

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2010

Before:

SIR WILLIAM BLACKBURNE
(Sitting as a Judge of the High Court)

Between:

(1) JEFFREY WARREN HERRMANN **Claimants**
(2) MINA GEROWIN HERRMANN

- and -

(1) THE ROYAL BOROUGH OF KENSINGTON **Defendants**
& CHELSEA
(2) MICHAEL WAINWRIGHT (AS
TREASURER FOR THE TIME BEING OF
OVINGTON SQUARE GARDEN COMMITTEE)

Charles Harpum (instructed by **Thring Townsend Lee & Pembertons**) for the Claimants
Ranjit Bhoose (instructed by **their in house legal team**) for the First Defendant
Cain Ormondroyd (instructed by **Pemberton Greenish**) for the Second Defendant
Hearing dates: 24 and 25 June 2010

Judgment

Sir William Blackburne :

Introduction

1. The garden square is one of London's glories. Situated typically in the middle of the square and fronted by terraced houses on each side of the square, the garden provides a haven of greenery and tranquillity amid the bustle of the neighbouring urban environment. London has a great many such squares. Some are open to members of the public, others are open only to keyholders. Most were established in the 18th and 19th centuries. All, or nearly all, are governed by legislation regulating their upkeep and management.
2. These proceedings are concerned with Ovington Square ("the Square"), which lies within the Royal Borough of Kensington and Chelsea ("the Royal Borough"), and with the Kensington Improvement Act 1851 ("the Act").
3. As originally enacted, the Act enabled gardens within what the Act describes as "the Limits" to be taken under the control and management of Commissioners. It also dealt

with other matters. Since enactment it has been much amended and most of its provisions repealed. Indeed, only the provisions on gardens, to be found in sections 3 to 5 and 41 to 53, remain in force, and then only in amended form. I am concerned with the Act as it stood on 1 April 1954. That was when management and control of the garden (“the Garden”) which lies in the Square was brought within the Act. By then the Commissioners’ functions had long since become vested in others, originally in Kensington Vestry (pursuant to the Metropolis Management Act 1855) and subsequently in the Metropolitan Borough of Kensington (pursuant to the London Government Act 1899). In 1965 they became vested in the (current) Royal Borough as successor to the Metropolitan Borough (pursuant to the London Government Act 1963). It was when the Metropolitan Borough was in existence that control and management of the Garden was brought within the Act.

4. The particular question which these proceedings raise is whether the claimants, Jeffrey Warren Herrmann and his wife, Mina Gerowin Herrmann, who own and occupy 37 Ovington Square (“No. 37”), are entitled to what Mr Charles Harpum who appeared for them described as “garden right”, namely a right of access to the Garden pursuant to section 51 of the Act. Section 51 confers on those entitled to its benefit “the exclusive Use” of the garden in question. (In citing from the Act I shall adopt the draftsman’s practice of using upper case first letters in the spelling of nouns where that has occurred.) It is the Herrmanns’ contention that they are entitled to that right. The first defendant, the Royal Borough, which has appeared by Mr Ranjit Bhowe, contends that they are not. Accordingly, the Herrmanns seek a declaration against the Royal Borough that as owners of the freehold of No. 37 they have such a right.
5. The Royal Borough is supported by the second defendant, Mr Michael Wainwright, who has appeared by Mr Cain Ormondroyd. Mr Wright is, and is sued as, the treasurer for the time being of Ovington Square Garden Committee (“the Committee”). The Committee is established by section 43 of the Act. By that provision it has the exclusive care, management and regulation of the Garden. Section 52 of the Act provides that a garden committee (established under the Act) “may sue and be sued in the Name of the Treasurer or Secretary...” The Committee, acting by Mr Wainwright, is sued because, through its chairman (a Mrs de Stanford), it has refused to make a key to the Garden available to the Herrmanns. It is sued for damages in nuisance on account of this refusal. It is said by the Herrmanns that the refusal amounted to an actionable interference with the garden right which they claim.

The Square

6. Attached to this judgment is a current (Ordnance Survey) plan of the Square. As will be seen from that plan the Square - confining that expression for the moment to what Mr Harpum described as “the Rectangular Area” - has the garden at its centre with terraced housing around its perimeter. The Garden is enclosed by railings, contains some mature trees and has an area laid to grass. It is accessed via a locked gate.
7. As further appears from the plan, access into the Rectangular Area is either by Ovington Gardens (formerly known as Ovington Terrace) at its western end, which in turn leads to the busy Brompton Road, or via a short road at its eastern end which leads into the very much quieter Walton Street. That short length of street was originally known either simply as Vincent Street or else as Vincent Street, Ovington Square. It underwent an official change of name to just Ovington Square in 1881

which is how it is described on the plan. According to the documentary evidence this change of name was because there was another Vincent Street within the same postal district and there was a concern to avoid confusion.

8. In argument Mr Harpum referred to this short length of street simply as “the Terrace”. As appears from the plan it has terraced housing on both sides. The Herrmanns’ property at No.37 fronts the Terrace in the sense that its front door opens on to the street there. The adjoining house to the east, 35 Ovington Square, fronts (i.e. its front door faces) the open square. So also does 34 Ovington Square immediately opposite at that end of the Terrace. Ignoring the side elevations of 34 and 35 Ovington Square, there are altogether eight houses in the Terrace. In addition to No. 37 they are 36 to 43 Ovington Square. All except 43 Ovington Square (which lies at the junction of the south side of the Terrace with Walton Street) have their front doors on to the Terrace. 43 Ovington Square used to but this was changed many years ago so that its front door now faces Walton Street. Nothing turns on this.
9. As it happens, the Herrmanns are US citizens who had long wanted to live in London. They had the opportunity to do so, and they seized that opportunity, when Mrs Herrmann, who is the managing director of a hedge fund, was offered a post at the London offices of her employer. As a result the Herrmanns have resided in London since January 2008. They completed their purchase of No.37 on 4 June 2008. In the process they were assured by the solicitors who then acted for them (other solicitors act for them in these proceedings) that, as owners of No.37, they would enjoy garden right over the Garden. The Herrmanns attached (and continue to attach) considerable value to this as No.37 itself has no garden. Moreover it is not in dispute that, apart from the pleasure afforded by access to an amenity such as the Garden, the existence of garden right adds considerably to the value of those properties which enjoy it. The assurance which the Herrmanns were given is of course irrelevant to the outcome of these proceedings but it helps explain their wish to establish whether they are entitled to the right which they say was a factor in their decision to purchase their London home.

Some history

10. This judgment will fail to do justice to the enormous amount of research undertaken by Mr Herrmann into the history of the Rectangular Area and of the two access roads to which I have referred, as well as into the wider area including certain other squares within the Royal Borough. His research has been aided (as I would think) by the fact that Mr Herrmann used to practise as a lawyer. He is now retired. What follows is largely taken from the summary of material events concerning the history of Ovington Square set out in Mr Harpum’s skeleton argument. A more detailed account is set out in *The Survey of London*, Vol XLI (1983) at pages 28 to 30 and in other documents exhibited to and summarised in Mr Herrmann’s first witness statement.
11. The Rectangular Area and Ovington Gardens were built on land belonging to Baroness Elizabeth Von Zandt, the widow of Sir Thomas Swinnerton Dyer, 7th baronet and the daughter of John Standerwicke of Ovington House in Hampshire (from which the name Ovington Square derived). She had subsequently married a German nobleman, hence her name. Following her death in 1864 the freehold in the land reverted to the Dyer family in whose ownership it had previously belonged. The

Terrace was built on land belonging to Smith's Charity, a well-known local charity, two of whose trustees at the time of its construction were surnamed Vincent.

12. The development of the land was undertaken by an architect and builder called William Pocock. He, or his nominee, took leases of the Rectangular Area and part at least of what is now Ovington Gardens from Baroness Von Zandt and of the Terrace from the Smith's Charity trustees. Mr Pocock built all of the terraced houses in the Rectangular area and on the western side of Ovington Gardens and the eight terraced houses in the Terrace. Work commenced on the building of the houses on the land leased from Baroness Von Zandt in 1844 and on the land leased from Smith's Charity in 1849. On 7 February 1854, after Mr Pocock had completed the last of those houses, Baroness Von Zandt granted him a lease of the Gardens and of the road, paths and ways in the Rectangular Area and Ovington Gardens for a term of 80 years from Michlaemas 1844.
13. The Terrace was completed before some of the houses in the Rectangular Area had been completed. The Herrmanns maintain that the fact that the Terrace was developed even before all of the houses in the Rectangular Area had been built shows that the Terrace was constructed as an integral part of the overall development. It is undoubtedly the case that, architecturally, the Terrace is very similar to the houses that face on to the Garden.
14. No houses were built on the eastern side of Ovington Gardens until 1867 or so. The builder was called Aldin. By then Baroness Von Zandt had died and the freehold had reverted to the Dyer family. In 1869, after the houses on the eastern side had been built, Ovington Terrace (as it was then known) was renamed Ovington Gardens. Ovington Gardens is the property, one side of which fronts the northern end of the Rectangular Area. In the north-eastern corner of the Rectangular Area is the side elevation of what is now a property in Ovington Mews.
15. 32A Ovington Square which is tucked behind 32 Ovington Square (in the south-east corner of the Rectangular Area) was constructed in 1925. It had previously been stabling of some kind.
16. Mr Herrmann's researches have not revealed that No.37 has ever actually enjoyed garden right since the Garden was taken under management and control, pursuant to the Act, in April 1954. Indeed, there is no evidence to indicate that the owners or occupiers from time to time of No.37 have ever enjoyed access to the Garden. Equally, it is fair to point out, there is very little evidence to indicate which other properties fronting the Garden (or, for that matter, in the immediate vicinity of the Garden) enjoyed any right of access to it before April 1954.
17. The current owner of the Garden is a BVI company called Cloten Holdings Limited. Notwithstanding that that company owns the land over which the garden right in these proceedings is claimed, it has not been suggested that Cloten should have been made a party.

The Act

18. This brings me to the Act. Its lengthy Preamble and section 1 (both since repealed) show that the Act applied to a number of existing squares, for example Edwardes

Square and Brompton Square, in what later provisions describe as “the Limits”. That expression which defines the geographical area to which the Act applies is defined by section 4 (an unrepealed section) as “...the whole of the Parish of St Mary Abbots, Kensington”. That is a reference to the then ecclesiastical parish of that name, civil parishes being then unknown.

19. Earlier in these proceedings, it had been in dispute whether No.37 (and the remainder of the Terrace) was even within the Limits (as so defined) when the Act was enacted. Much evidence was directed to this issue since, surprisingly, contemporary documentation is by no means clear: some documents seem to show that it was within St Mary Abbots, others that it was in the adjoining parish of St Luke, Chelsea. It was conceded shortly before the start of the trial that it did not matter what the boundary position was in 1851 since what is relevant is where the boundary was when the Garden was brought within the 1861 Act on 1 April 1954. By then No.37 was within the Parish of St Mary Abbots (whether viewed as an ecclesiastical or a civil parish) as a result of an Order in Council of 15 May 1900 made pursuant to the London Government Act 1899. So before me, it was accepted that at the material date, 1 April 1954, No.37 lay within “the Limits”.
20. Section 41 of the Act creates a procedure by which, so far as material, two-thirds of the freeholders of a square within the Limits may apply for “any Garden, Pleasure Ground, or Enclosure within or belonging to any Square now or at any Time hereafter to be formed or laid out within the Limits of this Act” to be brought under the control and management of “Commissioners” who would thereupon take upon themselves “the future Maintenance and Improvement of such Garden, Pleasure Ground or Enclosure, and thenceforth keep the same enclosed, laid out, fenced, planted, gravelled, maintained, repaired and embellished”.
21. Where this has happened section 43 (as subsequently amended) provides that the owner of the relevant garden and the “persons who, in accordance with the Part I of the Local Government Finance Act 1992, are liable to pay council tax in respect of any dwelling in the said square which is a chargeable dwelling for the purpose of that Part and who shall have been resident in the said Square for One Year at the least” are constituted a garden committee for the care, management and regulation of the garden.
22. The Act contains, in sections 44 to 48, provisions concerned with the operation and powers of the garden committee, including the power to make byelaws and, importantly, by section 46, the power to determine the amount of money to be raised for the maintenance of the garden. The amount in question is raised by an Order” (made under section 47) requiring the Commissioners (now the Royal Borough) to pay the amount so determined, subject to the Royal Borough’s power to cap the amount. It is for the Royal Borough (in exercise of powers subsequently conferred in substitution for a power previously contained in section 41) to raise that sum by way of an extra charge assessed on the occupiers of the houses entitled to the garden right in question.
23. By section 49, the kerbs, iron rails, enclosures, gates and fences enclosing the garden are vested in the garden committee although, at section 50, the “enclosing, forming, making, ornamenting, and embellishing of the Centre or Area of every Square hereafter to be set out within the Limits of this Act” were to be wholly under the

“Management and Direction” of the owner of the garden title to which was stated to remain in the Owner as if the Act had not been passed.

24. Section 51, to which I have already briefly referred, states, so far as material:

“That the Owner for the Time being of the Garden, Shrubbery, or ornamental Enclosure in the Centre or Area of each of the said Squares, is Heirs and Assigns, and the Occupiers of the several Houses in and encompassing such small square, and all Persons to whom such Owner shall have granted or may hereafter grant a Right of Access to the said Garden, Shrubbery, or ornamental Enclosure, shall be entitled to have the exclusive Use of such Garden, Shrubbery, or ornamental Inclosure, and no other person or persons whatsoever shall be entitled thereto: ...”

Thus, there are three categories of persons who are given garden right: (1) the owner of the garden and his successors in title; (2) the “Occupiers of the several Houses in and encompassing such square” and (3) such persons to whom the owner of the garden has granted or may in the future grant the right. The question is whether number 37 is one of the houses “in and encompassing” the Square, as referred to in the second category of persons mentioned in section 51.

25. Before coming to counsels’ submissions, I should first refer to the definition of “Square” set out in section 5 (the Interpretation section) and to two other provisions which bear upon the issue I have to decide.
26. As to the definition, section 5 provides that:

“‘Square’ shall include Crescents, Circuses, Half Squares, Terraces and ornamental Enclosures within the Limits of this Act; ...

That definition is expressed to apply “unless there be something in the Subject or Context repugnant to such Construction...”

27. Section 41, headed “Provisions for Management of Squares to be hereafter made” is the provision which explains how a garden is taken under the control and management of the Commissioners. It provides, so far as material:

“That with regard to the future Maintenance and Improvement of any Garden, Pleasure Ground or Enclosure within or belonging to any Square now or at any Time hereafter to be formed or laid out within the limits of this Act... the same, and the Fences thereof, shall, upon the Application in Writing of the Freeholder of Freeholders for the Time being when more than One of the Messuages constituting any such Square...”

- there is then a reference to the number of such freeholders who should apply and to another category of persons who should also be party to the application (that person is identified as “the Owners of the Messuages constituting any such Square (provided

such Garden, Pleasure Ground or Enclosure shall be completed)” but I think this must be an error of drafting and should instead refer to the freehold owner of the garden.

“be taken under the Control and Management of the said Commissioners...”

28. Lastly, there is section 42 headed “What shall be deemed a House in a Square”. This section provides:

“That every House of Building the Front or Side of which shall face or form Part of the Line of any of the said Square shall for the Purposes of this Act be deemed to be wholly situated in the Square which it shall face or form Part of the Line of, though the other Part of such House of Building may front or face on any other Street.”

The Herrmanns’ case

29. Mr Harpum submitted that, although neither “square” nor “encompass” appearing in section 51 is a term with a precise meaning, it was possible to deduce the following characteristics of a “square” for the purposes of the Act. First, having regard to the definition of “square” in section 5, the garden in question need not be surrounded by buildings; a single terrace with access to a garden enclosure is within the definition. Second, the garden does not have to be “within” the square; section 41 refers to “any Garden, Pleasure Garden, or Enclosure within or belonging to any Square...” “Belonging” he submitted, must mean “associated with”. Third, the square must comprise “Messuages” (i.e. dwelling houses): see the reference in section 41 to “...the Messuages constituting any such Square...” Based on those references he submitted that the core concept of “square” in the Act is that there should be some defined entity comprising dwelling houses and having a garden associated with it. That entity could be a crescent, a terrace, or a square in the conventional sense, or some combination of elements, such as two terraces on either side of a crescent with the associated garden in the crescent. This is consistent, he submitted, with the purpose of the Act, namely to preserve gardens and allow their enjoyment by all those who occupy the dwellings “associated” with them (picking up the reference to “belonging to” appearing in section 41).
30. He submitted that once the entity that is the square is identified, the range of houses or buildings within it is then extended by section 42. The effect of the section is to deem a “House or Building” to be “wholly situated in the Square” where the front or side, but not the rear, of the house or building either forms part of the line of the square or faces any of the square even though the other part of the house or building may front on to or face some other street. He submitted that, like the definition of “square” in section 5, section 42 was concerned to widen the range of “houses” referred to in section 51. But it shed no light on what constitutes a square. It presupposes that one has already identified what the square is.
31. He submitted that the ambit of entitlement to garden right is further widened by the reference in section 51, in its description of the second category of persons entitled to exercise garden right as comprising not simply the occupiers of the houses in the square but also the owners of the houses encompassing the square. Mr Harpum

submitted that the “and” between “in” and “encompassing” should be understood disjunctively and must have been intended to include properties that were not “in” the square so that, giving the expression “encompass” its customary meaning of “surround” “envelop” “contain” or the like, section 51 will be satisfied even if a particular house is not “in” the square provided the house could in some way be said to be one of the several houses which surround, envelope or contain the square. He submitted that it must be a question of fact in every case whether a property meets the requirements of section 51.

32. On the basis of that analysis, Mr Harpum submitted that a particular property is “in” a square for the purposes of the Act if it is part of a collection of dwelling houses with a garden “associated” with it. The nature of the entity, whether it is a square in the conventional sense, or a crescent or a terrace, or some combination of elements, will assist in defining it. He submitted that No.37 satisfies those requirements and can be said to be “in” the Square for the purposes of the Act because the Square includes a square in the conventional sense in that it has a rectangular area at its centre which contains the Garden and is surrounded by houses. However, as a matter of ordinary speech a “square” is not confined to the area at its centre; there must be a means of access to it and the street or streets which lead to it were commonly developed as part of it and are frequently named as a part of it.
33. He submitted that that was so in the case of the Square. He listed seven factors pointing to the conclusion that the Terrace (and also, he accepted Ovington Gardens) should be treated as part of the Square (in the wide sense for which he contended) with the result that the houses fronting those access streets are to be regarded as “in” the Square. Those factors were as follows: (1) the Square is an enclosed and defined entity lying between Brompton Road and Walton Street; (2) the means of access to and egress from the central part of the Square – the Rectangular Area - are by means of the Terrace from Walton Street and Ovington Gardens from Brompton Road; (3) the Rectangular Area, the Terrace and the western side of Ovington Gardens were all built by the same developer and architect, William Pocock, and constructed as part of the same development between 1844 and 1852 with construction of the Terrace taking place before all of the houses in the Rectangular Area had been completed; (4) both the Terrace and Ovington Gardens are an integral part of the design and structure of the overall Square, providing the necessary means of access; (5) the Terrace is indistinguishable architecturally from the buildings in the Rectangular Area and, viewed from the junction with Walton Street looking north-west, offer a vista of the Garden, so giving rise to a feature that formed an essential part of the design of the overall Square; (6) the Terrace was always (according to Mr Herrmanns’ researches) known as Ovington Square even if, until 1881, it was also known as “Vincent Street, Ovington Square”; and (7) on any view, the Terrace has been part of Ovington Square by name since 1881 and had been so known for more than 72 years when the Garden was brought within the Act in April 1954.
34. Accordingly, Mr Harpum submitted, No.37 is “in” the Square and, if it is necessary to say so, forms “part of the line” of the Square (picking up the wording of section 42). He submitted that this broad approach to the wording of section 51 is fairer than the narrower approach of the Royal Borough which would confine the square (for the purposes of the Act), and thus the houses within it, to the Rectangular Area. Inevitably the cut-off point between those houses which are “in” a named square and

those that are not is likely to be arbitrary but, in the instant case, it would be odd and scarcely fair if the narrower approach of the Royal Borough were to have the consequence that a house such as No.37 from which the Garden is visible and which lies literally only a few feet from it, should not enjoy garden right when 35 Ovington Square next door does.

35. Mr Harpum's alternative submission was that No.37 could be said to be one of several houses which "encompass" the Square in that it is on one of the two roads that link the Rectangular Area to Walton Street and Brompton Road respectively with the result that those roads can be said, to "contain" and therefore to "encompass" that Area.

Conclusions

36. Mr Bhoose described Mr Harpum's argument as ingenious but wrong. I agree.
37. The issue is a short one: what is meant by "the several Houses in and encompassing such square"? It is a crucial question since it is the occupiers of houses which fulfil that test who enjoy garden right.
38. The difficulty is, as Mr Harpum stated, that the Act does not provide a definition of the key concept of a "square". It includes houses but which? It may take a variety of forms in that it is not confined to the four-sided shape popularly associated with the notion of an urban square. It has a garden in or belonging to (or associated with) it. (I accept Mr Harpum's suggestion that "belonging to" must mean "associated with".) But that is as far as the draftsman goes. Instead, as it seems to me, the draftsman appears to have assumed that, subject to including "Crescents, Circuses, Half Squares, Terraces and ornamental Enclosures" within its meaning, the concept of "square" requires no explanation. As appears from section 42, his focus has been to clarify what the position is at those points where the square intersects with a street which is not within it. What is of interest about section 42 is that it assumes that a house which is in a square must have either its front or one of its sides facing some part of the square or forming part of "the Line" of some part of the square.
39. In one sense this begs the question as to what the square is. But the fact that its concern is to include (as a house wholly within the square) a house any part of which may "front or face on any other Street" rather suggests that a house, a part of which fronts an access street (such as Ovington Gardens or the Terrace in the instant case) will only be within the square if some part of the front or side of the house (but not its rear) faces the square or forms part of the line of the square.
40. The concept of the "Line" of the square, which the Act does not explain, suggests to me a notional line which follows the outline of the square (be it a square in the popular sense or a square in the extended sense indicated non-exclusively in section 5) and traces a course along the edge of each property (along either the property's front or one of its sides) which is within the square. It is a line which one would expect to mirror the general shape of the square, half square, circus, crescent or terrace in question.
41. Beyond those considerations there is another factor which has weighed with me in coming to a view on what the Act means by a square. That is that the Act must be

readily workable. By section 41 the initiative to bring a square within the operation of the Act comes from the owner of the garden and the owners and lessees of the “Messuages constituting any such Square”. The garden committee is drawn from among those persons.

42. I think it highly unlikely that the determination of what those properties are would turn on the kind of matters prayed in aid in the instant case concerning the circumstances in which the square and its access roads were constructed, for example whether they were designed or built by the same person or as a single development or are to be regarded as architecturally indistinguishable, much less on matters such as the street names which they bore when completed. The Act, which was intended to apply to garden squares already in existence as well as those yet to be constructed, was and remains, a facultative measure of indefinite duration. In the instant case the Square was only brought within the Act a century or so after it had been constructed and the Act had been passed. (I was told that it was one of 31 or so garden squares brought within the operation of the Act after 1901 and that most of those 31 were brought within the Act between 1953 and 1980.) The very fact that Mr Herrmann has devoted so much time and energy to researching the history of the Square, and has produced an exceptionally detailed account cross-referenced to treatises on the history of the Square, estate plans, memorials of deeds listed in the now defunct deeds registry, census and poor rate returns, street directories and the like, suggests to me (even ignoring those parts of his account that go to the parish boundary question) that the draftsman can never have intended the operation of the Act to depend on such matters.
43. In the circumstances, I have reached the clear conclusion that “Houses in and encompassing such square” appearing in section 51 refer to those houses which have a front or side which wholly or in part faces the open square, half square, circus crescent or terrace, as those expressions are popularly understood, within which or associated with which is the garden in question. In short, the square (whether four-sided, or having some other shape) must be of a kind which, with its attendant garden, the average man in the street would have no difficulty in recognising. Once identified, it is the houses within that square which qualify. Section 42 operates to resolve any argument at the fringes of the square.
44. I do not therefore consider that “square” has the extended meaning for which Mr Harpum argued. Nor do I consider that his alternative argument, based on the expression “encompass”, has any validity. In any event, it was an alternative argument which Mr Harpum urged only faintly.
45. Since the front or side of No.37 does not face the Square in the sense intended, it follows that the Herrmanns, as occupiers of that property, do not enjoy the garden right that they claim. It is, in my judgment, irrelevant that it is possible to see the garden from the front windows of number 37. Equally irrelevant (although this was not a point urged in argument) is the fact that the front elevation of number 37 juts forward from the front elevation of 35 Ovington Square by a few inches with the result that the face of those few inches might be said to be “facing” the Square. The reference in section 42 to the side of a building facing or forming part of the line of any part of the square is, in my view, to the whole or substantially the whole of that front or side.

The defendants' further argument

46. Mr Bhoose, supported by Mr Ormondroyd, advanced a further basis for rejecting the Herrmanns' claim. This was based on the established or settled practice of the Royal Borough and its predecessors when applying the Act.
47. In *Isle of Anglesey County Council v Welsh Ministers* [2009] EWCA Civ 94; [2010] QB 163 at [43] Carnwath LJ stated the principle in play on this point. He did so in the following terms:

“...where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach. That applies particularly in a relatively esoteric area of the law such as the present, in relation to which cases may rarely come before the courts, and the established practice is the only guide for operators and their advisers.”

In the sentence preceding that passage he had stated that this view of the law was supported by “Considerations of common sense and the principle of legal certainty”.

48. That case, involving orders made by government ministers under section 40 of the Sea Fisheries Act 1868, was a particularly strong candidate for the application of a principle which gives priority to the manner in which the statutory provision has been understood and operated over the strict interpretation of its terms. The principle is plainly an exceptional one. There is a conflict of authority over whether it is confined to very old statutes or can apply to recent enactments as well and whether, and if so to what extent, the language of the provision in question must give rise to difficulties of interpretation.
49. Antiquity of enactment is not a problem here: the Act is older even than the 1868 Act considered in *Isle of Anglesey County Council*. Nor is clarity of meaning a problem: the language of section 51, even when taken with other provisions in the Act, is far from clear. The fact that Mr Harpum was able to advance cogent arguments in favour of a more generous interpretation of the expression “square” than I have found to be justified merely serves to emphasise the lack of clarity in the provision.
50. What then of a settled practice: does the evidence establish that section 51 has been interpreted in a particular way, or, as it was expressed before me, that there is a clear and settled practice in its application?
51. In the case of the Square I was taken to some of the letters passing between officers of the then Royal Borough (i.e. the Metropolitan Borough of Kensington) and trustees of the Dyer Estate (the then owners of the garden) and other internal council documentation at the time that control and management of the Garden was brought within the Act. That material shows that the criterion applied by council officers when deciding which properties should be liable to pay the extra charge and therefore enjoy garden right over the Garden was whether the property in question faced the open square, i.e. the open part of the Rectangular Area. Mr Harpum pointed to the fact that officers asked themselves which properties faced the Garden. That, he said,

was different from asking which properties faced the open square. But it is plain that such language was shorthand for any property the front or side of which faced the open square even if strictly it did not face the Garden itself. This is evident from the fact that properties were included, for example 32 and 33 Ovington Square, which faced (i.e. their fronts were at right angles to) the open square but did not actually face (at right angles) the Garden in the middle. There was no question at that time of including properties like number 37 which faced, not on to the open area of the Square, but on to the Terrace or Ovington Gardens. 1 Ovington Gardens at the other end of the open square was included because, as a contemporary council report stated, “it faces the garden enclosure”, as indeed it does. The only possible exception to the rule of thumb thus adopted was 32A Ovington Square, constructed in 1925. As I have mentioned it is tucked behind 32 and 34 Ovington Square. It was included. In my judgment it was rightly included. As the plan attached to this judgment shows, its only means of access is via a narrow driveway between numbers 32 and 34. Insofar as it faces any part of the surrounding townscape it faces the Rectangular Area (i.e. the open square) even though the only part of that area likely to be visible from the front of number 32A is its southernmost end.

52. Mr Harpum criticised the fact that officers appear to have decided not to give notice to lessees of properties in the Rectangular Area where the lease had less than 20 years to run. But this is not evidence of inconsistency in its approach to deciding which properties should qualify. Rather it was a failure to consider which occupiers of properties that did face the open square within the Rectangular Area should be notified.
53. I was then taken to plans and other materials concerned with four other gardens which had been brought within the Act. They were the gardens in Cornwall Gardens, brought within the Act in 1970, in Campden Hill Square brought within the Act in 1972, in Earls Court Square, brought within the Act in 1974, and in Pembridge Square, brought within the Act in 1980. (I understand that the garden in Pembridge Square was the latest of the many gardens which have been so treated.)
54. Mr Harpum’s purpose in drawing attention to these four squares was to demonstrate that the extra charge had been assessed on properties - so that their occupiers enjoyed garden right over the garden in question which, although situated in the corner or near the corner of the square, did not in fact face the garden in that square. As it turned out, however, there were reasons concerned with the identity of the relevant rateable entity as it existed (or was thought to exist) at the time that the garden was brought within the Act which would explain why a particular property which appeared to have no front or side facing or forming part of the line of the open square was included. What was clear, however, was that once allowance is made for the unusual nature of the rateable entity in question (in more than one case it was a property which was internally linked to another or others), so far from showing that the Royal Borough had an inconsistent practice when applying the Act (or did not consistently seek to include only properties which faced the open square), it would appear to have followed a consistent approach in every case. The fact that difficult judgments were often needed at the fringes of the square - and that it might be possible to say that a particular property should have been included when it was omitted, or vice versa - does not detract from this.

55. In my view, therefore, if it were necessary to do so I would have found that there existed a clear and settled approach to the application of the Act stretching back at least to 1954. I would have found that that approach had been applied without evident dissent from any interested or potentially interested party and that, in the interests of certainty in an area of the law as obscure as the present where cases have rarely if ever come before the court in the past (none was cited to me) and the Royal Borough's established practice is the only guide to how the Act is to be applied (being an Act local to Kensington, no other local authority practice is material), it is desirable that those interested in the operation of the Act should be able to continue to order their affairs on the basis of the approach that the Royal Borough has consistently followed without risk of that approach being overturned in favour of some other.

Final thoughts

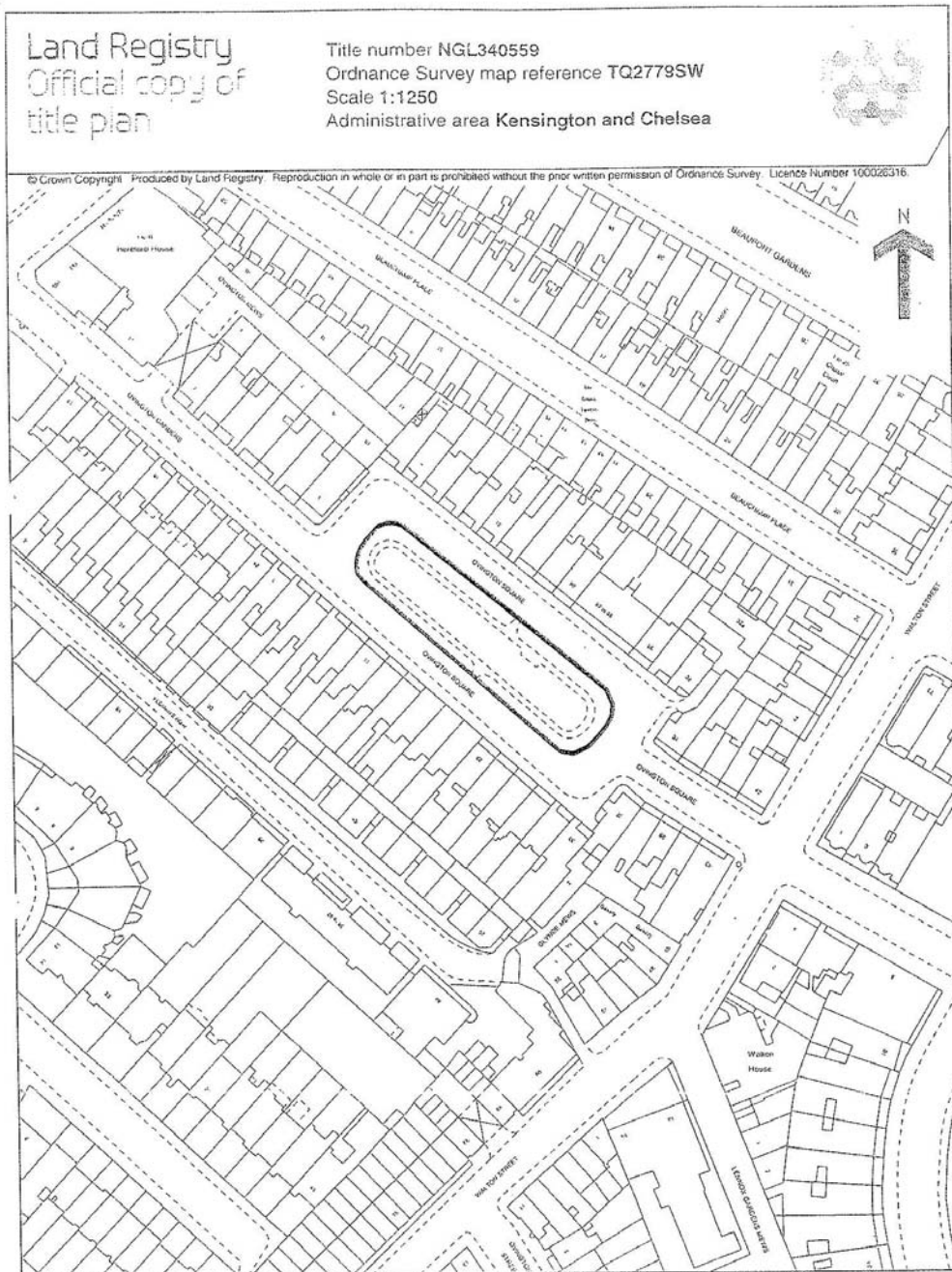
56. It is to be noted that in this regard No.37 is not unique. If the Herrmanns had succeeded, many others in occupation of a property in a like position to No.37 would have grounds to apply to establish garden right in respect of their property. That would risk upsetting the basis upon which properties in the Square and, doubtless, other squares have been owned and sold on for very many years, namely either on the basis that they did not enjoy garden right or on the basis that they did and that such right was shared with certain other properties between the occupiers of whom the cost of maintaining the garden had been exclusively shared over a great many years. That is a conclusion which I would have reached with some reluctance.
57. I am the readier to reach this conclusion as the approach to the Act for which Mr Harpum contended would not only have resulted in great uncertainty over what precisely a square is in any case but have potentially opened the door to numerous claims by occupiers of many other properties which have not hitherto been regarded as fronting an open square. Not the least of the difficulties would have been to establish where along an access road such as the Terrace the "square" would end. Indeed, it was by no means clear where, on Mr Harpum's argument, the Square ended along Ovington Gardens. At one stage I thought it was being suggested that properties at the corner of Ovington Gardens and Brompton Road (and fronting Brompton Road) were to be included, rather like 43 Ovington Gardens which is the Property at the junction of the Terrace and Walton Street. In fact, Mr Harpum suggested that the boundary of the Square ended some properties short of Brompton Road on the western side of Ovington Gardens but quite where and why was not apparent to me.

The claim against the Committee

58. It is not necessary to decide whether, if I had concluded that the Herrmanns enjoyed garden right by reason of their occupation of number 37, the Committee wrongly interfered with their enjoyment of that right by refusing to provide them with a key to the Garden. I venture a few observations nonetheless. What follows assumes that the Herrmanns had succeeded in establishing garden right over the Garden.
59. Mr Harpum submitted that, if established, the garden right is in the nature of an easement (see *Re Ellenborough Park* [1956] Ch 131), that interference with its enjoyment is therefore actionable as a nuisance, that liability in nuisance is strict, and that the Committee through its chairman interfered with the Herrmanns' enjoyment of

the right by denying them access to the Garden with the result that it is liable in damages. It was not suggested that the Herrmanns' damages should be other than modest in amount. The recovery of damages was not the Herrmanns' prime objective; rather it was to establish their garden right.

60. Mr Ormondroyd, while conceding the fact of interference and accepting the general position in law where an easement, or a statutory right in the nature of an easement, is interfered with, submitted nevertheless that his client should not be liable. He submitted that under the Act it is the Commissioners (now represented by the Royal Borough) who take control and management of the garden. It is only those who are liable to pay the extra charge to cover the garden's care and maintenance that are entitled to exercise garden right. The garden committee has no involvement in determining who has that entitlement and who therefore is to be subject to the extra charge. On the contrary, a proper understanding of the statutory scheme which applies once a garden has been taken under the Royal Borough's control and management involves that the garden committee is obliged to allow persons who pay the extra charge to have access to the Garden and are no less obliged to prevent persons from having access who do not pay the charge. It is not for the garden committee to second-guess these matters. In those circumstances, he submitted, even though it was the Committee, through Mrs de Stanford, who denied the Herrmanns access to the Garden, in so acting it was doing no more than carrying out the obligations placed on it under the Act and is to be absolved from liability on that account. The liability, if there was any, was that of the Royal Borough.
61. I consider that Mr Ormondroyd was right in his submission. The garden committee was not to be held liable for a nuisance which was attributable to the exercise by it of a duty imposed by statute. See Clerk and Lindsell on Tort, 19th Edition, at paragraph 20-77.
62. Mr Ormondroyd sought permission on the first day of the hearing to bring an indemnity claim against the Royal Borough in the event that the Herrmanns had succeeded. I refused him permission on the ground that, with the trial already underway, it was too late to join such a claim. That refusal was, of course, without prejudice to any separate claim (outside these proceedings) that his client might be advised to bring. In the event, as matters have turned out, the Committee's understandable wish to make others accountable for the consequences of its actions in this case does not need to be further pursued.



This official copy issued on 19 September 2008 shows the state of this title plan on 18 September 2008 at 17:13:40. It is admissible in evidence to the same extent as the original (s.67 Land Registration Act 2002). This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground. See Land Registry Public Guide 19 - Title Plans and Boundaries. This title is dealt with by Land Registry, Birkenhead (Rosebrae) Office.

