the courts will strive hard to do what it can to give effect to what the parties agreed. I also take fully into account the submission made by Mr Gore that the courts have been particularly concerned not to find void provisions in agreements which have been partly performed or an agreement which is part of a wider agreement.

90. However, having considered the rival submissions carefully I prefer those advanced on behalf of the Haiders. In particular I find it of significance that there is ambiguity in what the expression 'selling' may mean and that there is no process, time frame or mechanism to resolve any dispute that there might be as to the price to be paid by the Laws. Whilst the court does have wide discretion to imply terms there are limits to what the court can and should properly do.

91. I therefore come to the conclusion, with some reluctance that the right as granted is void for uncertainty.

If not void what is the proper construction of the right of pre-emption

92. If the right granted is not void for uncertainty what is its proper construction?

93. In terms of the document the right is set out in paragraph 4 and follows quite detailed provisions as to the transfer of two other parcels of land.

94. Applying the usual and modern approach to construction of instruments I come to the conclusion that what the agreement provided for was that if the Haiders (or their estates) contemplated selling or intended to sell the subject parcels of land they would give the Laws 'first option' to purchase the land proposed to be sold. By that all that the Haiders had to do was to invite the Laws to make an offer to purchase. I find that is clear from the expression "' first option' to purchase". The Haiders did not have to make an offer to sell, or name a price for which they would sell. In response to an invitation to the Laws to purchase, it was for the Laws to make their offer. The Haiders were not expressly obliged to accept that offer. Subject to what I say below, I take the view that it is to be implied into the agreement that the Haiders were to be reasonable in their response to any offer which was put forward. I am not persuaded that any or much more would be implied.

95. It must be remembered that what the agreement provided was a 'first option' to purchase. The right was a right of pre-emption and not an option agreement. In the paragraph 3 of the agreement the parties had come to a concluded agreement that a parcel of land would be sold by one to the other and they set out a mechanism to determine the price payable in the event that it could not be agreed. The parties did not go that far as regards the right to make a first offer in respect of the subject parcels of land. It was open to the parties to go on and make provisions to determine the price to be paid for any land that the Haiders might be disposed to sell but they did not do so.

96. On the facts, I have found that twice the Haiders invited the Laws to make an offer to purchase the parcels of land and twice the Laws declined to do so. It was not clear to me the reason why they declined to do so, but that is not material. I therefore find that the right of pre-emption is spent and the Haiders are now free to sell elsewhere should they choose to do so. The Haiders got to the point in May and June 2015 that they wanted to sell the subject parcels of land. They did what they promised to do and gave the Laws 'first option to purchase the land' The Laws did not respond, still less did they make an offer. They had the opportunity to do so but they did not take it. It is not now open to them to complain.

Implied terms

97. If it were to be held that the right of pre-emption is not void and has not been spent, and that the right is still subsisting the question arises as to how the right must be given effect to. Questions arise such as:

- Do the Haiders have to make the first move and offer to sell ?
- Do the Haiders have to name a price?
- If not how is the price to be determined?

- How long do the Laws have to accept?
- If the Laws make a counter-proposal do the Haiders have to respond?
- If so, how long do they have?
- If the parties cannot agree a price how should it be determined?

The list could go on.

98. I accept the submissions made by Mr Gore that most if not all of the above questions can be answered in the sense that a process can be structured, but I am not convinced that it would be right for the court to do so. The task for the court is not to write or rewrite a workable process for the parties, but to give effect to what the parties had agreed. In *The Interpretation of Contracts (5th edition)* by Sir Kim Lewison at paragraph 6:06 the author sets out a useful guideline for a term to be implied:

- It must be reasonable and equitable;
- It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
- It must be so obvious that it goes without saying;
- It must be capable of clear expression; and
- It must not contradict any express term;

99. In *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Limited & anor* [2015] UKSC 72 Lord Neuberger reviewed several authorities and then considered subsequent judicial observations on that authority and whilst noting that it could be dangerous to reformulate the principles he offered six comments on Lord Simon's summary in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* [1977] 52 ALJR 20:

1. The approach is the question: what would the parties have agreed? The court is not strictly concerned with the hypothetical answer of the actual parties but with that of notional reasonable people in the position of the parties;
2. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers the parties would have agreed it if had been suggested to them, those are necessary but not sufficient grounds for implying a term;
3. It is questionable whether Lord Simon's first requirement of, reasonable and equitable, will usually, if ever, add anything - if a term satisfies the other requirements, it will not be unreasonable or inequitable;
4. As Lord Hoffman suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, business necessity and obviousness (Lord Simon's second and third requirements) can be alternatives in the sense that only one of them needs to be satisfied;
5. If one approaches the issue by reference to the 'officious bystander', it is vital to formulate the question to be posed to him with the utmost care; and
6. Necessity for business efficacy involves a value judgment. The test is not one of absolute necessity, not least because the necessity is judge by reference to business efficacy. A more helpful way of putting it is that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

With reference to Lord Hoffman's analysis in *Belize* Lord Neuberger observed that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. He said that Lord Hoffman's analysis might obscure the fact that construing the words used and implying additional words are different processes governed by different rules. Lord Hoffman's observations in *Belize* have been considered by the courts on several occasions including by the Supreme Court in *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56. Lord Neuberger considered that those observations should *"... henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms."*

100. If this matter were before a court I am far from convinced that the court would see fit to imply the number of terms necessary to make the right granted workable.

Should I make an order requiring the Chief Land Registrar to cancel the unilateral notices on title numbers NK171471 and NK211881 and to cancel the restriction on title number NK211881?

101. I have considered the rival submissions on this question. I am conscious that the strict issue before me is the application to enter a restriction in the register of title number NK171471.

102. I will avoid the current contentious issue of exercising a wider jurisdiction. In essence I have found that the Laws do not have the benefit of a valid or enforceable right of pre-emption. That turned on the proper construction of the Act and that is the ratio of this decision. Everything else concerning the right being void for uncertainty, but if not void spent because the Laws did not submit an offer, is obiter. For this reason I do not consider that I should make a direction to the Chief Land Registrar.

103. I hope that my reasoning is clear. If this decision is not successfully appealed the obvious course is for the two unilateral notices to be cancelled and for the other restriction to be cancelled. If they are not voluntarily withdrawn by the Laws it will be open to the Haiders to make applications to Land Registry to cancel them and any objections by the Laws will doubtless be considered groundless.

Costs

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

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

105.1 Any application for costs shall be made in writing by **5pm Friday 10 June 2016**. The application shall be accompanied by a schedule of the costs and expenses incurred/claimed supported by invoices/fee-notes where appropriate. A breakdown shall be given of the work carried by solicitors and the charge-out rate and grade of the fee-earner(s). A copy of the application and

supporting schedule shall be sent to the opposite party at the same time as it sent to the tribunal.

105.2 The recipient of an application for costs shall by **5pm Friday 1 July 2016** file with the tribunal and serve on the applicant for costs representations on the application and on the amount of the costs claimed and any points of objection he or she wishes to take.

105.3 The applicant for costs shall by **5pm Friday 15 August 2016** file with the tribunal and serve on the opposite party representations in reply, if so advised.

106. In the absence of any objections I propose to make a determination on any application for costs, and if appropriate, to assess any costs ordered to be paid, without a hearing and on the basis of the written representations filed and served pursuant to the directions set out in paragraph 101 above.

Dated this 20 April 2016

By order of the Tribunal