FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
LAND REGISTRATION DIVISION

REF/2017/0307

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

B E T W E E N:

(1) MICHAEL DERRICK RICHARD PRICE
(2) JENNIFER REES PRICE

Applicants

and

(1) JAMES FRANCIS BARTLETT-WARD
(2) PAUL BANNERMAN PETRIDES
(3) CLARE FRANCES SAUNDERS
(4) ANDREW CHRISTOPHER HAMISH WARD

Respondents

Property Address: Land to the east side of Over-Compton House, 55 Waverley Lane, Farnham, Surrey GU9 8BW.
Title Numbers: SY371531 & SY791536

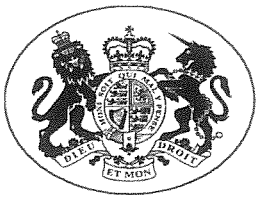
Before: Mr Max Thorowgood sitting as Judge of the First-Tier Tribunal

Sitting at: Alfred Place, London WC1E 7LR
On: 16th January 2018 & 21st May 2018

Applicants' representation: Carl Brewin of Counsel
Respondents' representation: Simon Sinnatt of Counsel

1. Introduction

1.1. The Applicants have been the registered proprietors of Over Compton House, 55 Waverley Lane, Farnham, Surrey under title number SY371531 since 19th December 1980. It is a detached property with a substantial garden, much of which is 'laid to lawn'.



1.2. The south eastern boundary of the Applicants' land adjoins the Respondents' field. The Respondents are the trustees of that field, which lies to the north of Waverley Lane together with another field to the south of Waverley Lane and a number of other parcels of land, for the beneficiaries of the trusts of the will of Ernest William Smith Bartlett who died on 4th May 1958. Until 10th November 2010 their title was unregistered. On that date it was registered under title number SY791536.

1.3. The vast bulk of the land in dispute comprises the bank between the Applicants' lawn above and the Respondents' field below. I shall refer to that bank as, "the Bank". In addition to the Bank the application relates to a contiguous area to the south which was referred in the course of the hearing but not with compete precision as, "the Kink". I shall use the same terminology.

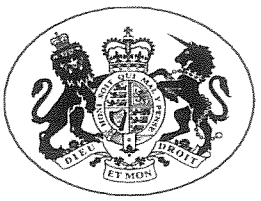
1.4. The application is cast as an application to alter the Applicants' title on the basis that the disputed land ought not to have been included within the Respondents' title when it was first registered in 2010 because the Applicants had by that stage established their title to it by adverse possession.

1.5. For the sake of completeness, the Applicants made a further subsequent application in Form ADV1 on the basis that they were entitled to be registered as the proprietors of the land pursuant to Schedule 6 Land Registration Act 2002. That application has not yet been referred to the Tribunal by HM Land Registry so I have no jurisdiction respect of it and shall not consider it any further.

2. The question which I have to consider

2.1. Subject to some slight caveats as to the precise extent of their title to the land at the top of the Bank, the Applicants do not contend that either the Bank or the Kink fall within their registered title. They also accept that as matters currently appear from the title plans, the Bank does fall within the Respondents' title. For their part the Respondents accept that, whatever the lines on the title plans may indicate, the Applicants' title extends to the top of the Bank. It is not necessary for present purposes to say more because there is no application to determine the precise position of the boundary.

2.2. The question which I have to consider, therefore, is whether, pursuant to s. 11(4)(b) or (c) and Schedule 1 Land Registration Act 2002, the estate which vested in the Respondents upon first registration in 2010 was subject to any interest of the Applicants by reason of their adverse possession. Although the Applicants could possibly contend that the Respondents had notice of their title by reason of Applicants' erection of a new fence at the bottom of the Bank in 2009, it was their primary case as it was advanced before me, that they had been in adverse possession of the Bank for a continuous period in excess of 12 years prior to November 2010 and that the Respondents' title to the Bank had accordingly been extinguished by virtue of ss. 15 & 17 Limitation Act 1980 as at the date of first registration and, further, that they were in actual occupation of it as at the date of the Respondents' first registration.



2.3. The test to be applied in determining whether a person has been in adverse possession of land was laid down in the decision of the House of Lords in *J.A. Pye (Oxford) Limited v Graham* [2003] 1 AC 419 approving the analysis of Slade J in *Powell v MacFarlane* (1977) 38 P & CR 452.

2.4. There are two elements to the dispossession of the owner of a paper title by an adverse possessor, first, factual possession and, second, an intention to possess. As to factual possession, Lord Browne-Wilkinson approved this statement of Slade J:

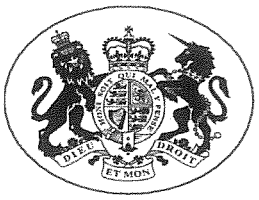
> "Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot 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."

The necessary intention to possess, he said, was:

> "... 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"."

2.5. Lord Hope addressed the question of the nature of possession in this way:

> "70 The general rule, which English law has derived from the Roman law, is that only one person can be in possession at any one time. Exclusivity is of the essence of possession. The same rule applies in cases where two or more persons are entitled to the enjoyment of property simultaneously. As between themselves they have separate rights, but as against everyone else they are in the position of a single owner. Once possession has begun, as in the case of the owner of land with a paper title who has entered into occupation of it, his possession is presumed to continue. But it can be transferred from one person to another, and it can also be lost when it is given up or discontinued. When that happens, possession can be acquired by someone else. The acquisition of possession requires both an intention to take or occupy the land ("animus")



and some act of the body ("corpus") which gives effect to that intention. *Occupation of the land alone is not enough, nor is an intention to occupy which is not put into effect by action. Both aspects must be examined, and each is bound up with the other. But acts of the mind can be, and sometimes can only be, demonstrated by acts of the body. In practice, the best evidence of intention is frequently found in the acts which have taken place.*" (My emphasis)

2.6. The essence of factual possession can be elusive, not least because an occupying owner is generally entitled to do nothing with his own land. For the purposes of the Applicants' case, however, as the alleged squatters, the burden is upon them to show that at some point 12 or more years before November 2010 (that is to say, by November 1998) they dispossessed the Respondents. That entails them showing that at some point they, rather than the Respondent, came to have an appropriate degree of physical control of the land, or, put another way, that they came to deal with the disputed land as an occupying owner might be expected to do **and that no one else did so**. It is this exclusivity, as Lord Hope emphasised, which is in many ways of the essence in terms of assessing whether the Applicants had the requisite degree of physical control.

2.7. In addition, the Applicants must also show that they had the requisite intention to possess the land and that they were in actual occupation of is as at November 2010.

2.8. Lord Hutton's speech in *Pye* offers the most assistance in relation to the relevance of the requirement for the Applicants to demonstrate an intention to possess. He said this:

> "76. ... 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.
>
> 77 The conclusion to be drawn from such acts by an occupier is recognised by Slade J in *Powell v McFarlane*, at p 472:
>
> > "If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner."

And, at p 476:

> "In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite *animus possidendi* in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner."

In another passage of his judgment at pp 471-472 Slade J explains what is meant by "an intention on his part to ... exclude the true owner":

> "What is really meant, in my judgment, is that the *animus possidendi* involves the 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."

78 It is clear that the fact that the Grahams would have given up occupation to the plaintiffs or would have made payment for their occupation to the plaintiffs, if requested to do so, does not prevent the existence of the intention to possess: see the judgment of the Privy Council delivered by Lord Diplock in *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, 24.

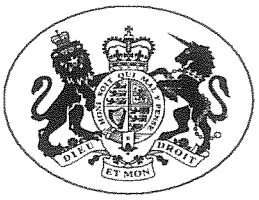
79 Therefore I consider that Clarke LJ was right to state in *Lambeth London Borough Council v Blackburn* (2001) 82 P & CR 494, 504:

> "I would not for my part think it appropriate to strain to hold that a trespasser who had established factual possession of the property for the necessary 12 years did not have the *animus possidendi* identified in the cases. I express that view for two reasons. The first is that the requirement that there be a sufficient manifestation of the intention provides protection for landowners and the second is that once it is held that the trespasser has factual possession it will very often be the case that he can establish the manifested intention. Indeed it is difficult to find a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention."

(My emphasis)

Thus, it seems that in cases such as the present where the land said to have been possessed is of a liminal character and of limited practical utility and consequently that the acts of possession relied upon are minimal, that the question whether applicants had the requisite intention possess the land and manifested that intention to the outside world assumes the most importance.

2.9. Mr Sinnatt was at pains to stress this point and referred to a number of pre-*Pye* as well as post-*Pye* cases to illustrate his submission, that trivial alleged acts of possession cannot support a claim of adverse possession no matter how strong the



subjective intention of the Applicants to possess the land may have been. The question in my view, however, is whether the Applicants were in physical control of the land and whether by the acts which they did on it they made it, "....sufficiently clear so that the owner, if present at the land, would clearly [have] appreciate[d] that the Claimant is not merely a persistent trespasser, but is actually seeking to dispossess him."[1] For, as Peter Gibson LJ said in *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85:

> "It would plainly be unjust for the paper owner to be deprived of his land where the Claimant had not by his conduct made clear to the world including the paper owner, if present at the land, for the requisite period that he was intending to possess the land."

2.10. I think the principal issue which I have to decide can be summarised in the following way: did the Applicants sufficiently manifest to the outside world that they and not the Respondent were in control of the Bank ? And, if so, from what point did they do that ?

2.11. The difficult point to which that issue gives rise is the significance, if any, which should be attributed to the fence at the bottom of the Bank, the Applicants' periodic repair of it and their replacement of that fence with their own in 2009. It was the practical effect of that fence, which lay moreorless along the line of the natural boundary feature of the bottom of the Bank and which was in place when the Applicants bought their property in 1980, to exclude the Respondents from the Bank, whereas the Applicants retained access it.

2.12. This is a matter of some controversy as the decision of the Court of Appeal in *Chambers v LB Havering* [2011] EWCA Civ 1576 demonstrates. In my view the matter is correctly approached in this way. The Applicants cannot rely upon the existence of the fence at the bottom of the Bank as a manifestation of their intention to possess the Bank. Minimal running repairs to the existing fence are likely to be equivocal, but if they enabled or assisted the Applicants as a matter of practice to gain and retain exclusive control of the Bank and do acts on the Bank which in the circumstances are sufficient to demonstrate their factual possession of it they will be relevant. Their replacement of the fence in 2009 is likely to be a manifestation of their intention to possess the land which it may or may not be appropriate to 'read back' to an earlier relevant period.

3. Disputed matters of fact

3.1. The matters of fact in dispute between the parties are relatively slight. They amount to these:

[1] See *Powell v McFarlane*

3.1.1. Did Mr Price periodically clear the Bank of brambles ?

3.1.2. Was the Kink always enclosed, as it is now, as a part of the disputed land ? And if it was not, at what point was it so enclosed.

3.2. Mr Price was the only person to give evidence on behalf of the Applicants and it is true, as Mr Sinnatt emphasises, that his evidence was notably succinct. In his Statement of Case he said almost nothing about the use which he made of the Bank. Likewise in his 'History of the eastern boundary fence'. Very shortly before the hearing, on 15th January 2018, it having been pointed out to him on several occasions by the Respondents' solicitors that he had filed no evidence in that regard he did file a further, very short, witness statement in which he explained that he had used the Bank as a repository for grass clippings and leaves throughout the year and that he had repaired the fence as required. He said nothing about clearing brambles from the Bank.

3.3. Mr Sinnatt did not object to that statement being admitted. He also did not directly dispute Mr Price's assertion that he deposited grass clipping and leaves on the Bank throughout the year throughout the period of his ownership. Although it might be said that it was the implication of the case which he did put, that the Bank was an unkempt mess of brambles for much of the relevant period, that it could not have been used for the purposes alleged by Mr Price.

3.4. In cross examination Mr Price expanded slightly on his evidence as to the use which he had made of the Bank insofar as he said that in addition to dumping grass clippings and leaves on the bank he said that he did get brambles coming in from the field and that he used to keep the Bank clear of them.

3.5. As to the first of these matters, I noted when I viewed the site on the afternoon before the first day of the hearing, that the Bank was largely clear of undergrowth. This was in significant contrast to the bank of the adjoining property to the east and the part of the Respondents' field which adjoins the disputed boundary both of which were thick with brambles despite (in the case of the adjoining property) much heavier tree cover. In relation to the field specifically, I would estimate that a large part of the area adjoining the disputed boundary comprised a thicket of brambles approximately 3-4 metres deep which the tenant of the field had erected a stock-proof fence beyond, that is to say, some 4-5 metres at least from the bottom of the Bank.

3.6. I asked Mr Price how the state of the Bank which I had witness the previous day compared with the position over the last 20 years. He replied that every so often he had had to clear away the brambles in the area of the fence but that the Bank would have looked as it did when I saw it either last year or the year before. I then asked what it would have looked like 20 years before, to which Mr Price replied, "Oh exactly, yes," by which I took him to mean that the position had not changed substantially over the last 20 years or so. I then asked him whether a substantial amount of clearing had been necessary in order for the new fence to be erected in

2009 to which he replied that he had not had any difficulty with his fence contractor on that account. It may perhaps be inferred from this recitation of his evidence that Mr Price was not inclined to give direct answers to the questions which he was asked. Indeed it was my impression that he had the impression that the success of his application was little more than a rather irritating formality. The reason I find for that attitude on Mr Price's part was his firm belief, despite being told by his conveyancer in another connection in 2004 that there could possibly be a problem about it which needed to be sorted out, that the Bank had always formed part of his garden. I don't believe it really crossed his mind until the question arose in connection with the Respondents' planning application that he did not own the Bank.

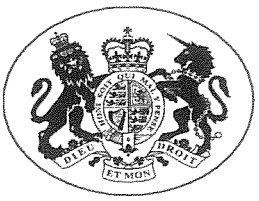
3.7. The strength of that belief on Mr Price's part is easy to understand when one considers the report prepared by his surveyor, Mr Robert Shaw, at the time of his purchase in 1980 which refers to the post and barbed wire fence against the field. That apparent boundary feature remained essentially unchanged and undisputed until 2009 when it became so dilapidated due to its extreme age and repeated penetration by livestock that Mr Price replaced it with a close boarded fence. The Respondents raised no objection to that step on his part and matters continued as before until this application came to be made. Their concern was to avoid a claim by Mr Price in respect of the damage caused to his grass tennis court by their tenant's horses.

3.8. That brings me to my second observation concerning the site visit: Mr Price is an enthusiastic gardener. He has a large garden and even in the middle of winter his lawn was immaculate, as were most of the other aspects of his garden which I saw. This was plainly not the work of a moment but of many years. The Bank was not 'immaculate'. It was, as Mr Price, said an area used for disposing of garden waste but it was nevertheless kept tidy. For this reason, I regard it as unlikely that Mr Price would have allowed it to become overgrown with brambles, it would have offended his sense of neatness, still less do I regard it as plausible that it would have become so overgrown with brambles that it would not have been possible to see someone mowing the lawn from the field as was suggested to him.

3.9. It is against this background that I consider the Respondents' evidence about the state of the Bank and the boundary features.

3.10. The first piece of evidence is the 'survey' of the boundaries conducted by Mr Fuller in 1990. It is clear from Mr Fuller's letter that there was concern about the boundaries at that time and that it was Mr Fuller's conclusion that they were, "a total mess." Concerning the northern boundary of the field specifically, he said this:

> "The boundary between G and H is again difficult. There is a bank which I think is factually the end of the gardens and about 5 yards to 7 yards and even up to 10 yards into the field from the bank is a very poor quality post and wire fence which has been the current field boundary. There has been little encroachment between the field fence and the bank, a few fallen down trees,



some lawn mowings, but generally speaking very overgrown with bramble etc."

Save possibly for the reference to lawn mowings, this broad summary of the position in respect of the northern boundary of the field does not apparently refer specifically to the Applicants' property. Insofar as it refers to trespassing between the field fence and the bank, it is difficult to relate this to the disputed boundary because at that time so far as the evidence shows, there was no distance between the bank and the field fence because the field fence was against the bottom of Bank.

3.11. 11 years later in May 2001 a further survey was conducted by Simon Ellis who prepared a more comprehensive note of his findings. It is worth setting what I take to be the relevant parts of those notes in full:

"West boundary against ? House

This fence is hugely overgrown. It could be argued the boundary goes back to the top of the Bank or where there is a different level of ground. This could be up to 6 yards from the very poor quality fence which I can see in places and if you took the bramble outgrowth from that very poor quality fence it could be up to 10 yards from what it might well have been. These measurements are not accurate merely by eye.

I REALLY THINK IT WOULD BE APPROPRIATE IF THE TRUSTEES OR WHOEVER MADE THE EFFORT TO TIDY UP THIS BOUNDARY AND PUT A NEW FENCE ALONG IT.

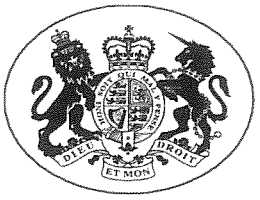
The blackberries are delicious, even in October !

I suspect there would be an argument if one was to cut back to the top of the bank. I bet the owners behind would claim part of it was their boundary by possessory title.

I suspect the issue is going to have to be faced up to one day.

I mentioned earlier under this heading the boundary could have been up to 10 yards away. At the Waverley Lane Road end or the south west corner it gets much closer to the bank or the old fence does. There is still at least 5 yards of blackberry outgrowth."

3.12. The following points are to be particularly noted. It was apparent to Mr Ellis in 2001 that it was likely that the owners of the adjoining properties would claim to have been in adverse possession of the Bank. The western boundary is a long one and the Applicants' end of it was plainly distinguishable from the rest by Mr Ellis. At that point the fence, which Mr Ellis appears almost but not quite to have equated with the boundary, was at the bottom of the Bank and that there was an outgrowth of brambles into the field which was around 5 yards at that time. I take this to be



important contemporaneous evidence from a professional man, apparently well used to evaluating such matters, advising the Respondents in 2001 and accord it significant weight on that basis as an authoritative statement of the position at that time.

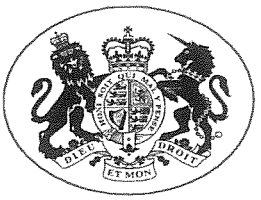
3.13. In addition to that contemporaneous documentary evidence there is also the evidence of Mr Richard Temple. Mr Temple was a trustee of the trust between 2001 and 2009. He told me that in early 2002 he visited the land in order to prepare an informal report for discussion amongst the trustees about the problem of incursions onto their land. He said that he had walked the entire length of the boundaries of the two fields either side of Waverley Lane and noted all the potential incursions. Mr Temple said that he did not note any incursion by the Applicants. He said that he did recall the boundary between the field and the Applicants' land which he described as, "a beautiful scene," which struck him as, "quite picturesque." He was asked why this boundary should stick out from any other and he explained that it was like, "... looking through what I would describe as the hedge, I could see gaps and behind it was a garden which had a glade-like quality and that particular scene was not apparent on any other part of the field."

3.14. Because it was difficult to square Mr Temple's description of a hedge with the glade like quality of the garden, he was asked to explain it further and he said this:

> "I was standing on the field and I could see what looked like a large suburban garden on a slightly raised level beyond the bank and, as I was looking at it, on the bank there was this general growth, an outgrowth, coming towards me, and the bank, and what was on it, indicated to me, as just ... an ordinary member of the public that indicated to me that that was probably quite an ancient division between the field and the garden."

He then clarified that the ancient division to which he was referring was the bank and what was on top of it.

3.15. I have no doubt whatsoever that Mr Temple was doing his best accurately to recall his impressions of what he saw when he visited the site in 2002. The picture which he painted was a vivid one moreorless consistent with what I saw during my site visit, although the weather was less fine. However, it need hardly be said that he was attempting to recall impressions formed 16 years ago and, as inevitably happens in cases like this, an impression gathered at leisure many years ago without any expectation at the time that it would be invested with so much significance is dissected, pored over, examined to the minutest degree and then tested to destruction in the crucible of the adversarial process. My conclusion about it having regard to the reports of Mr Fuller and Mr Ellis and indeed the evidence of Mr Price, whose familiarity with the site bordered on the contemptuous, is that the Bank was much as I saw it on the day before the site visit throughout the period of his Over Compton House and indeed before. In my view part of the difficulty here derives from the fact that the position in respect of the boundary between the field and the Applicants' property was distinct to some degree at least from the bulk of the



northern boundary to the east. Mr Fuller's general observations about it being generally substantially overgrown with brambles do not relate specifically in my view to the Bank. They relate to the portion to the east of it and to the thickets of brambles in the field. Both Mr Ellis and Mr Temple noted this distinction and commented upon it. In my view there was not really a great deal to choose between the evidence of Mr Price and Mr Temple both of whom were describing a situation in which there would have been some growth both on the top of the Bank and on the Bank in the summer months in addition to which in the spring (Mr Temple view in April) and summer the leaves on the trees would have created the impression when viewed from the field below of substantial growth both in the field and on the Bank. Nevertheless, Mr Temple's description of an idyllic sunlit glade is inconsistent in my view with a substantial, unruly growth of bramble largely covering the Bank right up to its top.

3.16. Mr Temple did not see what the Applicants were doing on the Bank as an incursion and note it as such because the dilapidated post and wire fence up against the bottom of the Bank seemed so naturally to be the ancient boundary as he described it. He viewed the Bank when he saw it as being part of the Applicants' garden, as the Applicants themselves did.

3.17. The most significant evidence in this regard in my view is Mr Ellis's assessment that he believed the owners of the properties which adjoined the Bank would make claims of adverse possession if the boundary were moved to the top of the Bank. This demonstrates that the Applicants did indeed make it manifest to the world that they were in possession of the Bank in 2001 at least.

3.18. I turn now to consider the evidence that the Kink was enclosed together with the Bank. Here I regret to say I did not feel I could rely upon Mr Price's evidence. It was quite clear to me from the manner in which he gave his evidence that he is bitterly, viscerally, opposed to the Respondents' proposed development of the field which he, quite understandably, feels will blight the picturesque semi-rural beauty of his property. The Kink, or part of it at least, is significant to that proposed development for the purposes of access.

3.19. It was my clear impression on inspecting the site that the fencing in the Kink was of recent construction. Mr Price admitted as much but said that the new fencing replaced older panels which had been damaged. I was not persuaded by that account in light of my inspection.

3.20. That scepticism is fortified by the fact that the Kink is so obviously inconsistent with the Applicants' title plan. Since it was Mr Price's evidence that the position of the fences had not changed since he moved in, that they had remained as reported by Mr Shaw in his careful and comprehensive pre-purchase survey, I have no doubt that the discrepancy would have been noted and addressed had it existed at the time of the purchase. In view of the care which Mr Price apparently took of these matters, I find it extremely unlikely that he would not have noted the discrepancy even if Mr Shaw had not commented on it.

3.21. I therefore conclude that the Kink was not fenced in as it is now until very recently. The Kink is physically distinct from the Bank in that it is both outside the line of

the fence along the western boundary of the Applicant's land and down the bank where the land falls away to Waverley Lane. It follows that I reject any contention that the Applicants have demonstrated any physical control of the Kink or any intention to possess it at any point until very recently.

4. The correspondence between the parties

4.1. In addition to the contested evidence which I have discussed above, I should comment on the Mr Price's correspondence first with Mr Robinson and then his conversations with Mr Ward. On 7th April 2009 Mr Price wrote to a former trustee of the field to complain that *his* fence had been damaged by the Respondents' tenant's horses on several occasions and that on the most recent occasion considerable damage had been caused destroying the boundary fence and wrecking Mr Price's grass tennis court. He sought compensation for that damage. The significance of the exchange lies principally in the assertion by Mr Price that the fence was his, the failure of the Respondents to demur to that suggestion, the fact that the Respondents did not object to the erection by the Applicants of a fence at the foot of the Bank and their subsequent failure to take any action in response to the Applicants' clear enclosure of the Bank within their garden.

4.2. I consider that it is possible to infer from these exchanges, that the Respondents did not substantially dispute the Applicants' contention that the fence was theirs or that the Bank was properly within their control. This was not a new position it was an acceptance of a long-established position.

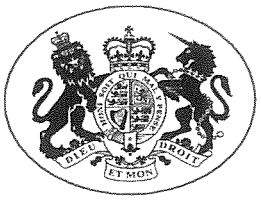
5. Conclusions

5.1. My conclusions are therefore as follows:

5.1.1. That the Applicants have been in physical control of the Bank since they bought the property in 1980 and that in all probability their predecessor was likewise. As Mr Temple candidly acknowledged he could not have accessed the Bank from the field except by climbing over the fence and the Respondents had no effective control of that area. They were not in possession of it. It was, as it appeared to Mr Ellis to be, part of the Applicants' garden and they treated it as such by keeping it reasonably tidy and using it for disposing of grass clipping and leaves.

5.1.2. The Applicants have not been in physical control of the Kink at any point until very recently.

5.1.3. The Applicants always had the intention to possess the Bank because they believed it to be part of their land at least until 2004 and probably thereafter too. That intention was manifest to the Respondents and their agent Mr Ellis from the use which they made of the land, their incorporation of it into their garden, their use of it to dispose of grass and



leaves, their maintenance of the fence following incursions by the Respondents' tenants their caring for it by keeping it clear, their assertion that the fence was theirs and their reinstatement of the fence at their own expense.

5.1.4. Although the new fence was not erected until 2009, Mr Price's exchanges with the Respondents reflect both his view of the matter and their acceptance of the position as he stated it as an accomplished fact. It is therefore appropriate to infer that the position as it appeared to Mr Ellis in 2001 had on balance obtained for at least 12 years before November 2010 when the Respondents' title was first registered.

5.2. It follows that I propose to direct the Chief Land Registrar to give effect to the Applicants' application save in respect of the Kink. I have marked, by cross hatching, the area which I propose to direct the Chief Land Registrar to exclude on the plan annexed hereto which is based on the plan at p. 766 of the bundle. However, in view of the possible significance of the extent of the Kink, which was not the subject of detailed evidence before me, I shall invite the parties to make submissions in relation to its delineation on the plan before finalising my order.

5.3. It would seem to follow from the order which I propose to make that the Applicants are substantially the successful party and that the Respondents should pay their costs. However, I shall invite submissions in that regard and extend time for any application for permission to appeal until the question of the parties' liability for costs (but not their quantum) has been determined.

ORDER

UPON hearing counsel for the Applicants, Carl Brewin, and counsel for the Respondents, Simon Sinnatt

IT IS ORDERED THAT:

1. If either party wishes to contend that the extent of the Kink is not correctly delineated on the plan annexed hereto, that party must file and serve a revised plan and set out their reasons for any proposed change in writing by 5 pm on 16 July 2018.

2. The Respondents shall file and serve any submissions which they wish to make in respect of the order which the Tribunal should make concerning the costs of this reference by 5 pm on 23 July 2018.

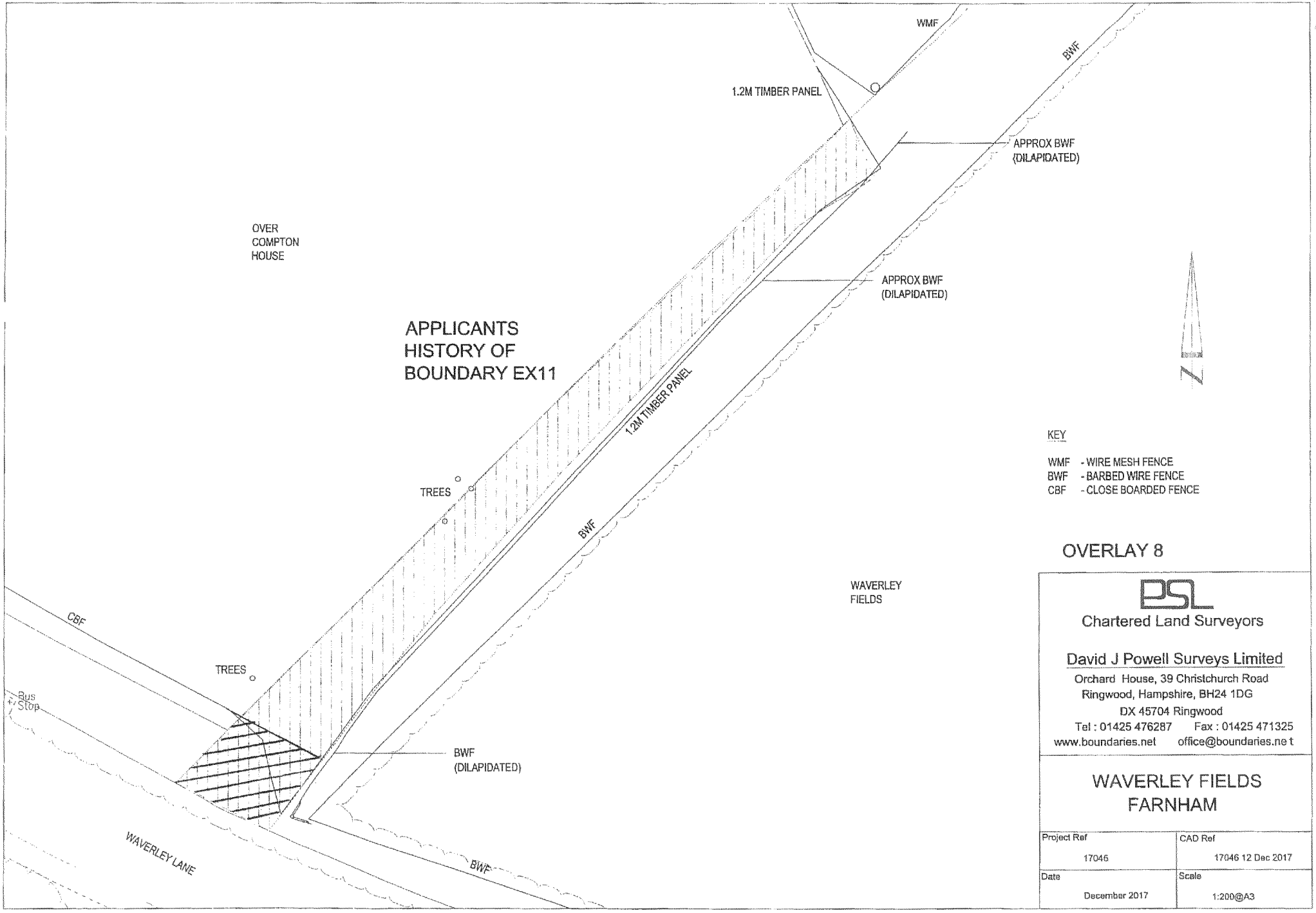
3. The Applicants shall file and serve such submissions as they may be advised in answer to any submissions made by the Respondents in respect of the costs of this reference by 5 pm on 6 August 2018.

4. The parties' time for applying for permission to appeal against this decision is extended to 28 days after the date of the Tribunal's decision concerning their liability to pay (as opposed to the amount of) the costs of this reference.

Dated this Monday 2 July 2018

Max Thorowgood

BY ORDER OF THE TRIBUNAL



OVERLAY 8

PSL
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WAVERLEY FIELDS
FARNHAM

Project Ref	CAD Ref
17046	17046 12 Dec 2017
Date	Scale
December 2017	1:200@A3