Neutral Citation Number: [2012] EWHC 3521 (Ch)

Claim No. HC10104343

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Before Mr Clive Freedman QC sitting as a Deputy Judge of the Chancery Division

BETWEEN:

(1) JANE ELIZABETH AKHTAR
(2) SULEMAN AKHTAR
(3) ASH ISLAND LIMITED
(4) TW ALLEN AND SONS (YACHTS) LIMITED

Claimants

and

(1) CHIRSTOPHER JOHN BREWSTER
(2) LYNN ANNE BREWSTER

Defendants

JUDGMENT

Paul de la Piquerie (instructed by **IBB Solicitors**) for the **Claimants**

Nathaniel Duckworth (instructed by **Stepien Lake**) for the **Defendants**

Introduction

1. The Claim concerns the true boundaries of land owned by the Defendants on Ash Island, East Molesey, Surrey. Ash Island is an island in the Thames. It is near Hampton Palace. Its ownership is divided between the parties to these proceedings (the Claimants' land adjoins the Defendants' land) and two further parties (who share no boundaries with the Defendants).

2. In addition to hearing evidence from a number of witnesses of fact and from expert evidence, and to having within the bundles numerous plans and photographs, at the invitation of the parties, I visited the island with both Counsel on the first day of the trial. This enabled me to appreciate better the issues which I have had to try. It was a worthwhile exercise, and the assistance of both Counsel, which I acknowledge with thanks, was essential to getting the most out of the visit.

3. Ash Island was once in common ownership, but individual plots were sold out by a series of three conveyances entered into on 25th July 1947 ("the 1947 Conveyances"). The 1947 Conveyances are in common form. By the 1947 Conveyances, parts of Ash Island were sold by the then common owners, creating the boundaries which the Claimants ask the Court to declare. The parcels clause in each conveyance described the land conveyed by reference to the attached plan as follows:

> "*All that piece or parcel of land situate in the River Thames and forming part of an Island known as Ash Island East Molesey in the Parish of Hampton in the County of Middlesex which said piece or parcel of land with the abuttals and dimensions thereof (be the same little more or less) is for the purposes of identification only more particularly delineated and described in the plan annexed hereto and thereon coloured pink and green...*".

4. Each plan records the dimensions of the boundaries of each of the three plots being conveyed. The Claimants' case is that these plans specify the dimensions of the land conveyed in 1947 and now owned by the parties.

5. The parcel of land from which the Defendants' title is derived was conveyed out by a conveyance dated 25th July 1947 and made between (1) Charles William Kent, John William Calder and James Ashurst Le Brasseur (2) George Henry Booker and (3) Walter Bernard Patrick Bowen.

6. In 1969, the First Claimant's parents, Douglas Chapman and his wife, moved to Ash Island, at first as residents on a houseboat and then living on a bungalow on that which appears in a plan with colours denoting various parts of the island as being in orange under title number TGL21123 and which is the Second Claimant's home. The First Claimants' parents lived in the bungalow from 1974 to 1984.

7. In 1984, the First Claimant's parents decided to divide their land at Ash Island among their three children, of whom the First Claimant is the oldest. Her brother Roderick and she were given parts of Ash Island as gifts. The bungalow was sold to their other son Andrew Chapman, but at a reduced price.

8. Andrew Chapman lived in the bungalow, until it was repossessed by the bank in 1991, and the First Claimant's parents then bought it back from the bank and lived there until 2000 when the First Claimant's mother died. Her father, Douglas Chapman continued to live until 2002 when the Second Claimant acquired the same.

9. The First Claimant became the owner of the brown coloured land (title number SGL430989 on the plan to the north western side of the Defendants' land).

10. The Second Claimant is the son of the First Claimant. As a child, he lived with his parents in Lahore, Pakistan, where his father practised as a lawyer. He came to England from time to time in summer holidays to stay with his grandparents. He stayed in the summers of 1971, 1976 and 1978. He says that he helped his grandfather with aspects of his mooring business, and that he roamed and explored the island. He first lived on the island in May 2001 with his grandfather, before buying the orange land from his grandfather in 2002. His grandfather retired to March, Cambridgeshire. From then on, he managed the mooring business, as well as continuing to work for a time as a chartered accountant.

11. In 1976, the First and Second Defendant are married to each other. They acquired Nonsuch II, a motor torpedo boat which then as now was moored alongside this land. From and after that point, the Defendants lived on Nonsuch II and held a tenancy of land which they subsequently purchased.

12. On 8 September 1989, the Defendants purchased this land and were registered as its proprietors on 23 October 1989 under title number MX187785. The Defendants have conducted a mooring business from the island, and the First Defendant has been a professor of human resources management.

13. In late 2009, the Defendants sold off the parcel of land at the south eastern corner of their land to Mr and Mrs Selwyn Smith (who had previously been tenants). This is marked in yellow in the coloured plan and has title number TGL334195.

14. The Claimants are the current registered proprietors of the various parcels of land which adjoin the Defendants' land. The Claimants are connected parties. In addition to the First and Second Claimants, the Third and Fourth Claimants are companies controlled by the Second Claimant. The Third Claimant's land is on the southern perimeter of the island to the west of the Defendants' land, it is under title number TGL211125 and it is marked

yellow on the coloured plan. The Fourth Claimant's land is to the east of the Defendants' land, it is under title number MX188025 and is marked blue on the coloured plan.

15. One of the parties whose land does not adjoin the Claimants' land, and who accordingly is not a party to this action is Andrew Chapman, the First Claimant's brother. His land is to the west of the island and is coloured pink on the coloured plan.

16. This case involves a dispute in respect of land which is only about 10 feet in width. The dispute, at its heart, concerns the value of mooring rights. Both the Second Claimant and the Defendants use the land on Ash Island to operate the business of granting mooring rights on licence. The licence fees which boat owners pay for mooring rights depends on the length of their boats. The Second Claimant's evidence is that residents whose boats are moored to his land pay between £256 and £319 per annum for each metre of boat length as a licence fee. Sometimes, boats are moored three abreast. On the basis of a yield of 5%, the Second Claimant has calculated the value of the action as being worth several tens of thousands of pounds at paragraph 12 of his first statement.

17. In 1997-1998, there were communications between the First Claimant and the Defendants. By a letter dated 8 October 1997, the First Claimant wrote to the Defendants saying that a boat between 008 and Nonsuch should not be overlapping her mooring area. It did not identify what that was. A note on the letter dated 30 October 1997 written by the First Claimant records that the First Defendant had rung and said that he would move his boat back. A year later on 7 October 1998, the First Claimant wrote and said that the boat had not been moved back, she did not mind that it was overlapping the land, but wanted a written assurance that if ever she needed it, it would be moved back. By a letter dated 29 October 1998, the Second Defendant wrote and said that she was unaware of encroachment on to the First Claimant's mooring space a year earlier, and that it had been removed and that it had overlapped by approximately 2 feet. She said that in view of the

letter, she was having the boat pulled back to the boundary as she had been willing to do last year. She wished to have less tenants in any event.

18. The First Claimant says that in the conversation in October 1997, there was no reference to the green gate being the boundary, and both appeared to acknowledge that the boundary was a sycamore at point E on plan 2 to her statement. This is the point where the Claimants say that the boundary was, whereas the Defendants say that it was about 10 feet to the west of that at the point of what used to be the green gate. The First Defendant says that the First Claimant had asked to share mooring rights overlapping both plots. When the Defendants had said that they were not interested in doing that, she said that the Defendants would have to make sure that there was no overlapping on to her land. In his third statement, the First Defendant stated that there was no reference point to the sycamore tree as being the boundary. In fact, the boat had slipped beyond the point of the green gate, and he understood the complaint to be that it had slipped beyond the green gate. If it had been put that the problem was that it had slipped beyond the sycamore tree, then the First Defendant said that he and his wife would have put the First Claimant right about that.

19. The Second Claimant says that there was a discussion which he had with the Second Defendant in 2008 about an orange speedboat which he says was moored adjacent to the disputed land. He says that he told her that the speedboat could remain moored where it was, but only for a short while. Although in his second statement, he went on to give more information about this to the effect that there was a request to move it "so that the bow encroached beyond the sycamore/ash tree", in oral evidence, the Second Claimant accepted that there was no reference in the conversation to the sycamore tree, and that the precise area of land where there was any overlapping was not identified. The Second

Claimant said that in the discussion, there was reference to the elder tree which he said was about 5 feet to the east of the green gate. It is shown in a picture which was at page 243b of the trial bundle. He accepted that he had not referred to the elder tree in either his first statement at para. 26 or in his second statement at para. 13. The Second Claimant said that the boat did not extend beyond the alder tree which was at about the point of the green gate (also shown in the same picture), and that there was not a reference to the alder tree in the discussion.

The dispute

20. The dispute between the parties arose in early 2010, when the Defendants were in the process of trying to sell their land. The Second Claimant had offered to purchase the Defendants' land himself, but his offer had been rejected. A dispute subsequently arose between the Claimants and the Defendants as to the extent of the northern frontage of the Defendants' land. The Second Claimant claimed that the boundary on the western side was at the sycamore tree and not at the green gate. In July 2010, the Second Claimant cut a tree which was at a point towards the river in a straight line from the green gate (marked X on a plan attached to the statement of the First Defendant). At the start of September 2010, the First Claimant removed the green gate itself. The boundary dispute has culminated in these proceedings which were issued on 14 December 2010.

21. By their Particulars of Claim, the Claimants rely on the annotated plans to three conveyances by which ownership of the land was divided in 1947 ("the 1947 Conveyances"). The Claimants' case is that the dimensions on those plans, which are marked in feet and are

identical in each plan, indicate the size and boundaries of the land held by the Claimants and the Defendants.

22. At an early stage, the Defendants were critical of the case of the Claimants in that they said that the declaration sought, namely *"that, on a true construction, of the conveyances, the common plan [in the 1947 conveyances] delineates the boundaries between the claimants' land and the defendants' land"* fails to seek relief as to where the boundary lies on the ground. There was not attached to the Particulars of Claim a topographical plan showing where the boundary is alleged to lie on the ground. The Defendants said that it was not in dispute that the 1947 Conveyances had created the boundaries, but that the real question was where the 1947 Conveyance boundaries were located on the ground. In those circumstances, the Defendants said that the form of declaratory relief sought by the Claimants was entirely abstract and would not be dispositive of the dispute between the parties.

23. However, the Claimants also made a criticism. They said that the Defendants deny that the plan attached to the 1947 Conveyances records the boundaries of the land that was conveyed. However, they observed that the Defendants do not plead a positive case as to where the boundaries of the land conveyed in 1947 in fact were. Instead, they rely on the assertion that the Defendants have possessed the area shaded in green on the plan attached to the Defence and aver that if and insofar as that area includes the Claimants' land then the Defendants have acquired the same by adverse possession.

24. Since those criticisms were advanced, the Claimants have amended the Particulars of Claim and obtained expert evidence. Their case is that the southern boundary of the Defendants' land is 130 feet in length. The eastern boundary is delineated by a fence which runs through a brown gate toward the northern waterfront and culminates in a large tree at the waterfront. The Second Claimant has given evidence that the brown gate and fence were there in the 1970's. Those boundaries are agreed between the parties' experts. The issue between the parties is as to the location of the Defendants' western boundary and in particular where it meets the path that runs across the north of the Defendants' land and where it meets the riverfront. The Claimants' case is that it meets the northern riverfront 89 "11" from the tree in the north eastern corner of the Defendants' land as per the plan of the Claimants' expert attached to the Amended Particulars of Claim at 3i-3j.

25. The Defendants say that the western boundary of the Defendants' land meets the riverfront to the North of the island some 100 feet from the tree in the north eastern corner. They have attached a plan to the Amended Defence and Counterclaim which shows an area of land shaded green. They assert that the perimeter of this land represents their boundary and in the alternative that the Defendants have adversely possessed any part of it that is not included within their title.

The issues before the Court

26. In order to determine whether and to what extent the Defendants hold title to the whole of the Green Land, the Court must first determine the extent of the land conveyed under the 1947 Conveyance. Then, if and to the extent that the Court finds that some part of the Green Land falls outside the boundaries created by the 1947 Conveyance, the Court must go on to consider the adverse possession counterclaim of the Defendants.

(1) Construction of the 1947 Conveyance

27. The first issue is one of construction of the 1947 Conveyance. The principles to be applied when construing a conveyance of land are as follows:

27.1 First and foremost a conveyance is a contractual document to which ordinary principles of construction of documents apply. The process of construction involves the application of the usual principles of contract construction as set out by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896:

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

27.2 Whereas the Court may in other contexts decline to reach a conclusion as to the meaning of a clause in a contract, a decisive result must be reached when construing a conveyance (*Lewison on the Interpretation of Contracts* (5th Edition), para 11.02).

27.3 To the extent that the subject matter of the conveyance cannot be identified from the conveyance itself, extrinsic evidence is admissible. In particular, topographical features present on the land at the time of the relevant conveyance is admissible as an aid to the construction of a conveyance to arrive at 'the most sensible result' (*Lewison On the Interpretation of Contracts* (5th edition), para.11.04)

27.4 Similarly, evidence of subsequent conduct is admissible as an aid to the construction of a conveyance if it is probative of the parties' intention at the date of the conveyance (*Lewison para 11.05; Watcham v Att-Gen. of the East Africa Protectorate* [1919] A.C. 533; *Ali v Lane* [2007] 1 P&CR 26). In *Ali v Lane* left this question open. Carnwath L.J stated at paras.36-38:

"The conclusion I would be inclined to draw from this review is that Watcham remains good law within the narrow limits of what it decided. In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended.

The qualification is crucial. When one speaks of 'probative value' it is important to be clear what needs to be proved. In this case the issue concerns the line of a boundary which was fixed not later than 1947. Evidence of physical features which were in existence in the 1970s is of no relevance to that unless there is some reason to think that they were in existence in 1947, or they are replacements of, or otherwise related to, physical features which were in existence in 1947. Similarly Mr Attridge Senior's understanding of the

position of the boundary, or actions by him apparently relating to that boundary, is of limited probative value, even if admissible."

On the question whether acts of successors-in-title to the original conveyancing parties were admissible as extrinsic evidence Carnwath LJ continued:

"I would add that in principle reference to the intention of the parties means the parties to the original conveyance. Thus, in Watcham the user relied on by the Privy Council was that of the Watcham family, who were the beneficiaries of the original certificate. In none of the cases reviewed above was account taken of the conduct of subsequent owners".

27.5 Whilst the issue of whether acts by subsequent owners might be admissible was not decided in *Ali v Lane*, paragraph 11.05 of *Lewison* concludes as follows: *"In practice many boundary disputes are ultimately determined by a consideration of acts of ownership over the disputed land. If one party to a boundary dispute can prove a consistent course of conduct evincing ownership, then unless the title deeds are clear (in which case the dispute is unlikely to have arisen anyway) it is probable that the acts of ownership will carry the day."* That is the position for which the Defendants contend in this case.

27.6 The Defendants submit that the principle of allowing extrinsic evidence is conceded in *Ali v Lane* to the extent of the conduct of the original parties to the conveyance, and that it is therefore simply a matter of deciding what should be the limits of the *Ali v Lane* exception. The Defendants submit that evidence of long user, even by successors, should be admissible for reasons of

policy and pragmatism. Sometimes, the Court has no evidence other than this evidence, and yet it has to reach a conclusion as to the location of the boundaries, and it would be strange and undesirable if the law tied the Court's hands in this way.

28. As far as conveyance plans are concerned, the applicable principles are these (see *Lewison* para 11.07) :

28.1 A plan which is expressed to be *"for the purposes of identification only"* (or words to like effect) is intended to be used to locate the land, but not to identify its precise boundaries. Having said that, it may still be taken into account in the construction process provided that it does not conflict with the verbal description. The starting point is *Neilson v Poole* (1969) 20 P & CR 909 in which Megarry J had to construe the parcels clause of a conveyance which contained both the phrase *"for identification purposes only"* and *"more particularly delineated on the plan"*. At p.916, he said that the effect of the phrase *"for identification purposes only"*:

"Seems to be to confine the use of the plan to ascertaining where the land is situated and to prevent the plan from controlling the parcels in the body of the conveyance..."

Of the phrase "*more particularly delineated...*", he said that the words:

"tend to show that in cases of conflict or uncertainty the plan is to prevail over any verbal description."

He went on to conclude that where both forms of expression are used together they tend to be *"mutually stultifying"*.

28.2 These views were considered by the Court of Appeal in *Wigginton Ltd v Winster Ltd* [1978] 1 WLR 1462. That case also contained both forms of phrase and the question for the Court was whether it was necessary to have regard to evidence outside the conveyance in question on the grounds that the words of qualification reduced the reliance which could be placed upon the plan. Buckley LJ cited the passages referred to above and said (at p.1471) that the comments of Megarry J. that the phrase *"for the purposes of identification only"* confined the use of the plan to determining where the land was situated were obiter. Rather, Buckley LJ concluded:

"...in so far as the plan does not conflict with the parcels, I can see no reason why, because it is described as being "for identification purposes only" it should not be looked at to assist in understanding the description of the parcels. The process of identification is in fact the process of discovering what land was intended to pass under the conveyance, and that is the precise purpose the plan is said to serve. Accordingly, so long as the plan does not come into conflict with anything which is explicit in the description of the parcels, the fact that it is said to be "for the purposes of identification only" does not appear to me to exclude it from consideration in solving problems which are left undecided by what is explicit in the description of the parcel".

Bridge LJ said (at p.1475):

"I cannot think that any of the judicial pronouncements on this subject to which we were referred in argument and which have been cited in the

judgment of Buckley LJ were made in contemplation of a case where the boundary shown on a plan "for the purposes of identification only" is the sole means by which the conveyance affords to indicate where that boundary is intended to be drawn. To refer to the plan in such a case in order to ascertain the boundary allows the plan merely to elucidate, not to control, the parcels. The ascertainment of boundaries being an integral part of the process of identifying the land conveyed, I cannot see why, as a matter of language, the qualifying words "for the purpose of identification only" should inhibit the use of the plan for this purpose when no other means is available by which the relevant boundary can be ascertained."

28.3 A similarly worded parcels clause was considered by the Court of Appeal in *Affleck v Shorefield Holidays Limited* (18 November 1997, unreported). That case concerned a plan which was not annotated with dimensions as in this action but which was described as *"carefully drawn"*. Harman J. expressed the view that Megarry J. in *Neilson v Poole* did not hold that where parcels are imprecise but the plan (although for identification only) is carefully drawn, the plan cannot control the boundary. Peter Gibson LJ agreed with that view.

28.4 The Court of Appeal approached the construction of a conveyance containing the same phrase in the same way in *Wools v Powling* (CA, unreported, 10 February 1999).

28.5 A plan will not necessary prevail over evidence of topographical features on the land at the time of the conveyance – in appropriate cases the former may be preferred to the latter (*Brown v Pretot* [2011] EWCA Civ 873, para 26).

The Court will more readily reject lines marked on a plan in favour of topographical evidence if the plan is expressed to be for the purposes of identification only (*Cameron v Boggiano* [2012] EWCA Civ 157).

The 1947 Conveyance

29. The relevant provisions of the 1947 Conveyances can be summarised as follows:

29.1 The parcels clause, in clause 1, conveys *"ALL THAT piece or parcel of land situate in the River Thames and forming part of the island known as Ash Island East Molesey in the Parish of Hampton in the County of Middlesex which said piece or parcel of land with the abuttals and dimensions thereof (be the same little more or less) is for the purposes of identification only more particularly delineated and described in the plan annexed hereto and thereon coloured pink and green"*.

29.2 Clause 1 also confers a right of way *"over and along the strip of land six feet wide shown coloured brown on the said plan"*, but reserves a right of way in favour of *"the owners and occupiers for the time being of that part of Ash Island situate to the West of the land hereby conveyed...over and along the strip of land six feet wide shown coloured green on the said plan."*

30. Looking at the 1947 Conveyance plan, the Defendants' land is shown edged red (rather than pink). Similarly, the shading of the strip of land over which a right of way in favour of the owners and occupiers of the land to the west looks rather more like brown than green.

But, it is reasonably clear that this is that land referred to in the parcels clause as being shaded pink and green. The plan itself is on a comparatively small scale, but it does include dimensions not only of the Defendants' land, but also the dimensions of those parts of the Ash Island which have frontage onto to the river.

31. There is agreement that the Court should look at the 1947 Conveyance plan with a view to considering where the boundaries are. If the plan is clear and unequivocal, then that is the end of the matter. However, there is agreement that this is not determinative of the location of the boundaries, not least because the plan does not delineate the boundary lines clearly and the measurements from the eastern tip of the island are not entirely accurate. There is also agreement that the Court should consider the topographical features on the ground and look at what was there in 1947 with a view to ascertaining the intention behind the conveyance and determining what was conveyed. Despite this agreement, there are significant differences between the parties as to the extent to which the 1947 Conveyance plan is of utility, as to the importance of various topographical features and as to the actions to which one may consider after the time of the 1947 Conveyance plan.

Submission of the Claimants

32. The Claimants submit that in the 1947 Conveyances there is no verbal description in the parcels clause of the land being conveyed. The verbal description relates only to the island as a whole. The precise division of the island is left solely to the plan. The plan is incorporated by reference and is the sole means of defining that which was conveyed. The plans attached to the 1947 Conveyances contain precise dimensions. The parties to the

1947 Conveyances must have intended those dimensions to be relied upon to delineate the land conveyed. Otherwise, the inclusion of such dimensions in the formation of such a precise plan would have been pointless and the parties would have included some other method of demarcating the land conveyed.

33. It is therefore submitted by the Claimants that this is not a case where there is a conflict between the verbal description and the plan. In fact, in this case the plan and the measurements on it are the only definition in the conveyance of what was conveyed. Since the boundaries are recorded accurately on the plan, the boundaries of the Defendants' land are those recorded on the plan. (I should say that when the shorthand "the Defendants' land" is used in this Judgment, it is not used to denote which party owns the disputed land, and in no sense does it judge the issue between the parties). The intention was that the Defendants' predecessors-in-title would get a northern boundary of 90 feet along the riverfront. The Claimants submit that one starts with a presumption that the northern boundary was 90 feet and that the southern boundary was 130 feet.

34. The Claimants point to the fact that on the basis of the case of the Defendants, assuming that the north eastern boundary was the point of the brown gate, the northern boundary would be 100 feet. They accept that there is a lack of topographical features marking the north eastern boundary: there is a tree at the waterfront which may have been used by the parties, but there is no evidence that this tree existed in 1947. Even allowing for inaccuracies in the plan, the Claimants submit that an inaccuracy of 10 or 11% would be far beyond an allowance which should be made. They point to inaccuracies which are accepted in the order of less than 1%. For example, the north eastern boundary is said by

the Defendants' expert to be 1.26m from where it should be under the measurements set out in the 1947 conveyances, measured from the eastern tip of the island. That is an inaccuracy of 4 feet 2 inches over a distance of 384 feet i.e. just over 1%. Further, the experts agree that the 1947 conveyances accurately record the measurement from the eastern tip of the island to the south eastern boundary of Defendants' land and that the southern boundary of Defendants' land is 130 feet 'within a very small tolerance'. The Defendants' expert, Mr Francis, stated in evidence that the 1947 conveyances record the distance between the Defendants' north eastern boundary and the Defendants' south western boundary moving anti-clockwise around the island inaccurately by 2.38m over a distance of 366.10m. That is an inaccuracy of 7 feet 11 inches over a distance of 1201 feet, that is less than 1%. The Claimants contend that the plan could not have been so inaccurate that 90 feet should become 100 feet.

35. The Claimants submit that some assistance is to be derived from the position of the fences as shown in the 1972-1979 OS plan. It was envisaged according to the 1948 Land Registry title plan for what is now the Defendants' land that fences would be erected. Attention is drawn to the note on that plan that *"The boundaries shown by dotted lines have been plotted from the plans on the deeds and are subject to revision on survey after the erection of fences"*. At some point thereafter, the fences which appear along the eastern side of the Defendants' land and, albeit now dilapidated in places, along the western side of the Defendants' land, were erected. The Claimants submit that it is a logical inference that those fences were erected pursuant to that note and that they were so erected with the knowledge and perhaps assistance of the parties to the original conveyance along the boundaries of what was actually conveyed. The conduct of the parties to the original

conveyance can be taken into account in accordance with the guidance given in *Ali v Lane* above.

36. By contrast, the Claimants submit that although in this case there is a dispute about why the Second Claimant and his grandfather erected a green gate where they did, even if they actually did so in the belief that the boundary fell where the green gate was constructed and that the Defendants' northern riverfront boundary extended to a line perpendicular to it, that would not mean that that was the boundary of the land conveyed in 1947. That belief, the Claimants say, would be irrelevant.

37. The Claimants' case is that the northern segment of fencing as mapped on the 1972-1979 OS plan culminated at its northern tip pointing in a line which if projected would lead to a spot 89 feet 11 inches from the Defendants' North Eastern riverfront boundary. That would be in accordance with the stated dimension in the 1947 conveyance of 90 feet for the Defendants' northern boundary. The Claimants' expert stated in evidence that he was 'firmly of the view' that somebody had tried to make the fencing on the ground give effect to the dimensions set out in the 1947 conveyances. Whilst acknowledging that that was a possibility, the Defendants' expert, Mr Francis, stated that the segment in question should be projected to pass through the former location of the green gate.

38. The Claimants seek to refute that suggestion because the OS plan did not have any gate marked on it, and that therefore there was no gate there at the time of the 1972-1979 OS plan. They say that the starting point should be that the OS plan was accurate and so the absence of reference to the gate indicates that there was no gate at that stage. Reliance is also placed on evidence of the Second Claimant that he had no recollection of the green

gate replacing an earlier gate. I shall refer to the evidence of witnesses in this regard below. The Defendants' assertion is based on the idea that the OS plan may have failed to take into account further green picket fencing which led to the green gate, perhaps because that fencing did not show on aerial photography, or that the OS plan did in fact record that fencing, but mapped it in the wrong place on the resulting plan.

39. The Claimants say that it is more likely that the OS plan accurately recorded the position of the fencing on the ground, a result which if projected would delineate what became the Defendants' property to within 1 inch of that which was intended to be conveyed. The Claimants say that whilst there may not have been topographical feature which would indicate the location of the north western boundary, the location was to be explained by reference to the 90 feet measurement from the north eastern boundary, the measurement being that which appears in the 1947 conveyance.

40. If and to the extent that the Court is permitted to take into consideration conduct since 1947, and bearing in mind that the Claimants did not become owners until 1985 and 2002 and the Defendants did not become owners until 1989, the Claimants say as follows. There was evidence that the reason for the installation of the green gate some eight to ten feet to the west of the actual boundary was that it would enable the Claimants to utilise an existing scaffolding pole drilled into the concrete.

41. Further, reference by the First Defendant to green picket fencing erected by the Second Claimant from the green gate running down the slope toward the river is, say the Claimants, contradicted in that none of the photographs in the bundle show any such

fencing. Mr Bolam agreed in cross examination with the suggestion that there had never been such fencing.

42. Further, as regards evidence of the installation of electricity cables from the north of the island to the southern riverfront, the Claimants say that the Defendants cannot rely on this since in evidence. Andrew Chapman accepted that he had not told the Claimants prior to the installation of the cables either that he was undertaking the exercise or that he or the Defendants regarded the cables as being installed along the boundary between the parties' land. He also accepted that the electricity cables did not commence their journey south down the island from the green gate but from a point west of it. Moreover, the Claimants say that it is fanciful to accept that Mr Chapman managed to clear a line through the undergrowth from the green gate to the southern riverfront so that he could see the southern side of the island from the north.

Submissions of the Defendants

43. The Defendants say that it is not possible to place reliance on the 1947 Conveyance plan in that it is not to scale. Whilst the plan contains the reference to a 90 foot northern boundary, and for various plots along the full perimeter of Ash Island, this does not allow for a satisfactory method of drawing a boundary. In particular, they rely upon their expert's assessment that

    43.1 the 1947 Conveyance does not make clear whether the measurements are straight line measurements or measurements which take into account the curvature of the shoreline;

43.2 if they are the latter, an issue arises as to accretion and erosion in the last 65 years. Further, there may have been changes through man-made reinforcements;

43.3 Attempts to do a pure measuring exercise have not been satisfactory: see paras. 12-14 of Mr Francis's report dated 10 September 2012.

44. It is then necessary to consider whether any conduct of the owners of the land subsequent to the 1947 Conveyances sheds light on the position of the boundaries. There is the issue of law referred to above as to whether this can apply during a period when the land on both sides of the boundary was owned by successors to the original parties to the relevant 1947 Conveyance. The Defendants submit that if the law were limited to permit reference to post-conveyance conduct to the period when the land on both sides of the boundary was owned by the original parties to the relevant 1947 conveyance, they can prove their case by reference to conduct during that period alone.

45. By reference to a spreadsheet prepared by the Defendants, it can be deduced that:

(i) The Defendants' land (the red land) was conveyed under the relevant 1947 conveyance to George Booker (as purchaser) and to Walter Bowen (as subpurchaser). The first time that the red land was conveyed to someone who was not an original party to the 1947 conveyance was 25th August 1969.

(ii) The Fourth Claimant's land (the blue land) was conveyed under the relevant 1947 conveyance to George Booker (as purchaser) and Thomas Allen (as subpurchaser). The first time that the blue land was conveyed to someone who was not an original party to the relevant 1947 conveyance was 11th May 2000.

(iii) The First Claimant's land (the beige land) was conveyed under the relevant 1947 conveyance to George Booker and Alfred Hughes (as subpurchaser). It was conveyed back to George Booker on 15th July 1950. The first time that the beige land was conveyed on to someone who had not been a party to the relevant 1947 Conveyance was 27th October 1972.

(iv) The Second Claimant's land (the orange land) is more difficult. It was the subject of a conveyance dated 30th July 1984 from Douglas and Kathleen Chapman to the First Claimant and Andrew Chapman. However, it is not known when it was first conveyed on to someone who had not been a party to the relevant 1947 conveyance.

46. Whilst the Claimants emphasise that it is necessary to have actions of both original owners or the action of one party acceded to by the other, they do not take issue with each of sub-paragraphs (i)-(iii) above.

47. On the eastern boundary of the Defendants' land, all of the features presently in situ on the eastern boundary were erected prior to 11th May 2000. They were therefore erected during the period when Thomas Allen owned the Fourth Claimant's land. It follows that either Thomas Allen erected these features or alternatively they were erected by the owner of the Defendants' land without demur from Thomas Allen. Applying ordinary *Ali v Lane* principles, these features fall to be considered when construing the 1947 conveyance. The Claimants say that this is uncontroversial provided that the erection of the features was with knowledge or assistance of an original party to the 1947 Conveyance.

48. As for the boundary between the Defendants' land and the First Claimant's land (the beige land), the First Claimant herself gave evidence that the brown wooden gate (which the green gate later replaced) had been there "since the 1960s". It was therefore installed at a time when the land on both sides of the boundary was still in the ownership of someone who was an original party to a 1947 conveyance. On ordinary *Ali v Lane* principles, it falls to be taken into account. Similarly, the First Claimant and Andrew Chapman recall that fencing to the south of the gate was in place along the western boundary of what is now the Defendants' land, and their memory goes back to the 1960's. Neither suggested that it had been repositioned or replaced in the meantime. A section of this fencing is in any event shown on the 1972 OS map [294]. Again, on ordinary *Ali v Lane* principles, this fencing falls to be taken into account.

49. The boundary between the Defendants' land and the Second Claimant's land (the orange land) is complicated by not knowing when the Second Claimant's land first passed out of the hands of the relevant 1947 conveyance party. However, it is known that it was not until August 1969 when the Defendants' land first passed to a successor. All parties accept that the chainlink fence and boarded fence in evidence along the southern section of the Defendants' western boundary has been there as long as anyone can remember. It shows on the 1972 OS map. On this basis, there is an inference that it was in place on the balance of probabilities by August 1969. This is agreed by the Claimants, albeit that they challenge its evidential significance.

50. It can also be inferred that the landing stage was in existence by August 1969. It is shown on the 1972 OS map. There is some other evidence, namely a boat moored up against the

southern shoreline in the photograph taken in June 1971. This too is agreed by the Claimants, albeit that they challenge its evidential significance.

51. On this basis, there is evidence that salient boundary features on both the eastern and western boundaries, had been erected during a period when at least one of the original parties to the relevant 1947 conveyances remained an owner.

52. Taking into account the relevant boundary features to the extent that they were made at a time when at least one party to the original 1947 Conveyance was an owner, the Defendants submit by reference to the expert evidence as follows. The real area of dispute is as regards the western boundary, particularly the northern section of the western boundary. The contest is between Mr Francis' approach which fixes the western boundary by reference to the location of the relevant topographical features (ie the landing stage, the chainlink and timber fences, the green gate and the short section of picket fence running off it) on the one hand and Mr Spencer's approach which involves scaling the fence lines shown on the 1972 OS map onto a modern surveyed plan on the other. The Claimants rely heavily on the accuracy of the 1972 OS map, from which Mr Spencer's plan is predicated. The Defendants submit that it is not safe to rely entirely on the 1972 OS for a number of reasons including the following:

    (i) The 1972 OS map is on a scale of 1:1250. As Mr Spencer pointed out in both his written and oral evidence, mapping at that scale is only accurate to +/- 1.25m. Given that the amount of land in issue at the northern end of the Defendants' western boundary is only 1.5m, a tolerance of +/- 1.25m affects the utility of the scaling exercise.

(ii) The method of production of the 1972 is also open to question. Either the 1972 OS map was produced by process of manual tracing from aerial photography, as Mr Spencer indicated in his written report [para 8.4] – a method which is susceptible to imprecision – or alternatively, as Mr Spencer suggested in his oral evidence, it was the product of a ground survey which was questionable in that it contained features which were contrary to the evidence. For example, it is unlikely that the fencing on the western boundary comprised straight lines, contrary to the 1972 OS map. Both experts' surveyed plans indicate that the more southerly of the fencing was not straight, and the remnants of the northern section on Mr Francis' surveyed plan also contained significant kinks.

(iii) There is an issue as to why it is that the 1972 OS plan did not contain the predecessor to the green gate. The Defendants submit that in the light of the evidence, particularly of the First Claimant, that an old wooden gate had been there since the 1960's that the omission of the same from the 1972 OS plan must be an omission. They suggest that it can be accounted either because it was not picked up from the air or because it was missed on a ground survey.

53. The plan itself leads to caution about the ability to use it to do the scaling exercise of Mr Spencer:

(i) There is a 2.5 metre discrepancy between the south eastern shoreline on the modern plan and the equivalent black line on the 1972 OS map.

(ii) The location of the sluice gates at the eastern end of the Island and the line of the northern shore do not marry up.

(iii) Looking at the Defendants' land itself on the plan, it is clear that the south-western corner of the Defendants' land appears a little over 2m to the west of both the landing stage and the chainlink fence – the difference is seen at Appendix H.

54. The Defendants are critical of the way in which Mr Spencer has dealt with the gaps contained in the 1972 OS map in respect of the western boundary, and particularly the more northerly of the two gaps which is at the heart of the dispute. To fill in these gaps, the Claimants' expert, Mr Spencer has assumed that the fence line would have continued on the same bearing to the north shoreline. However, he accepted in evidence that it was possible that the real fence line might have followed a different route. Further, Mr Spencer produced his report in ignorance of the evidence of the First Claimant told the Court in her oral evidence, there had been a wooden gate (in the same place as the green gate) since at least the 1960s. Mr Spencer accepted that if this gate had been shown on the 1972 OS map, then that would have been the logical place to which to project the fence line. It therefore follows that in the event that it is accepted that the gate did exist at the time of the 1972 OS plan that Mr Spencer accepts that the fence line should projected to the former green gate.

55. The Defendants also say that Mr Spencer's projected line does not lead anywhere in particular. It dissects the shoreline between the two concrete steps, slightly to the west of an Ash tree, leaving the former gate and adjoining short picket fence 'floating' well to the west of the boundary line. That is not what one would expect.

When pressed, Mr Spencer sought to suggest that there was a certain logic to his line because it split the concrete stairs in the middle, leaving each adjoining land owner with one set of stairs. However, the line does not bisect the stairs through the middle point between the steps. In fact, the concrete stairs are so close together they could not possibly have two difference boats simultaneously moored alongside them. The Defendants submit that the 90 feet measurement in the 1947 Conveyance plan is not critical. They say that the owners may not have adhered to the contents of the 1947 conveyance when putting up their fences and may have to some extent *gone their own way*.

56. The Defendants also say that if account is taken of how the parties actually treated the boundaries, it is entirely possible that the resultant plot which will differ slightly, in shape or dimensions, from a strictly-measured 1947 conveyance plot. So, for example, the eastern and western boundaries on Mr Spencer's plan are both kinked (rather than straight lines as shown on the 1947 conveyance) and both will correspondingly be longer than the measured dimensions shown on the 1947 conveyance plan. It should in any event be noted that Mr Spencer's measurement of the northern frontage is taken from the position of the brown gate at the eastern end the Defendants' land. He might equally have started measuring the 90ft frontage from the green gate at the western end. As Mr Francis explained in his oral evidence, if you measure from that end, the end point comes just over a meter before the brown gate about half way between the green line on [280] and the line of the brown gate. The difference between the plot as treated by the land owners and the 1947 conveyance plot might therefore be referable to the slight deflection of the fencing line at the northern end of the western boundary.

57. Finally, the Defendants submit that there is, by contrast, much to recommend about Mr Francis' western boundary line [250]. Mr Francis' line is drawn from and to actual boundary features of considerable antiquity[1]. These features have been accurately and reliably surveyed (the problems inherent in Mr Spencer's scaling process do not arise). They submit that the western boundary line shown on Mr Francis' Appendix A plan is where any objective observer would assume the boundary to be[2] and it is consistent with the longstanding *status quo*. The plot shown on Appendix A has straight-line measurements on three of the four sides. The only point of departure from a strict 1947 conveyance measured plot is therefore the deflection of the fence line at the northern end of the eastern boundary – a departure which all parties agree is justified by the location of a very longstanding boundary feature.

Discussion

58. The starting point is the common ground that the 1947 conveyance is not clear and unequivocal and so it is necessary to consider other matters including topographical features and the subsequent conduct of the parties to the 1947 conveyance with a view to considering what matters are indicative as to the intention of the parties to the 1947 conveyance. I take the law as set out above, save for reasons which appear below, I do not rule on whether there is a basis for allowing extrinsic evidence by reference to the conduct of the successors in title to the original parties to the conveyance.

[1] The old wooden gate, the chainlink and timber fencing and the landing stage are features that have been in place longer than any of the parties can remember.
[2] See Mr Bolam's evidence [para 4] and that of Ms Fitzgerald [para 4].

59. Despite not regarding the 1947 conveyance including the plan as being clear and unequivocal, the plan itself is significant. In particular, whilst it is not to scale, it is significant that it contains a measurement of the northern boundary of 90 feet. The Claimants say that there should be a presumption that the northern boundary is 90 feet. The expression 'presumption' begs the question as to the strength of the presumption, but I accept that it is a starting point, but that it is nonetheless a starting point only.

60. I treat as important the evidence regarding the various features including the old wooden gate which preceded the green gate (in the north western part of the Defendants' land) as well as the chainlink, the timber fencing and the landing stage. The reason why its position is important is because it would appear to indicate an intention of the parties erecting that this would be the boundary. It would seem unlikely that the gate was erected at a point within the land of one of the landowners so that the public would have passed from one side of the gate to the other side remaining in the land of one person. It would be particularly odd if the gate was positioned close to a boundary, but not at the boundary itself, in this instance on the case of the First Claimant about 10 feet from the true boundary. This would be quite an odd thing to do in circumstances where there was not any topographical feature marking the true location of the boundary. If in fact, the gate was created at a time when the original parties to the 1947 Conveyance remained owners of the land in the vicinity of the gate, then its position would indeed be a significant guide as to where one would expect the boundary to be. Mr Selwyn Smith gave evidence to the effect that this is what one would expect. That is a matter of common sense, and I agree with it.

61. However, I have to consider first whether there was a gate at the position of the green gate at the time when the parties to the 1947 conveyance were in the position. I have come to the view that that was the case. The first issue is whether there was a predecessor gate. The second issue is whether the predecessor gate was at the same point as the green gate. The third issue is how far back such a gate was in that position. After those issues, it becomes necessary to consider evidence to the effect that the position of the gate may not in fact have been in any way probative of the position of the boundary because of specific reasons not to erect at the point of the boundary.

62. I have come to the view that there was a predecessor gate to the green gate, that it was at the same point, and that it goes back until the 1960's and possibly earlier. In coming to that view, I have had particular regard to evidence of recollection of the parties. I should say that I find evidence as to a state of affairs in this case over a period of time as more likely to be reliable than evidence of a particular conversation of say 35 years ago.

63. I first consider the evidence of the First Claimant. I formed the view that her recollection was impaired by time, and that in seeking to help her son's cause, she was from time to time seeking to make out, I believe unintentionally, that her recollection was less hazy than it was. The First Claimant did not remember the old gate being built, just that she remembered it being there. She was clear in her evidence that the green gate, erected in the late 1970's, replaced the old wooden gate, which had been there for as long as she could remember and at least as far back as the 1960's. She stated that the first gate was an old wooden gate which was brown. When asked how long the first gate had been there, she responded that she could not say exactly how long: perhaps since 1947 (when she would have been only about 6 years old), but she was 'not sure'. It was her way of

emphasising, but without precision, that it was there as far back as she could recall. It is logical that a gate should replace an older gate, and her recollection that there was such a gate is likely to be correct, and I accept it.

64. Mr Andrew Chapman, her brother, recalled that there had been a gate prior to the green gate. He said that he had known the island since the 1960's, but that his recollection went back to the period from the early to the mid-1970's. His statement refers to the green gate replacing the previous gate in the same location, albeit that he says that this was in the 1990's. I do not know what he meant by the reference to the 1990's, which might be contrary to the recollection of the First Claimant about a gate being erected in 1976 or 1978, unless it was the case that there was a second green gate put up in the same place in the 1990's. I have reservations about aspects of the evidence of Andrew Chapman, first because of the history of controversy with the immediate members of his family. Secondly, I consider that some of his evidence seemed patently unreliable such as his suggestion that he managed to erect a fence with his father along the boundary line, when such a feat seemed to me to be unlikely even if he was trying to do it. Nevertheless, it is credible evidence that the gate should remain in the same position, and insofar as his evidence of recollection goes back as far as he can recollect, it is consistent with and corroborates the evidence of his sister, the First Claimant.

65. The First Defendant's evidence is that he recalled that when the green gate was erected in the 1970's, he believed that the gate was being putting up on his side of the boundary and that he spoke with Douglas and Andrew Chapman. In a cheerful and amicable conversation, it was agreed that the fence would remain where they wanted it to be, that is slightly inside their boundary. The new gate and fence, says the First Defendant at

paragraph 14 of his second statement, were literally touching the old ones, which were then removed. As with other evidence of this kind from the First Claimant and from Andrew Chapman of one off conversations of so many years, I am concerned about the reliability of the same bearing in mind their antiquity. However, I have formed the view that I am able to rely upon an aspect of this evidence, namely that the First Defendant recalls that the new gate was replacing the old gate at about the same position. In his case, that will not go back much earlier in the time than the time of the erection of the green gate. However, this evidence to that extent corroborates the evidence of the First Claimant and Andrew Chapman about the green gate replacing an earlier gate.

66. The substance of this evidence has not, in my view, been contradicted even by the Second Claimant. He recalled helping his grandfather install the green gate, but he did not recall that there was a gate there before it. He does not say that he has an active recollection that it was in the same position at an earlier time. This was in 1976 or 1978, when the Second Claimant was on holiday from Pakistan: he would have been about 11/12 or 13/14. He says at paragraphs 14 and 15 of his statement that the hinge post was placed opposite an existing scaffold post that had already been sunk into the stone slope which runs down to the river. The existing post was used to support the non-hinged side of the green gate to prevent it from swinging back and forth in the wind. He does not contradict the evidence of a previous gate: if he does contradict it in any way, his recollection was limited because he was not a regular visitor and he was quite young at the time.

67. Looking at the totality of the above evidence, I have come to the view that a green gate was erected in the latter part of the 1970's. I find based on the evidence of the First Claimant and Mr Chapman, that it replaced an old wooden gate. It is logical that it was in

the same position as the earlier gate, and I so find. Further, I find that the old wooden gate was there for as far back as the First Claimant can recall which was at least as far back as the 1960's, and may have been further in time. For practical purposes, it was at a time when the parties to the original parties to the 1947 Conveyance were in the disputed part of the island to the north western part of the Defendants' land. In the light of this evidence as to the pre-existing gate, I accept the submission that the evidence of recollection is more weighty than the absence of a gate in the 1972 OS plan. I have therefore come to the view that it is more likely than not that the omission of the gate in the 1972 OS plan is to be explained either because it was not picked up from the air or because it was missed on a ground survey, and not because there was not a gate at that point in time.

68. I now refer to the position of the green gate. The Claimants' case is that the gate was not on the boundary of the Defendants' land. They say that the Claimants owned land to the east of the gate on the basis of there being only 90 feet from the brown gate on the north western boundary of the land. This left several feet to the west of the green gate in respect of which ownership is claimed by the Claimants.

69. The First Claimant and Mr Chapman also gave evidence as to whether the location of the gate was on the boundary. Mr Chapman said that, as with the fence on that north western side of the Defendants' land, it was erected on the boundary. He recalls his father explaining to him that there had been a long history of agreement which extended back to the former owners, the Bookers and the Arnsides. I treat that evidence of what he was told by his father with caution because of its hearsay nature and how long ago it would

have been. Even if it had been said, there is an issue as to how the information used on which the father stated this to be the case, and the inability to cross examine Douglas Chapman upon this. Further, as noted above, I was concerned about uncorroborated aspects of Mr Chapman's evidence. For all these reasons, I cannot attach any weight to this alleged conversation or to the truth of the matters therein related.

70. The First Claimant said the following. In her statement, she said that at a time when her parents were considering dividing the land among their children, she obtained office copy deeds for the three parts of Ash Island. She showed her father a conveyance dated 1947 and discussed with him the boundary between the brown land and the red land (referring to the Defendants' land). She says that she recalls her father saying that the gate on the north western part of the land did not mark the boundary. He said that the gate should be moved to the boundary but that it was impractical to move it. He considered that the sycamore tree represented the boundary. Since he had that belief, so did the First Claimant.

71. The First Claimant was asked to refer to the plan of her parents' land and the Defendants' land to how the division of the island would take place. She stated that the plan was drafted by her father. She was asked whether the word 'gate' on the plan might be the green gate. She responded that she did not think so because the gate was never attached to the boundary. It was suggested to her that it must be a reference to the green gate and that it could be no other gate. She agreed. She was asked whether the gate marked the boundary. She responded that it did not and that the boundary was where the deeds said it was. It was put to her that her father's plan showed the boundary line connecting with the

gate. The First Claimant said that although that is how it looked on the plan, the boundary was never at the gate, but in fact the gate was inside the boundary.

72. It was put to the First Claimant that anyone else coming to the land would have assumed that the green gate marked the boundary. She said that that was not the case, and that the deeds showed that the green gate was not on the boundary line. She said that her father had told her that the green gate was not on the boundary line. She says that she remembers saying that the gate should be moved, but that her father said that it was impractical for him to move it.

73. In re-examination, the First Claimant said that her father explained to her that it would be impractical to move the green gate to the boundary because of the amount of undergrowth, stone and difficult terrain. She said that neither she nor her father paid attention to where the gate was actually located in those days. She said that she particularly remembered her father stating that the green gate was not upon the boundary was that at that time the land was being divided and she was getting that part of the land, so she was interested in this point.

74. When the Second Claimant gave evidence about the conversation with his grandfather, he said that his grandfather had told him that the green gate did not mark the boundary. He said that it was put up to deter trespassers. He said that the elder tree was in the way of putting a gate at the boundary and that there was an element of convenience because of the position of the scaffolding poles. It will be noted that the First Claimant referred to her father having referred to the sycamore tree, whereas the Second Claimant recalled that he was told that it was the elder tree. When this was put to the Second Claimant, he said

that he went along with what his mother said that it was the sycamore tree and not the elder tree.

75. I now have to appraise this evidence. I have come to the view that the position of the gate is a matter of importance. I am satisfied that it was erected in the same position of the green gate at latest in the 1960's and at a time when the parties to the 1947 Conveyance were both owners of the disputed part of the land in question. This is therefore a case where it is not necessary to consider extrinsic evidence by reference to conduct of a subsequent owner or successor in title. It is a natural starting point to infer that it is likely that a property owner would erect a gate at what he understood to be the boundary and not several feet short of the boundary, and without opposition of the neighbouring land owner. It is unlikely that a gate of this kind would be erected at a point which did not mark a boundary.

76. That starting point is not displaced, in my view, by the evidence which the First Claimant and the Second Claimant have given. I bear in mind the following matters in coming to that view. It seems to me to be a very odd state of affairs to build a gate at a point which is known not to be the point of the boundary, so that some of a fence and a gate were constructed deliberately within the land of Douglas Chapman. Further, it is even odder when there is no topographical identification point where the true boundary was. It is not by reference to a tree which was there in 1947.

77. Further, the suggestion that the boundary would come out between the position of the two steps does not make any particular sense: the steps were too close together for this to be a

natural dividing point. It is much more logical that the two steps would serve the same person's land. Further, there is no particular separation feature there on the land. The evidence of Mr Selwyn Smith that both sets of steps were used by the same tenant, albeit one more than the other, seems to me to be entirely logical. Similarly, I am unimpressed that the use of some scaffolding holes several feet away from the boundary would make a landowner build a gate other than at the site of the boundary. This would be particularly the case when the place of the boundary would be important in the exercise of riparian rights which were a valuable source of income to the landowners.

78. I therefore am not satisfied that the recollection of the First Claimant about the conversation is accurate. In any event, the evidence of what the First Claimant says that her father had told her is at best hearsay because it is intended to go to the truth of what he is alleged to have said. Such evidence is admissible, but it carries in my view very little weight, being not only a conversation of such antiquity, but going to matters which might have arisen so many years before that. For similar reasons, I have not relied on the evidence of Andrew Chapman about being told matters by his father which are the opposite of that recalled by the First Claimant.

79. I am also not satisfied about the evidence of the Second Claimant in this regard. It is about a conversation of about 35 years ago. It was at a time when the Second Claimant was a child. I find myself unable to place much weight on a conversation of so long ago. The more detailed it was, the less credible it was that the Second Claimant could accurately recall it. Indeed, the contradiction about the sycamore tree as per the First Claimant's evidence and the elder tree as per the Second Claimant's evidence is an illustration of how unreliable recall of so many years ago is.

80. I find the foregoing evidence as to what it is alleged that the First Claimant was told by her father and indeed of the Second Claimant by his grandfather as of little weight. It does not displace the inference that a party would not place a gate other than on what they believed to be the boundary. Further, and a matter which has not been explained is why in the plan drawn by Douglas Chapman, he identified the gate as being on the western boundary if he believed that the gate was not at the boundary: indeed the plan would be exactly a moment for him to record this point of obvious importance that the gate did not represent the boundary. In fact, the plan as drawn appears to show that Douglas Chapman recognised that the gate was at the boundary.

81. The evidence of the Claimants does not identify how Douglas Chapman who came to the land on the basis of my finding when the old gate was in situ would have known that that that did not represent the boundary on the north western side. Still less is there identified how he knew that the true boundary would be 10 feet to the east of the gate at the point of the sycamore tree. Thus, even if the recollection of the conversations of the Claimants with Douglas Chapman was entirely accurate, it would be of a hearsay nature because of the inability to test these matters, as well as the contradiction with his plan. Indeed, even if Douglas Chapman had been alive to give evidence, even his evidence about this would have to be treated with caution because on the basis of my finding above, he did not build the original gate, and one would have to be interrogating the person who originally built the wooden gate how such a gate was not built at the point of the boundary. In all the circumstances, I have come to the consideration that the starting point that the position of the gate represented the point of the boundary on the north western side has not been displaced by any of the evidence subject to one point which I now consider.

82. The Claimants say that it was by reference to the 1947 Conveyancing Plan that only identified the land by reference to the 90 feet measurement. I have considered the dispute in the expert evidence and in the submissions as regards the effect of the 90 feet measurement in the 1947 Conveyancing plan. I accept by reference to the submissions of the Defendants that the real area of controversy is the position of the western boundary.

83. There is no evidence about that measurement being carried out in such a way as to identify the western boundary at a different point from the gate. On the contrary, the plan drawn by the First Claimant's father indicates the contrary. How then is the 90 foot measurement to be explained? I follow the argument of the Claimant that the inaccuracies on the plan were of a different extent than the difference between 100 feet and 90 feet. Nonetheless, there are a number of possibilities which might account for the discrepancy. One possibility is the combination of the inaccuracies of the plan and/or the fact that the coastline is not a straight line and/or changes in the lie of the land over a period of more than 60 years.

84. There is another possibility which was canvassed in discussion which concerns the north eastern boundary. In the 1947 Conveyance Plan, the western boundary to the Defendants' land appears to be a straight line, albeit that it is not possible to say this definitively. However, other plans show the boundary kinking westwards instead of being a straight line. It is possible that this was due to a widening of the western boundary, such that a northern boundary once of 90 feet or thereabouts was widened to the 100 feet. It is conceivable that the real issue is the position of the eastern boundary rather than the western boundary. This would give rise to an issue as to whether the

position of the eastern boundary was at the point of the fence where it kinks westwards, or at the point where it would have been if the fence had been built in a straight line. In other words, some or all of the 10 feet may have been there rather than lying between the gate and the eastern boundary.

85. I do not have to make a finding on how the 90 feet boundary at the northern part of the Defendants' land became about 100 feet. There are a number of possibilities, and I therefore find that the measurement of 90 feet on the 1947 Conveyancing Plan does not indicate that the current measurement is 90 feet or that the marking on the plan of 90 feet shows that the land on both sides of the green gate must belong to the Claimants. There are numerous possibilities including the possibility that the land in question has been extended to its current 100 feet on the northern boundary by the kinking eastwards of that boundary. I accept the Defendant's submissions that there are a number of reasons why the 1972 OS map cannot safely be relied upon which are referred to above.

86. I also accept the matters set out above as to why the scaling exercise undertaken by Mr Spencer is unreliable. I accept the three points set out in paragraph 53 above as to the need for caution about the ability to use it to do the scaling exercise of Mr Spencer. I accept the criticism of the way in which Mr Spencer has treated the gaps between the fences in the 1972 OS plan referred to in paragraph 54 above. Further, Mr Spencer produced his report in ignorance of the evidence of the First Claimant told the Court in her oral evidence, there had been a wooden gate (in the same place as the green gate) since at least the 1960s, as well as the analysis of how this chimed with other evidence. If this had been treated as a given so that the omission of the gate in the 1972 OS map is not treated as significant, then Mr Spencer accepted in cross examination that

it would be "tempting, reasonable and rational" to project the fence line to the former green gate.

87. I treat as important that Mr Spencer's projected line does not lead anywhere in particular, dissecting the shoreline between the two concrete steps, slightly to the west of the ash tree leaving the former gate and adjoining short picket fence 'floating' well to the west of the boundary line. That is not what one would expect. I accept the points made about the absence of logic in respect of this line.

88. It seems much more likely that the owners did not adhere to the contents of the 1947 Conveyance when they put their up their fences and the like. I accept the submission in particular that if account is taken of how the parties actually treated the boundaries, it is likely that the resultant plot was treated as differing from a strictly-measured 1947 conveyance plot. I accept the logic of the matters above summarising the submissions of the Defendants as regards this aspect of the evidence. For the reasons set out in the summary of the Defendant's submissions above, I have come to the view that the approach to the plans of Mr Francis accords with logic and that there are too many unresolved problems in Mr Spencer's scaling exercise.

Conclusion as to position of the boundaries

89. Considering everything on the balance of probabilities, I have come to the view that it is more likely than not that the position of the green gate before it was removed was the position of the boundary. It seems to me to be much more logical that the intention of the

landowners was to have the gate on the boundary and unlikely that a person would have a gate other than on the boundary. That would apply both to the party which erected the original gate and to the neighbour who acceded to the building of the gate in that position, if indeed it was not built by both of them in cooperation. None of the various matters which I have heard to contrary effect support in my view a contrary finding. In view of the above, I regard it as proven on the balance of probabilities that the gate towards the west of the Defendants' land was intended to mark and did mark the boundary. In this regard, I prefer the evidence of Mr Francis to that of Mr Spencer. The position of the boundary is therefore to be treated as the position of the gate with the approach of Mr Francis to the extrapolation out of this to the shore of the river.

90. It follows that I resolve the issue of the identification of the boundaries as per that for which the Defendants contend and against that for which the Claimants contend, and in particular rule that the disputed land belongs to the Defendants.

Adverse possession

Introduction

91. The Defendants' alternative case is in the event that they did not own the land up to the green gate and its predecessor, they acquired title by adverse possession. I consider this aspect of the case in case my findings thus far were wrong as to ownership. On this basis, the issue of adverse possession then arises for consideration. It should therefore be

treated as an integral basis of my judgment rather than simply remarks as to what I would have found if it had arisen for consideration.

92. The Defendants' case is that they acquired title by adverse possession before the coming into force of the Land Registration Act 2002 ("the Act") and, in the alternative, that they satisfy the provisions of paragraph 5 (4) of Schedule 6 of the Act. As it transpired, the Defendants say that they are able to establish title prior to the coming into the force of the Act, and therefore that any additional hurdles to adverse possession under the Act do not arise for consideration.

93. There are various facts and matters on which the Defendants rely in support of their case, both in relation to factual possession and intention to possess the land up to the point of the green gate and its predecessor. Some of the factors relate to tenancies conferred to moor boats on the shore. Others relate to other factors. I shall consider them as tenancy factors and non-tenancy factors, but before doing so, I shall say something about the law.

The law

94. The fundamental requirements to be established in a claim for adverse possession were confirmed in the speech of Lord Browne-Wilkinson in J A Pye (Oxford) Limited v Graham [2003] 1 AC 419. At paragraphs [40] – [43], his Lordship stated that:-

> *"there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own*

benefit ("intention to possess"). What is crucial to understand is that, without the requisite intention, in law there can be no possession."

95. As to these elements, Lord Browne-Wilkinson continued:-

"41. In Powell's *case Slade J said, at pp. 470-471:*

"(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so...

Intention to possess

42. ...Slade J reformulated the requirement (to my mind correctly) as requiring an "intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.""

96. Further, Lord Hutton [at paragraph 76] observed:

> *"Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded."*

97. It is not necessary for the adverse possessor to continually occupy the land continuously. Accordingly, the mere fact that there are certain intervals (eg. a hiatus between mooring tenants) does not, of itself, mean that the Defendants have gone out of possession. In *Bligh v Martin* [1968] 1 WLR 804, at 811, Penncuick J said: *"Possession is a matter of fact depending on all the particular circumstances of the case. In very many cases possession cannot, in the nature of things, be continuous from day to day, and it is well established that possession may continue to subsist notwithstanding that there are intervals, and sometimes long intervals, between the acts of user...In the case of farmland, this must habitually be the position; for example, as regards arable land during winter months."*

98. In addition, in order to constitute possession, the use of the land must be such that the owner, if present at the land, would clearly appreciate that the Claimant is not merely a persistent

trespasser, but is actually seeking to dispossess him: *Powell v McFarlane* (1977) 38 P & CR 452, 480.

99. If a person is in possession of land with the permission of the true owner his possession cannot be adverse (*Smith v Lawson* [1997] 74 P & C.R. D34). Thus, the Claimants emphasise that the use of a right of way over the land of another is not a case of adverse possession. This is not in dispute. Nor is it in dispute that, as the Defendants emphasise, the grant of a lease or licence over the disputed land is an indicator that the grantor has the requisite animus and thereafter possession by the tenant or licensee is treated as possession by the grantor for the purposes of adverse possession[3].

100. Trivial acts will rarely suffice to establish adverse possession. (*Megarry & Wade 'The Law of Real Property'* 7th ed. para. 35-018). Acts which have been held insufficient include:

(i) Occasional grazing of goats and clearing of scrub;

(ii) Parking of cars on a small scale on a large site;

(iii) Cutting timber and repairing fences.

101. Additionally, the Defendants emphasise that in determining whether the claimant's activities amount to adverse possession, the character of the land in question is all important. In *Powell v MacFarlane* (1977) 38 P&CR 452, Slade J explained: "The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, *in particular the nature of the land and the manner in*

[3] See the authorities reviewed in *Jordan on Adverse Possession* at 13-03 to 13-08.

which land of that nature is commonly used and enjoyed" (emphasis supplied)[4]. Adverse possession ceases where the squatter vacates the property (*Megarry*, para.35-016).

Defendant's submissions regarding moorings

102. The Defendants say that during the 1970s, 1980s and 1990s, they granted tenancies to boat-owners moored their boats along the disputed land. In particular, the First Defendant says that between 1976 and 1988 or 1989, the mooring space was let to Dave and Elsa Corbett. Between about 1990 and 1994, the mooring space was let to Tony Orr who owned a boat called "Rosie". During 1998 and 1999, the mooring space was let to Neil Sinclair for his boat Poppy. These tenants all lived on their boats and correspondingly made daily use of the two sets of concrete stairs at the north-western corner of the Defendants' land to obtain access from their boats to the mainland and vice-versa.

103. The Defendants rely upon the evidence of their daughter Rebecca Brewster. She recalled a tenant by the name of "Dave Bassett or Dave Batten" being moored there in the late 1980s and early 1990s. She would be unlikely to have had an earlier recall in view of the fact that she was only born in 1980, and so her evidence does not assist ass regards when Dave Batten became a tenant. She recalled that his boat had a cockatoo on it; that he used to fish off the back of his boat and that there was enough room between his boat and Nonsuch to enable him to do that. Rebecca Brewster also recalled that one of her parents' tenants had been a Mr Orr who she said was the husband of one of their friends.

[4] Substantially the same point was made by Cairns LJ in *Red House Farms (Thorndon) Ltd v Catchpole* [1977] 2 EGLR 125, at 126K-L.

104. Although the Defendants have been unable to produce anything like a complete financial record, the First Defendant has produced evidence of at least some payments made by Dave Batten in the late 1980s and some made by Neil Sinclair in the late 1990s (see paragraph 4 of the First Defendant's fourth witness statement).

105. The Defendants rely upon the evidence of Mr Selwyn Smith who recalled a 20 feet cabin cruiser which was moored to the west of Nonsuch II in the first few years after they had acquired the land (1989). Mr Selwyn Smith recalled that "Dave" (that is Dave Batten) used both sets of concrete steps to obtain access to his boat, albeit that the more easterly of the two was used with greater frequency. The First Defendant also gave evidence that both sets of steps were used by the tenants and indeed that they were used by the Defendants without complaint. I accept this evidence. The Defendants refer to the fact that in his second statement and his oral evidence, the Second Claimant stated that Mr Sinclair indicated that he moored "Poppy" alongside the two concrete steps in a photograph in the bundle (at page 243(b)) and not nuzzled into the bow of Nonsuch, contrary to what he had previously suggested. It is notable that the owner of the orange speedboat did likewise. They submit that given that both these two boats moored in that position, it would seem highly likely that Mr Batten and Mr Orr did likewise.

106. Insofar as the Claimants say that consent was given in 1998 or in 2008 to any encroachment, thereby negativing the possibility of adverse possession, the Defendants counter this by saying that (a) this is not a pleaded issue, (b) no licence was granted, and (c) that even if it was, by then the 12 years of adverse possession had already taken place. The 1998 licence is said to arise from the First Claimant's letter on 7 October 1998. This letter does identify the First Claimant's mooring area in that whereas the communication was about the boat of a tenant "overlapping my mooring area", there was no identification as to what was the First Claimant's mooring area.

107. I reject the evidence that there was a common understanding that the boundary was the sycamore tree, contrary to the First Claimant's evidence. If that had been the case, then the First Defendant would not have believed that the boundary was the green gate, and I do not believe, bearing in mind that the Second Defendant was clearly liaising with the First Defendant, that she would have regarded the request to move as just involving 2 feet in her letter of 29 October 1998 (which letter followed a reminder on 23 October 1998 given orally by the First Claimant to the Second Claimant as is apparent from her manuscript annotation on her copy of her letter of 7 October 1998).

108. I have come to the view that there was no meeting of minds between the First Claimant and the Defendants. Absent a meeting of minds, there is no possibility of consent arising. The Defendants point to the fact that each of the persons giving evidence in this regard has identified a different place for the boundary: the First Defendant at the green gate, the First Claimant at the sycamore tree and the Second Claimant at the elder tree. Despite the Second Defendant not giving evidence, I infer from the evidence of the First Defendant and from the letter of the Second Defendant of 29 October 1998 having been written following the reminder given by the First Claimant to the First Defendant a few days earlier, that the First Defendant and the Second Defendant were of the same understanding in respect of the position of the boundary. Given that the Claimants and the Defendants each thought differently, and indeed that the First Claimant and the Second Claimant thought differently, there was not such consent. There is nothing objectively in these communications which indicates that to an objective bystander it would have been apparent that the First Claimant had in mind the point of the sycamore

tree as delineating the boundary. I shall return to the subject of consent in my discussion below.

109. As regards the alleged 2008 conversation between the Second Claimant and the Second Defendant, the Defendants' case as developed depends upon an adverse possession prior to the Land Registration Act 2002 coming into force. In any event, the Second Claimant accepts that he failed to identify the point of the boundary in the conversation in 2008, and in particular that there was not a point of reference of the sycamore tree. I am also not satisfied that there was a reference to the elder tree despite the Second Claimant's assertion to the contrary in his oral evidence: this was not asserted in either his first or his second statement. If he did refer to any point of the boundary with any certainty, it is almost inevitable that this would have been passed on by the Second Defendant to the First Defendant. I am satisfied that this did not occur, and that if it had occurred, the First Defendant would have become involved as he did in 1998. Thus, even although there was no evidence given by the Second Defendant, I have reached the conclusion that if the Second Claimant's recollection is correct that he spoke with the Second Defendant in 2008, it was not a matter which led to any assertion about a specific point of a delineation of the boundary.

The Claimants' submissions regarding moorings

110. The Claimants challenge the Defendants' evidence relating to tenancies in a number of respects. The most important significant issues of factual dispute are as follows:

110.1 The periods in which the Defendants' tenants were in situ;

110.2 The position of the tenants' boats during the relevant periods (alongside the disputed land or neatly tucked in behind the bow of Nonsuch).

111. The Claimants draw attention to the changing detail in the Defendants' case. In the first statement of the First Defendant, he referred to using the central part of the island between the fences as a moorings business with several boats on both sides of the island. The First Defendant referred to two boats that were moored to the West of Nonsuch II, one towards the 'end of the 1990s' (first statement para. 20) and a 'small dinghy' in 2008 'for the Summer' (first statement para. 21). It was only in later statements that the First Defendant made reference to specific tenants and times of occupation, and the details were not entirely consistent. For example, whilst the second statement identified tenancies to Dave and Elsa Corbett, Dave Batten and Neil Sinclair with mooring up to the line of the green gate/tree (see especially paras. 4 and 6) , it was only the third statement which stated that 'it is right to say that from 1976 to approximately 1998 there was always a boat moored to the West of 4) II' (third statement para. 3). When paperwork was provided, it was very limited.

112. The Claimants drew attention to the absence of assertion that these boats were moored to posts on land that the Claimants say is included within the Claimants' title. They say that title ends at the waterfront, 'encroachment' alone of boats beyond the boundary would not constitute possession by the Defendants.

113. The Claimants point out that there are aspects of internal inconsistency in the details of the Defendants' evidence. Whilst the second statement was to the effect that there had been tenants over a period of over 20 years to 1998, the First Defendant also stated in evidence that there was a gap of 'a year or so' after Dave Batten was said to have left his mooring in 1994, that there were sometimes some months between moorings and that he could 'not give exact dates with any confidence'. They point out that the First Defendant's fourth witness statement which appeared to suggest that the boat 'Poppy' may have been moored upon the Defendants' land as late as 2003 rather than 1998 as apparently previously suggested. He said that there might have been a boat moored on the northern boundary in 2008 contrary to the First Defendant's previous evidence. Such assertions would also be at odds with the evidence of Rebecca Brewster who stated that there had only been one boat moored to the West of Nonsuch II after 1998-a dinghy.

114. The Claimants refer to the paucity of documentary evidence of bank statements and accounts, and also to the fact that they do not shed any light on the location of the boats to which payments apparently referred. They also draw attention to the failure of the Second Defendant to give evidence in circumstances where she had been in charge of the mooring business.

Discussion

115. I accept the evidence of the First Defendant that there were regular tenants from the late 1970's until at least 1998. I accept also the evidence as to the location of the boats being in the disputed area.

116. In accepting this evidence, I have had to be cautious about the unreliability of evidence going back so many years in circumstances where very little of it was documented.

117. I have taken into account the criticisms of the First Defendant's evidence that it became more detailed progressively, giving rise to issues of recent invention. However, I have formed the view that the substance of his evidence was correct about the fact that over the period in question, there were regular tenants for most of the time, albeit with some gaps between tenancies. The fact of such gaps for the minority of the time does not in my judgment affect the continuous nature of the possession. I accept in particular the identification of who the tenants were and the approximate estimates of time when they were tenants.

118. Whilst the documentation which was revealed at a late stage following a further search, there is some support from those documents to the evidence of Dave Batten being a tenant in 1989 and in 1991 and to Mr Sinclair in 1998 and 1999. The reference to 1991 might be in contradiction to the evidence that the tenancy of Dave Batten had come to an end in about 1989, but it is evidence of a long term relationship with Dave Batten. The accounts of 1994 and 1995 identify that the income from the moorings was substantial, albeit that I accept that this does not identify anything about the position of the boats, even which part was on the northern part and which part on the southern part of the island. Nevertheless, I have formed the view that inconsistencies or lack of precision about details and the fact that the picture did not emerge all at once are not the product of fabrication or unreliability in respect of the picture as a whole, but of the effect of having to recall matters of so long ago without at first the benefit of documentation, and then with sparse documentation.

119. I accept the submission that the First Defendant ran a mooring business from their river frontage, including the disputed land. The income from this business paid the Defendants' mortgage. The Defendants' tenants were therefore a matter of real importance to the Defendants, and one would correspondingly expect the recollection of the First Defendant in respect of these matters to be better than that of anyone else who gave evidence on this subject. I have taken into account the fact that the Second Defendant has not given evidence, but I do not draw an adverse inference. The First Defendant gave evidence that his wife had been under enormous pressure, was medically stressed and that attending to give evidence would have caused her too much pressure. I have no reason to disbelieve this evidence, and take the view that the Defendants have been able to prove their case on the basis of the evidence which they have chosen to call with the assistance of aspects of the Claimants' evidence as noted in this judgment.

120. By contrast, the ability of the Claimants to recall would have been less by reason of their lesser connection with the island at the relevant time. The First Claimant was effectively completely absent from Ash Island until 1978. Between 1978 and 1984, the First Claimant was resident in the UK and did visit her parents at Ash Island (until they moved to the mainland in 1984). Even when the First Claimant did visit Ash Island, the First Claimant explained (in her oral evidence) that she did not often have cause to walk across the Defendants' land and she often came to her parents' house by boat. In 1993, the First Claimant again moved to Pakistan and returned only for holidays. In summary, the First Claimant never lived on Ash Island and would have been absent for a substantial part of the relevant period. When pressed on matters of detail, the First Claimant's evidence was (unsurprisingly) somewhat vague.

121. The Second Claimant was likewise in Pakistan until 1978, albeit that as a young boy he came and stayed with his grandparents (who divided their time between Ash Island

and Claygate) for a number of summers. After 1978, the First Claimant went to Ash Island to visit his grandparents, but he lived elsewhere. It is only from May 2001 onwards that the Second Claimant was resident on Ash Island and even then lived in the centre of the Island rather than on the northern shoreline. Again, the Second Claimant was a young boy in the 1970s and was merely a visitor in the 1980s and 1990s in contrast to the First Defendant who was (like Rebecca Brewster) permanently living on the northern shore of the island, which was very close indeed to the disputed land. It follows that the First Defendant and Rebecca Brewster are far more likely to be aware of the day-to-day activities of the disputed land than either of the First or the Second Claimants.

122. As regards the evidence in respect of location, I have come to the view that it has been proven adequately that the boats were adjacent to the disputed land. That was proven in particular by the evidence of Mr Selwyn Smith, which I accept, to which I referred above and to the evidence of the Second Claimant as regards the orange boat to which I referred above. I accept Mr Selwyn Smith's evidence in that, albeit a tenant on the southern side of the island, he is well placed to recall accurately the factual detail at the relevant time. This evidence about the position of the boats of the tenants makes sense. Indeed, it is logical that boats would have moored alongside the steps because:

122.1 the concrete steps provided the means to obtain access to and from the river bank;

122.2 the concrete steps sit immediately either side of the "stand-off" the clear purpose of which was to enable boats to safely moor alongside it[5].

[5] The Second Claimant sought to suggest that a boat could not moor against this stand off alone because, in the absence of a second stand off, it would pivot and be damaged against the bank. This is wrong. First, as the First Defendant explained the stand off consisted of two wooden poles on either side of the sycamore tree – there was therefore no pivot. Secondly, we know that boats did moor

122.3 if the boats moored alongside the bow of Nonsuch II, there would have been no steps onto the shore; the boat would have been adjacent to the Defendants' bedroom window; there would, as the Second Claimant explained in his oral evidence, be greater noise disruption; there would be a risk of damage to both boats during winter. I accept the evidence of the First Defendant in this regard.

123. It also makes sense that both sets of steps would be used by the tenants, there being nothing to indicate that they should use the eastern rather than the western steps. Such evidence as one has in respect of the position of some boats or the use of steps by a particular tenant is important because one can extrapolate out from the position of those boats to the boats of the other tenants or from the use of steps by one tenant such as Dave Batten to the practice of other tenants.

124. There is no reason to believe that any tenant would have treated the boundary as being between the two steps, absent any indicator to that effect. Indeed, I have come to the view that a tenant, if thinking about the boundary, would be likely to have assumed that the boundary would be contiguous with the green gate. I do not make a finding to the effect that they did because there is no positive evidence to that effect. However, I do make a finding that there was no evidence to show that a tenant would have distinguished between the two steps or would have been on notice to the effect that the boundary was in the place contended for by the Claimants.

125. I am not impressed by the point that the position of the boats is irrelevant to the issue of adverse possession, because, the Claimants say, the use of the river is not the issue: it is

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along side the stand off because both Mr Sinclair and the owner of the orange speedboat clearly did so.

the use of the land. The answer to this point is that there is an inference that the land adjacent to the boats would be used by the tenants to get on and off the boat. In this case, this is of particular significance by reference to the two sets of steps. The fact that the boats would have gone up to the position of the green gate would have led to the disputed land being used by such tenants, particularly the two sets of steps one of which is in the disputed land. An example of how the land would be relevant to the moorings is not only the use of the land by the tenants on coming on and off the boats, but also the use of the land by the landlord for the benefit of the tenants. Hence, there is evidence that at an early stage, the First Defendant painted the steps (it was not a one off event), but it was not repeated after the first two or three years since the water splashing made it pointless. This was done for the benefit of the tenants. There is also evidence of the First Defendant, which I accept, that in the late 1970s, the First Defendant replaced the existing, dilapidated scaffolding around the sycamore tree with new scaffolding (best seen on the photograph which was at page 90 of the bundle) to support the "stand-off" so as to ensure that his tenants' boats moored in the mooring space in front of Nonsuch did not bash against the concrete.

126. In respect of the issue, if there is one, to the effect that there was consent given by the Claimants to the Defendants to use the boats in the disputed area in 1998 and/or 2008, I do not propose to rule against this because it is not pleaded. I accept the submission of the Defendants that there was no definition of the area in question required for consent either in 1998 or in 2008. I accept also that there was nothing to indicate objectively that the boundary was in the place now contended for by the Claimants. I accept the evidence of the First Defendant that he believed that the boundary was by reference to the green gate. This belief is underlined by the evidence of the First Defendant about how in the initial years of his occupancy of the land in question, he painted both sets of steps, which

would not have been sensible if he knew that the western steps were not a part of his demise.

127. In accepting that the First Defendant believed that the area up to the green gate formed a part of the land which he occupied and subsequently owned, I regard that as a natural and reasonable inference in any event absent other topographical indications, and that that points to his belief at the time. Whilst there was no evidence from the Second Defendant, there is no reason to believe that her understanding was any different from the First Defendant. I do not have to make a finding as to what the First Claimant believed to be the case at the time and as to whether she indeed did believe that the boundary was where she now contends it to be. However, I do find that there is no basis from which to infer that there was a communication of that belief to the Defendants from which it could be inferred that there was not just a meeting of minds of the parties, but a meeting of minds by reference to the boundary now contended for by the Claimants. To the extent that an argument based on consent is pursued by the Claimants, I reject it. If I had not rejected it, I should have found that the adverse possession was made out by 1998, that is before any issue of consent arose, and that therefore any consent was too late to defeat the adverse possession.

128. In my judgment, the evidence about the use of the land relating to the tenancies is significant. This amounts to factual possession in the sense that the Defendants dealt with the land as an occupying freehold or leasehold owner might have been expected to deal with it. It also carries with it in my judgment an intention to treat the land up to the green gate and its predecessor and the line going from there to the shore as belonging to the Defendant. It is in my judgment a highly important aspect of user in that in the end, it is the essence of the dispute being the riparian rights which go with ownership and the ability to use it by tenancies to boat owners. Neither is the act of granting a trivial act nor

is it intermittent. It is for the duration of the tenancy, albeit that there might be times when no tenancy is in existence.

Other factors regarding adverse possession other than the moorings

129. There are many other features relied upon by the Defendants, some of which are ephemeral by themselves. However, they are to be seen not in isolation from the matters relating to the moorings. They are also to be seen as part of a bigger picture, namely of a general user of the land up to the green gate.

130. The Defendants rely in particular upon the following matters. First, the First Defendant stated that the Defendants stored dinghies on the land on either side of the sycamore tree, between points A – G on the plan at [p95k]. The Defendants accept that the dinghies were not always stored on the bank, but equally they were there for substantial periods at a time. The First Defendant's account was corroborated by the oral evidence of both Rebecca Brewster and Mr Selwyn Smith. The Claimant made some inroads into the case of the Defendants in this regard by his second statement and his oral evidence in which he pointed to a dinghy relied upon to support the Defendants' evidence as being that of Mr John Bouvier, a tenant of the First Claimant. Despite this, I accept that from time to time, on the basis of the evidence of the First Defendant, Rebecca Brewster and Mr Selwyn Smith, I find that the Defendants did make use of the bank on either side of the sycamore tree to store dinghies, albeit that such use was not continuous.

131. There are other indicators of the Defendants using the entirety of the land between the two gates as if they were the owners. This included laying or requesting the laying of the path between the two gates with an extra half paving stone to make it wider on the basis that this was safer for the children. From 1994 onwards, the son of the Defendants became very keen on fishing and used

to fish regularly with his friends along the full length from the bow of Nonsuch II to the line of the green gate without complaint.

132. As regards, the Defendants keeping the path clear, I accept the submission that this might not take the matter further because it can be explained on the basis of the exercise of a right of way. However, in the context of the Defendant's conduct, it is a part of a wider account of the treatment of the entirety of the land as their own from the green gate to the west to the gate to the east. This is also the explanation of how the children came to play from gate to gate as referred to at paragraph 43 of the First Defendant's statement and to pick blackberries at the north eastern end of the Defendants' land at paragraph 40 of the First Defendant's statement. I do not treat these matters as trivial within the context of the bigger picture of the Defendants exercising ownership of the entirety of what they believed to be their own land.

133. The Second Claimant gave evidence of his grandfather telling him about his tending to the land on both sides of the green gate, but this was lacking in detail including the identification of the precise land that he tended, the question of what he did cannot be tested and, in any event, the actions can be explained by reference to the exercise of the right of way. As regards his own evidence of his tending to this area, this evidence was challenged by the First Defendant who said that he had tended to the path. In the end, I do not have to reconcile this evidence because this was after the time when the right of the Defendants by adverse possession would have arisen and it is consistent with the exercise of the right of way.

Conclusion on adverse possession

134. In short, I conclude that there were a number of factors which are consistent with the understanding of the Defendants that their boundary was from north western gate to north eastern gate. The indicators relied upon in respect of adverse possession add to the case based on the moorings. They involve actions consistent with that belief and which are indicative of the exercise of the factual possession. I find that these actions form a part of a picture together with the much more important evidence about the moorings which lead me to the conclusion that at latest by 1998, there had been 12 years continuous possession such as to give rise to a case of adverse possession in respect of the disputed land.

135. In case it is not clear that the land at the north eastern end were covered by the conveyance, I am satisfied that there was an assumption of factual control to the north eastern side as well. This is particularly evidenced by the unchallenged evidence about maintenance by the Defendants of the chainlink fence at the north eastern end, as well as by the evidence of the path having the extra half paving stone from gate to gate.

136. I should add that I have heard evidence to the effect that when the green gate was erected in the mid-1970s, the First Defendant insisted and Douglas Chapman's accepted that the new gate should not be positioned any further east than its predecessor [p95e, para 14]. I attach no weight to this discussion bearing

in mind how long ago it was, and to the difficulty of inferring the reason why Mr Chapman accepted that it should not be so positioned.

137. Based upon the totality of the evidence, I have come to the view that the Defendants have since 1976 made use of the disputed land in the manner in which one would reasonably expect the owner of the land to do and in a manner which clearly signalled to the outside world that they were treating it as their own. Accordingly, their 12 year period completed in 1988. In any event, I have found that it was completed at least by 1998 by the time of the correspondence between the Second Claimant and the Defendants. All of this precedes and is by the time when the Second Claimant came to live on the Island. If and to the extent that they did not already own the disputed land, I find that the Defendants acquired the land by adverse possession. The issue then of the application of the Land Registration Act 2002 does not arise.

138. Further, whilst it is not controversial that the Defendants exercise factual possession up to the wooden gate on the north western end of the property, if the Defendants for any reason did not by virtue of the 1947 conveyance acquire the land up to the point where the chainlink fence and gate is to the north western end of the Defendants' land, I am satisfied that the Defendants acquired title to that land too.

139. For all the above reasons, I have concluded that there should be a declaration broadly in line with that sought by the Defendants. I invite the parties to agree a form of order which reflects this judgment, and I shall hear Counsel as to the form of the precise order in the event that there is disagreement.

Clive Freedman
12.12.12