Neutral Citation Number: [2024] EWCA Civ 1388

Case No: CA-2024-000211

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
APPEALS (ChD)
Mr Justice Leech
[2023] EWHC 3337 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

- -

Between:

(1) ANTHONY CHARLES CLAPHAM **(2) AMANDA CLAPHAM** **(3) DAVID WRIGHT** **(4) LAURA WRIGHT**	**Claimants/ Appellants**
- and -	
DEE NARGA	**Defendant/ Respondent**

- -
- -

Tom Morris (instructed by **Crane and Walton LLP**) for the **Appellants**
Jonathan Gale (instructed by **Gateley plc**) for the **Respondent**

Hearing date: 23 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. The parties to this appeal are the owners of adjoining properties in Thrussington, Leicestershire. The first and second appellants, Mr and Mrs Clapham, own 24 The Green ("Number 24"), while 25 and 26 The Green (respectively "Number 25" and "Number 26"), immediately to the east, belong to the third and fourth appellants, Mr and Mrs Wright. The respondent, Ms Narga, owns Brook Barn, Seagrave Road, which is just to the north of Numbers 24, 25 and 26.

2. The houses at Numbers 24, 25 and 26 lie to the south of a brook which runs from west to east, with steep slopes on either side. The present dispute concerns land ("the Disputed Land") between the northern edge of the south bank of the brook and a fence ("the Fence") which stands at the top of the slope to the north of the brook. The building at Brook Barn is a little further northwards.

3. In an impressive judgment dated 15 September 2022, His Honour Judge Hedley, sitting in the County Court at Leicester, held that the Claphams and Wrights had acquired title to the Disputed Land by adverse possession but that they had lost ownership of it pursuant to provisions of the Land Registration Act 2002 ("the LRA 2002") when Ms Narga bought Brook Barn. The Claphams and Wrights appealed, but without success. Leech J dismissed the appeal in a judgment dated 22 December 2023.

4. The Claphams and Wrights now challenge Leech J's decision in this Court.

Some history

5. Brook Barn and Numbers 25 and 26 were owned by a Mr Crowden until, by a conveyance dated 8 October 1982, Mr Crowden conveyed Number 26 to a Mr Allen. In the following year, Mr Allen sold Number 26 to the Wrights, and they were registered as its proprietor on 13 February 1984. Four years later, Mr Crowden having died, his executors conveyed Number 25 to the Wrights by a conveyance dated 28 October 1988, and the Wrights were registered as the proprietors on 25 November 1988. At the time, Number 25 was occupied by longstanding tenants, and they continued to live there for about five years. Once, however, they were no longer there, the Wrights combined the houses on the plots into a single home.

6. So far as Number 24 is concerned, a Mr and Mrs Barrett were living there by about 1978. They sold Number 24 to the Claphams in 1996, and the Claphams were registered as the proprietors of the property on 18 November 1996.

7. A Mr Markham seems to have been the owner of Brook Barn by the early 2000s, and title to the property was first registered on 19 March 2003. In 2008, Brook Barn was acquired by M-Square Associates Limited, which transferred it on to M-Square Pension Trustees in August of that year. Ms Narga bought Brook Barn on 12 May 2020 and her title was registered on 5 June 2020.

8. At trial, Ms Narga argued that the title plan in respect of Brook Barn showed the boundary with Numbers 24, 25 and 26 as lying somewhat to the south of the brook. Judge Hedley, however, interpreted the plan as depicting the southern edge of the brook as the boundary: see paragraph 102 of his judgment. Judge Hedley also noted

that, in so far as the title plans for the various properties purported to denote the brook, they had it in the wrong place: see paragraph 89. He explained in paragraph 90 that, if Brook Barn's title plan were mapped onto the true physical layout, it would include both part of the land on which an electricity sub-station is located to the north-west of the property and part of the land on which a studio and kiln are to be found at Number 25. "Neither," Judge Hedley said, "is correct": see paragraph 90.

9. Judge Hedley held that, on the true construction of the conveyance of Number 26 dated 8 October 1982 (i.e. that to Mr Allen) and of the conveyance of Number 25 dated 28 October 1988 (to the Wrights), the northern boundary of Numbers 25 and 26 was the edge of the south bank of the brook: see paragraph 99 of his judgment. He thus considered that, "as a matter of interpretation, the title conveyed to the Wrights for each property extends to the southern bank of the Brook but it does not include the Brook itself": see paragraph 104.

10. Judge Hedley also, however, concluded that "both the Wrights and the Claphams had acquired title by adverse possession to the north bank up to the Fence prior to the first registration of the title of Brook Barn": see paragraph 167 of his judgment. He had found in paragraph 166 that "the Fence was in position prior to the occupation by the Wrights or the Claphams and was in place in the 1970s when No.24 was occupied by the Barretts"; that the Fence ran for the whole length of the north bank; that the Wrights and Claphams planted on the north bank; that the "result of the Fence and the planting of trees had the practical effect of screening the outside world from the north bank"; that the Wrights and Claphams "used the north bank up to the Fence as part of their garden for the whole period of their respective occupation until Ms Narga's involvement in 2020"; that the Wrights and Claphams "believed that they owned the respective strips of land on the north bank"; and that that "was an entirely reasonable belief on the part of all of them". In paragraph 166(p), Judge Hedley said that he was satisfied that "both the Wrights and Claphams had actual possession of the north bank and the intention to occupy the parts of the north bank opposite their respective properties".

11. However, Judge Hedley held that Ms Narga had taken free of any interest of the Claphams or Wrights when she bought Brook Barn. His reasoning proceeded along the following lines:

   i) When title to Brook Barn was first registered on 19 March 2003, the LRA 2002 not yet having come into force, section 75 of the Land Registration Act 1925 ("the LRA 1925") applied to the Disputed Land, with the result that the then owner of Brook Barn held the Disputed Land on trust for the Claphams and Wrights (see paragraph 141(c) of Judge Hedley's judgment);

   ii) Section 75 of the LRA 1925 was not replicated in the LRA 2002, but, once the LRA 2002 was in force, paragraph 18 of schedule 12 to the LRA 2002 entitled the Claphams and Wrights to be registered as the proprietors of the Disputed Land (see paragraphs 134, 135 and 141(c) of Judge Hedley's judgment);

   iii) Under paragraph 15 of schedule 12 to the LRA 2002, the rights which the Claphams and Wrights enjoyed pursuant to paragraph 18 of schedule 12 to the LRA 2002 ranked as overriding interests for three years (see paragraphs 134, 135 and 141(c) of Judge Hedley's judgment);

iv) After the expiry of those three years, the Claphams and Wrights could have overriding interests only if and for so long as they met the conditions specified in paragraph 2 of schedule 3 to the LRA 2002 (see paragraphs 132 and 142 of Judge Hedley's judgment);

v) For those conditions to be satisfied when Ms Narga purchased Brook Barn, the Claphams and Wrights not only had to be in actual occupation of the Disputed Land but that occupation had to be obvious on a reasonably careful inspection of it (paragraph 142 of Judge Hedley's judgment);

vi) The Claphams and Wrights were in actual occupation of the Disputed Land at that stage, but their occupation was not such as to have been obvious on a reasonably careful inspection (paragraphs 169 and 173 of Judge Hedley's judgment);

vii) Ms Narga thus took free of the interests of the Claphams and Wrights pursuant to section 29 of the LRA 2002 (paragraph 187(c) of Judge Hedley's judgment);

viii) Accordingly, "by reason of the provisions of the [LRA 2002], it is not open to the Claimants to rely upon their adverse possession of the north bank" (paragraph 174 of Judge Hedley's judgment).

12. On appeal, Leech J endorsed Judge Hedley's analysis. His judgment focuses to a considerable extent on the question whether section 75 of the LRA 1925 was applicable when an adverse possessor had already acquired ownership by the time title to the land was first registered. For the reasons he gave in paragraph 66 of his judgment, Leech J considered that Judge Hedley "was right to conclude that section 75 applied to the title which the [Claphams and Wrights] had acquired under the [Limitation Act] 1980 even though they had established 12 years adverse possession before the first registration of Brook Barn". Leech J also rejected arguments which had been advanced on behalf of the Claphams and Wrights by reference to the "general boundaries rule", formerly to be found in rule 278 of the Land Registration Rules 1925 ("the 1925 Rules") and now embodied in section 60 of the LRA 2002. In that connection, Leech J said this:

> "73. … [T]he Appellants' case on the general boundaries rule turns on the proper identification of the 'registered estate' for the purposes of section 29(1) of the LRA 2002. If the Respondent was registered as the proprietor of Brook Barn including the Strip, then the effect of section 29(1) was to postpone the Appellants' interest in the Strip to rank behind hers unless the priority of that interest was protected under section 29(2) and Schedule 3. But if she was registered as the proprietor of Brook Barn excluding the Strip, then section 29(1) did not have that effect and they are entitled to assert the priority of their title to the Strip.
>
> 74. In my judgment, the Respondent was registered as the proprietor of Brook Barn including the Strip when she

acquired the property for the simple reason that her predecessor in title was registered as the legal proprietor of the Strip on first registration and held the legal estate on trust for the Appellants under section 75 of the LRA 1925. It follows, therefore, that the legal estate to the Strip formed part of the subject matter of the registered disposition to the Respondent which was completed on 5 June 2020. It is an open question whether the Respondent's predecessors in title continued to hold the legal estate on trust for the Appellants after the expiry of the transitional period. But it is unnecessary for me to decide that issue given [counsel for the respondent's] concession (which I have recorded above).

75. The Judge found as a matter of fact that the precise line of the boundary ran between the Appellants' registered title was the northern edge of the south bank of the Brook …. [Counsel for the appellants] argued that in fixing the boundary he should have taken into account his later finding that the Appellants had acquired adverse possession to the Strip up to the Fence …. But as [counsel for the appellants] recognised, this argument depended on the Judge finding that title to the Strip had never been registered whatever was shown on the title plan. In my judgment, once the Judge had found as a matter of law that section 75 applied, he was bound to come to the conclusion that the registered title included the Strip. For this reason, therefore, the question whether the Judge was faced with a boundary dispute or a property dispute was a red herring.

76. For what it is worth, I might well have accepted [counsel for the appellants'] argument on the general boundaries rule if I had accepted his argument on section 75 and found that title to the Strip had never been registered and the Appellants remained its legal owners. I would have been prepared to accept that it was appropriate to characterise this action as a boundary dispute rather than a property dispute and that there was no real difference in fact or degree between the Brook and the Fence in the present case and the hedge and fence in *Drake v Fripp*. I would also have been prepared to accept that section 29(1) did not apply to override the Appellants' interest in the Strip even though they were unable to prove apparent occupation to the Judge's satisfaction. However, for the reasons which I have explained the Judge was right to reach the conclusion which did."

13. Leech J granted the Wrights permission to appeal to the High Court against Judge Hedley's construction of the 1982 conveyance of Number 26 and the 1988 conveyance of Number 25. Those grounds of appeal have not yet been the subject of a substantive hearing in the High Court and we are not concerned with them.

The statutory framework

The Limitation Act 1980

14. Section 15 of the Limitation Act 1980 states that "No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person". By section 17, at the expiration of the period prescribed by the Act for a person to bring an action to recover land, the title of that person is extinguished. With unregistered land, therefore, someone who has been in adverse possession for 12 years acquires title.

The LRA 1925

15. So far as relevant, section 5 of the LRA 1925 provided as follows:

> "Where the registered land is a freehold estate, the registration of any person as first proprietor thereof with an absolute title shall vest in the person so registered an estate in fee simple in possession in the land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject to the following rights and interests, that is to say,—
>
> (a) Subject to the incumbrances, and other entries, if any, appearing on the register; and
>
> (b) Unless the contrary is expressed on the register, subject to such overriding interests, if any, as affect the registered land; …
>
> (c) …
>
> but free from all other estates and interests whatsoever, including estates and interests of His Majesty."

16. Section 69 of the LRA 1925 further explained the effect of registration as a proprietor. Section 69(1) stated:

> "The proprietor of land … shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, … but subject to the overriding interests, if any …."

17. By section 70(1) of the LRA 1925, the "overriding interests" to which land was to be subject included these:

> "(f) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts;
>
> (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed".

18. Section 75 of LRA 1925 provided for land which had been in adverse possession to be held on trust for the adverse possessor rather than for the extinguishment of title. So far as relevant, it provided:

> "(1) The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts.
>
> (2) Any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof …."

19. Section 82 of the LRA 1925 made provision for rectification of the register. By section 82(1), the cases in which rectification was possible included these:

> "(g) Where a legal estate has been registered in the name of a person who if the land had not been registered would not have been the estate owner; and
>
> (h) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register".

Section 82(3) restricted the circumstances in which the register could be rectified so as to affect the title of a proprietor in possession "except for the purpose of giving effect to an overriding interest".

Rule 278 of the Land Registration Rules 1925

20. Rule 278 of the 1925 Rules (headed "General boundaries") provided:

> "(1) Except in cases in which it is noted in the Property Register that the boundaries have been fixed, the filed

plan or General Map shall be deemed to indicate the general boundaries only.

(2) In such cases the exact line of the boundary will be left undetermined—as, for instance, whether it includes a hedge or wall and ditch, or runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it; or whether or not the land registered includes the whole or any portion of an adjoining road or stream.

(3) When a general boundary only is desired to be entered in the register, notice to the owners of the adjoining lands need not be given.

(4) This rule shall apply notwithstanding that a part or the whole of a ditch, wall, fence, road, stream, or other boundary is expressly included in or excluded from the title or that it forms the whole of the land comprised in the title."

The LRA 2002

21. By section 29(1) of the LRA 2002, completion of a "registrable disposition of a registered estate", if made for valuable consideration, "has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration". Section 29(2) explains that "the priority of an interest is protected" if, among other things, the interest "falls within any of the paragraphs of Schedule 3".

22. Schedule 3 to the LRA 2002, headed "Unregistered interests which override registered dispositions", includes at paragraph 2 a provision dealing with "Interests of persons in actual occupation". So far as relevant, this is in these terms:

"An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—

…

(c) an interest—

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time …."

It is to be noted that the counterpart in the LRA 1925, section 70(1)(g), did not include anything equivalent to paragraph 2(c) of the LRA 2002.

23. The LRA 2002 does not reproduce either section 70(1)(f) or section 75 of the LRA 1925. Neither do sections 15 and 17 of the Limitation Act 1980 now have effect as such. Part 9 of the LRA 2002, which is headed "Adverse possession" and comprises sections 96 to 98, disapplies sections 15 and 17 of the Limitation Act 1980 and provides for a new regime as set out in schedule 6 to the LRA 2002, headed "Registration of adverse possessor".

24. Transitional provisions were, however, included in the LRA 2002 as schedule 12. Paragraphs 11 and 18 of schedule 12 are relevant in the context of this appeal. They read as follows so far as material:

> "Former overriding interests
>
> …
>
> 11 For the period of three years beginning with the day on which Schedule 3 comes into force, it has effect with the insertion after paragraph 14 of—
>
> '15 A right under paragraph 18(1) of Schedule 12.'
>
> …
>
> Adverse possession
>
> 18 (1) Where a registered estate in land is held in trust for a person by virtue of section 75(1) of the Land Registration Act 1925 immediately before the coming into force of section 97, he is entitled to be registered as the proprietor of the estate.
>
> …."

25. The "general boundaries rule" is now found in section 60 of the LRA 2002. That states:

> "(1) The boundary of a registered estate as shown for the purposes of the register is a general boundary, unless shown as determined under this section.
>
> (2) A general boundary does not determine the exact line of the boundary …."

26. The relevant parts of the LRA 2002 came into force on 13 October 2003.

The appeal

27. Mr Tom Morris, who appeared for the Claphams and Wrights, placed the general boundaries rule in the forefront of his submissions. It means, he argued, that the

boundaries between the parties' properties do not fall to be determined by Brook Barn's title plan but rather by reference to the position before Brook Barn was registered, at which stage the Claphams and Wrights had already acquired title to the Disputed Land. That being so, Mr Morris said, the Claphams and Wrights will not have been divested of ownership of the Disputed Land by section 75 of the LRA 1925 regardless of whether that provision was capable of applying to land in respect of which title had already been extinguished when first registration took place. In any event, Mr Morris contended, Leech J's interpretation of section 75 was wrong.

28. In contrast, Mr Jonathan Gale, who appeared for Ms Narga, supported Leech J's decision. Registered owners, he said, ought to be left in peace.

29. I find it convenient to address the issues to which the appeal gives rise under the following headings:

   i) The general boundaries rule;

   ii) Section 75 of the LRA 1925; and

   iii) The impact of section 69 of the LRA 2002.

The general boundaries rule

30. Under rule 5 of the Land Registration Rules 2003 ("the 2003 Rules"), the property register of a registered estate must contain "a description of the registered estate which in the case of a registered estate in land … must refer to a plan based on the Ordnance Survey map and known as the title plan". Rule 3 of the 1925 Rules was to similar effect.

31. The general boundaries rule for which rule 278 of the 1925 Rules and, more recently, section 60 of the LRA 2002 have provided means, however, that a title plan cannot normally be taken to define the boundaries of land comprised in a registered title precisely. Unless the exact line of a boundary has been determined pursuant to what is now rule 118 of the 2003 Rules (which will only rarely be the case), the title plan is "deemed to indicate the general boundaries only" (to quote from rule 278(1) of the 1925 Rules) and will "not determine the exact line of the boundary" (in the words of section 60(2) of the LRA 2002).

32. When a system of land registration was first introduced in this country, under the Land Registry Act 1862, "maps and plans were required to show the exact boundaries of registered property": see *Ruoff & Roper: Registered Conveyancing*, at paragraph 5.008. However, the Land Transfer Commission's 1870 report on the operation of the 1862 Act noted at paragraph 45 that compelling people to have their boundaries defined led to "two immediate consequences, both mischievous":

> "First, notices have to be served on adjoining owners and occupiers which may and sometimes do amount to an enormous number, and the service of which may involve great trouble and expense ... This is the first mischief. The second is that people served with notices immediately begin to consider whether some injury is not about to be inflicted on them. In all

> cases of undefined boundary they find that such is the case, and a dispute is thus forced upon neighbours who only desire to remain at peace."

When, therefore, the Land Transfer Act 1875 was enacted, it provided that registered land was to be "described in such manner as the registrar thinks best calculated to secure accuracy", but such description was "not [to] be conclusive as to the boundaries or extent of the registered land". The same principle was later carried forward into the 1925 legislation.

33. Stephen Watterson and Amy Goymour note in *A Tale of Three Promises* (in *New Perspectives on Land Registration*, ed. Goymour, Watterson and Dixon, at 286-287) that "[t]he fact that the registration regime's starting-point is the 'general boundaries' rule – and as a corollary, that the location of a registered estate's boundaries is not guaranteed – creates a significant risk for registered proprietors: they may suffer the uncompensated loss of what might be a substantial area of land, which they believed was comprised in their registered title". Watterson and Goymour go on, however, to observe that the risk can be argued to be tolerable and consistent with the aims of land registration: "A person who becomes registered as proprietor of an estate subject to the general boundaries rule does not benefit from any promise or guarantee of title *so far as it relates to the 'boundary' of his estate*".

34. We were referred to three cases in which there was reference to the general boundaries rule. The earliest of them was *Lee v Barrey* [1957] Ch 251. The question there was whether the eastern boundary of the defendant's land ran in a straight line (as shown on the title plan) or had a "kink" to the west. Lord Evershed MR noted at 260 that this was "not a mere trifling divergence", explaining that it was of the order of 10 feet when the whole frontage was only 42 feet. The location of the boundary was the more significant because a house which the defendant had built was in part on the disputed land.

35. Lord Evershed MR summarised the issue in this way at 260:

> "is this a case in which the defendant can, as things now are, say: 'I have got a piece of land, the boundaries of which are sufficiently identified and are such that my house at no point trespasses upon the plaintiff's property'? Or, on the other side, is the right answer that the identification in the certificate is not, and does not purport to be, a precise signification - a precise showing - of the boundaries, which boundaries can properly be discerned from other material in the case?"

36. Lord Evershed MR concluded that the boundary had the "kink" for which the plaintiff contended. He explained at 260-261:

> "a boundary dispute and a property dispute may be two things quite different. It is true that a property dispute may, and frequently does, involve boundaries, and that a boundary dispute involves in some degree a property dispute; and if the divergence is very great indeed, you may say that the matter has passed from any sensible use of the phrase 'boundary

> dispute' and becomes something else. But applying the common sense test, if … you put the question here: is the plaintiff saying in truth that the defendant got the wrong property by the land certificate? I would answer the question negatively. I think, for my part, that there is no doubt that the certificate purported to give him, and gives him, the right property. What, on the evidence, it has failed to do is to indicate its boundaries with sufficient correctness and precision."

37. Birkett LJ agreed with Lord Evershed MR, and Romer LJ, also agreeing, thought it "quite plain that this in substance is a matter of boundaries and not a matter of property, although … the two conceptions of necessity sometimes overlap": see 261.

38. In contrast, the Court of Appeal rejected a submission that the general boundaries rule applied in *Parshall v Bryans* [2013] EWCA Civ 240, [2013] Ch 568. In that case, the plans in respect of two titles both appeared to include a small triangle of land in Chelsea which the defendant had used for car parking. Mummery LJ, with whom Patten and Treacy LJJ agreed, said in paragraph 96:

> "In my judgment, the general boundaries rule does not help the defendant for the simple reason that the dispute in this case is not a dispute about the position or delineation of the boundaries of No 29 or No 31. The dispute is about title to registered land (the disputed land). The question is who has the better title to the disputed land. It is not about where the boundary should be drawn as between No 29 and No 31."

39. The third case to which we were taken was *Drake v Fripp* [2011] EWCA Civ 1279, [2012] 1 P&CR 4. There, a Mr Bolesworth had sold some 153 acres of land to a predecessor of SLA Property Company Limited ("SLA"). SLA and its tenant, Mr Drake, contended that the true boundary was a Cornish hedge (i.e. "a style of hedge found in Cornwall built of stone and earth"), but Mr Fripp, who now owned land which Mr Bolesworth had retained, said that the boundary was a post and wire fence. As was explained by Lewison LJ, with whom Lord Neuberger MR and Aikens LJ agreed, in paragraph 1:

> "The two rival boundary features are 4 or 5 metres apart and the disputed area of land between the two amounts to about 1½ acres. The aggregate area conveyed by the transfer was stated to be just over 153 acres. The disputed land is thus about 1 per cent of the total."

40. The title plans showed the Cornish hedge as the boundary, but the Court of Appeal nevertheless concluded that the fence was in fact the boundary. Having quoted rule 278 of the 1925 Rules and section 60 of the LRA 2002, Lewison LJ said in paragraph 20:

> "In substance [section 60 of the LRA 2002] is the same as the former rule; but even if that is incorrect, it is not suggested that the revocation of the 1925 rules could have enlarged SLA's

title. Rule 278(2) said in terms that one of the matters left undetermined was how far a boundary ran beyond a hedge, wall or fence. Accordingly in my judgment the registration of SLA as proprietor by reference to a filed plan on which the boundary line followed the Cornish hedge left the position of the precise boundary undetermined. Once the position of the precise boundary had been (retrospectively) determined by the adjudicator and the judge, it could be seen that SLA never had title to the disputed strip. [Counsel for SLA and Mr Drake's] proposition that SLA has 'lost' 1½ acres of land is thus either question begging or wrong. Nor do I accept that there is some limit to the quantity of land that might be encompassed in a boundary dispute. It must depend on all the circumstances and in particular the quantity of land abutting the boundary. A dispute over a strip of land a few centimetres wide but running the whole length of, say, a railway or a canal would plainly be a boundary dispute even if the area involved was many hectares. In *Lee v Barrey* [1957] Ch. 251 an alteration in the filed plan to move the boundary by 10 feet fell within the scope of the general boundaries rule, even though the whole frontage of the plot in question was only 42 feet. On the other hand an alteration in the proprietorship of a small strip of land registered under a separate title may well fall outside the scope of the general boundaries rule. In truth whether a change is 'appreciable' must depend on all the circumstances; and I can see no objection to the ratio between the quantity of land at issue and the quantity of land remaining being a relevant consideration. [Counsel for SLA and Mr Drake] suggested that the approach might be different if the contest is between two physical features, as opposed to a contest between a physical feature on the one hand and an imaginary line on the other. I do not accept that there is any difference in principle. If parties were to dispute whether the boundary was a hedge as opposed to a ditch; or whether the boundary did or did not include a road, the dispute would still be a boundary dispute."

41. In its 2016 consultation paper *Updating the Land Registration Act 2002* (consultation paper no. 227), the Law Commission suggested at paragraph 15.34 that factors relevant to the classification of a dispute as either a boundary dispute or a property dispute include these:

"(1) The relative size of the contested land in comparison to other land clearly within the remainder of the registered proprietor's title. Where the contested land is relatively small, that points towards the case being a boundary dispute. We emphasise that it is the relative size of the disputed land that is important, rather than the size of the disputed land alone.

> (2) Where the disputed land is particularly important to the registered proprietor the case should generally be seen as involving a property dispute. We see this factor as operating as a qualification on the first, so that where the disputed land is important the case is likely to be a property dispute even if the disputed land is relatively small."

42. I agree that each of these two matters can be of relevance when deciding whether an issue is a boundary dispute or a property dispute. With regard to the first, Lewison LJ said in *Drake v Fripp* that he could "see no objection to the ratio between the quantity of land at issue and the quantity of land remaining being a relevant consideration". As for the second, the fact that the small area in dispute in *Parshall v Bryans* served to provide car parking in a district in which property prices were high and parking spaces in short supply may perhaps explain why the general boundaries rule was not held to apply.

43. In the present case, Leech J explained that, had he not rejected the appellants' arguments on section 75 of the LRA 1925, he "would have been prepared to accept that it was appropriate to characterise this action as a boundary dispute rather than a property dispute": see paragraph 76 of his judgment. Further, while Judge Hedley did not specifically comment on the characterisation point, he referred in paragraph 17 of his judgment to "a dispute … as to where the boundary lies".

44. However, Mr Gale argued that the dispute as to whether the Claphams and Wrights are entitled to the Disputed Land as a result of adverse possession is, by its nature, one about title and outside the scope of the general boundaries rule. The extent of a registered estate is determined, Mr Gale said, by identifying paper title from the conveyancing documents. An adverse possession claim, Mr Gale submitted, is of necessity a property claim, not a boundaries claim. The flexibility inherent in the general boundaries rule must have limits, Mr Gale observed, if the aims of land registration are not to be defeated. Mr Gale noted in this connection that neither *Lee v Barrey* nor *Drake v Fripp* involved adverse possession issues. In the present case, Mr Gale said, Judge Hedley first determined where the boundary lay by reference to the relevant deeds and then turned to whether the adverse possession claim was well-founded. Judge Hedley treated that latter question as a title dispute, and, so Mr Gale contended, he was entitled to do so.

45. I cannot accept these submissions. There is no indication in either section 60 of the LRA 2002 or rule 278 of the 1925 Rules that it matters whether any uncertainty as to the position of a boundary stems from an issue as to the construction of a conveyancing document, on the one hand, or an adverse possession claim, on the other. Neither section 60 nor rule 278 contains any reference at all to adverse possession. What emerges from both provisions is that a title plan is not to be taken to show the boundaries accurately. If, therefore, neighbouring owners differ as to where a boundary lies, the answer is not to be found in the title plan but by reference to the other principles by which the extent of a person's property is ascertained. The exercise may involve analysis of conveyances, transfers and other documentation, but I do not think there is any good reason for disregarding adverse possession claims. In my view, a title plan will not settle the exact location of a boundary regardless of whether it accords with the paper title or has moved through adverse possession.

46. I find it hard to see how the position could be otherwise. It would seem to make no sense for a title plan which avowedly portrays only a general boundary to be deemed to determine the precise extent to which land claimed by adverse possession is included in the title. Title plans do not pretend to be accurate, and according them significance in the way for which Mr Gale contended could engender just the sorts of mischief which the Land Transfer Commission identified in 1870 and which the general boundaries rule has since sought to avoid. Owners whose boundaries might, as a result of adverse possession, no longer fully accord with the conveyancing materials might need to be alive to the title plans used for their neighbours' properties and, potentially, challenge them. To adapt what the Land Transfer Commission said, dispute might be forced on neighbours who had hitherto been at peace.

47. Turning to the present case, the precise dimensions of the Disputed Land are not known, but Mr Morris estimated by reference to a plan that it might be between 2 metres and 5 metres in depth. It is small in size when compared with Number 24, Numbers 25 and 26 or Brook Barn and there are no buildings on it. Nor am I aware of any other reason for considering the Disputed Land to be of particular importance to any of the registered proprietors. In the circumstances, it seems to me that Leech J was right to accept that this case involves a boundary dispute rather than a property dispute. While each case must be decided by reference to its own facts, it is noteworthy that the distance between the Cornish hedge and the fence in *Drake v Fripp* (viz. 4 or 5 metres) was comparable to Mr Morris' estimate of the maximum depth of the Disputed Land. The position appears to me to be that Ms Narga has been registered as proprietor of the right property and that what is contentious is that property's southern boundary.

48. On that basis, what is shown on the title plan for Brook Barn cannot be taken as a guide to whether Brook Barn encompasses the Disputed Land and, to the contrary, can be of no significance in the context of the present appeal.

Section 75 of the LRA 1925

49. Section 75 of the LRA 1925 featured prominently in the judgments of both Judge Hedley and Leech J. As I have mentioned, Judge Hedley considered that section 75 caused the then owner of Brook Barn to hold the Disputed Land on trust for the Claphams and Wrights when title to Brook Barn was registered in March 2003. On appeal to the High Court, Mr Morris argued that section 75 had no application where title to the land in question had already been extinguished through adverse possession when it was first registered. Leech J, however, disagreed. As he said in paragraph 66(1) of his judgment, he considered that "section 75 applies to all cases in which a squatter has acquired title to registered land by adverse possession whether or not first registration had taken place before title to the land had been acquired".

50. It is fair to say that section 75 of the LRA 1925 did not state in so many words that it had no application where title to the relevant land had already been extinguished by the time it was first registered. Several features of the wording tend to suggest, though, that it was in point only where title would have been extinguished after registration had been effected. In the first place, the opening words of section 75 referred to how the Limitation Acts "shall apply to registered land". If, however, land had been in adverse possession for 12 years before it was registered, extinction will have occurred pursuant to the Limitation Act 1980 in advance of registration and the

Act will not obviously have had any role to play as regards "registered land". Secondly, the words "shall not be extinguished" pointed towards the material event (viz. completion of 12 years' adverse possession) happening in the future, at a time when there was a "person registered as proprietor" with an estate in "registered land" capable of being extinguished. Thirdly, the section spoke of acquiring title "against any proprietor", which, in the context, must have referred to a person registered as a proprietor, and there could be no such person until land was registered. Section 3(xx) of the LRA 1925 defined "proprietor" to mean "the registered proprietor for the time being of an estate in land or of a charge".

51. Further, I agree with Mr Morris that observations made in *St Marylebone Property Co Ltd v Fairweather* [1963] AC 510 ("*Fairweather*") lend support to his case. *Fairweather* concerned a shed which straddled the gardens at the rear of properties referred to as "No. 311" and "No. 315". The two properties were the subject of separate 99-year leases in 1899, and a lessee of No. 311 subsequently occupied the shed in such a way as to give him title to it by adverse possession as against the lessee of No. 315. The lease of No. 315 having been surrendered, the freeholder claimed possession of so much of the shed as was in the garden behind No. 315. However, the defendant, who was a lessee of No. 311, contended that the freeholder would not be entitled to possession until the expiry of the full term of the 99-year lease of No. 315.

52. In the Court of Appeal ([1962] 1 QB 498), counsel for the defendant sought to raise for the first time an argument that the lease of No. 315 was held on trust for him pursuant to section 75 of the LRA 1925. Having been told that the Court was not disposed to allow fresh evidence, the defendant's counsel said that he would not pursue the point (see 505) but Holroyd Pearce LJ addressed it briefly in his judgment. He said at 516:

> "[Counsel for the defendant] sought to raise a point under the Land Registration Act, 1925, which was not taken below. Section 75 (1) provides that the Limitation Act shall apply to registered land, but where the estate of a person registered as proprietor would be extinguished 'such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for' the person who has acquired title against the proprietor. The leasehold title and the lease were registered, and therefore, it is said, the lessee's former estate is now held in trust for the defendant. Had [counsel for the defendant] been able to establish by evidence that the leasehold title was registered before the Act came into force, the point might well have had force. But on the evidence there is nothing from which one can draw that assumption, and we felt unable to give leave to adduce fresh evidence. Section 75 (1) clearly deals with the future, not the past. Therefore, the point fails."

53. When the case reached the House of Lords, Lord Radcliffe, with whom Lord Guest concurred, said at 541 that, as "the true meaning of section 75 (1) is not at all easy to discover and may have to be fully considered on some other occasion", he thought it "best on this occasion to say as little about it as possible". He nonetheless proceeded to comment on the section 75 argument. He said at 542:

> "But, although it is known from the Land Registry that the lease [of No. 311] had been entered on the Charges Register as an incumbrance on the absolute title and the entry of it had later been cancelled, presumably after the surrender, there is no evidence to show at what date the lessee himself had thus come upon the register as a 'proprietor.' As 'proprietor' in the Act is defined as meaning 'registered proprietor,' it is pointed out that it is impossible on the evidence to say whether or not the lessee was a registered proprietor at the date when the Act came into force, or for that matter was a registered proprietor at the date when adverse possession was completed.
>
> The Court of Appeal were unanimous in holding that this uncertainty by itself was fatal to the success of the appellant's argument, since, to use the words of Holroyd Pearce L.J.: 'Section 75 (1) clearly deals with the future, not the past.' He said that, had the appellant's counsel been able to establish by evidence that the leasehold title was registered before the Act came into force, his point might well have had weight. My Lords, I agree with this view in the sense that I regard section 75 (1) as operating only upon events occurring after the Act came into force, and if the Limitation Acts effected extinguishment at a date when the lessee was not a registered proprietor, the subsection would not operate.
>
> I do not think, therefore, that the appellant can succeed on this point."

54. For his part, Lord Denning, the other member of the majority, said at 548:

> "One word about section 75 (1) of the Land Registration Act, 1925. That point was not raised in the county court and its availability depends on facts which were not proved. I do not think it is open to the appellant here. But in any case I doubt if that puts registered land on a very different footing from unregistered land. It is machinery so as to apply the Limitation Acts to registered land but it does not alter the substantive position very materially."

55. Lord Radcliffe thus expressed the view that section 75(1) "would not operate" "if the Limitation Acts effected extinguishment at a date when the lessee was not a registered proprietor". Mr Morris did not in the end go so far as to contend that this comment formed part of the House of Lords' ratio decidendi, but Lord Radcliffe's remarks clearly remain persuasive. For his part, Mr Gale accepted that Lord Radcliffe's observations were, on the face of it, against him.

56. A final point is that it would, I think, be surprising if Parliament had intended section 75 of the LRA 1925 to apply to land to which title had been lost by the time of first registration. Suppose, say, that in 1900 a company acquires title to two fields, in one case pursuant to a conveyance and in the other by adverse possession, and that the land is unregistered until 19 March 2003 (the date of Brook Barn's registration) when

it is erroneously registered in the name of someone other than the company. If section 75 were in point, the field gained by adverse possession would at that stage be deemed to be subject to a trust, but the other field would not. It is not apparent to me why Parliament should have wished there to be such a difference.

57. Mr Gale suggested that it made sense that section 75 of the LRA 1925 should have applied where there had already been 12 years' adverse possession because that ensured that the adverse possessor still had an interest in the land notwithstanding the registration of someone else as its proprietor (and, hence, the vesting in that person of the legal estate in accordance with section 69 of the LRA 1925). However, application of section 75 would not seem to have improved the adverse possessor's position. He could anyway have claimed rectification of the register pursuant to section 82 of the LRA 1925.

58. Mr Gale also suggested that section 70(1)(f) of the LRA 1925 (referring to "rights acquired or in course of being acquired under the Limitation Acts") would have been otiose if section 75 had not applied where title had been extinguished through adverse possession in advance of first registration. I do not see, however, why that should be so. On any view, it would still have performed a role in relation to adverse possession accruing post-registration. Nor was I persuaded that either article 1 of the First Protocol to the European Convention on Human Rights or the decision of the European Court of Human Rights in *J.A. Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (in which the compatibility of the law relating to adverse possession with the First Protocol was considered) is of any real assistance.

59. In the circumstances, it seems to me, with respect, that Leech J and Judge Hedley were mistaken in thinking that section 75 of the LRA 1925 applied where title to the land in question had been extinguished before it was first registered. There is, moreover, a further objection to the application of section 75 in the present case. That arises from my conclusions as regards the general boundaries rule.

60. Leech J said in paragraph 75 of his judgment that, "once [Judge Hedley] had found as a matter of law that section 75 applied, he was bound to come to the conclusion that the registered title included the [Disputed Land]". To my mind, though, this put the cart before the horse.

61. Section 75 of the LRA 1925 provided for the proprietor of an estate in registered land to be deemed to hold it on trust where it would have been extinguished under the Limitation Act 1980 had the land been unregistered. Section 75 cannot, therefore, avail Ms Narga unless Brook Barn, as registered, included the Disputed Land: there can be no question of the provision having caused the predecessor of hers who was the first registered proprietor of Brook Barn to be a trustee of the Disputed Land unless the Disputed Land formed part of the "registered land" in respect of which he was registered as proprietor. The first question therefore needed to be whether the Disputed Land fell within the registered title of Brook Barn. Section 75 can have applied only if it did.

62. Notwithstanding its imperfections (as to which, see paragraph 8 above), the title plan in respect of Brook Barn can be said to depict the Disputed Land as within the scope of the title. In the light, however, of the general boundaries rule, that does not mean that Brook Barn, as registered, in fact included the Disputed Land. Nor can I see any

other reason for the boundaries of the "registered land" registered in the name of Brook Barn's first registered proprietor to have differed from the pre-existing boundaries. Since the Claphams and Wrights had acquired title to the Disputed Land by the time Brook Barn was first registered, the southern boundary of Brook Barn will by then have been the Fence. That being so, it seems to me that the land in respect of which Ms Narga's predecessor became the first registered proprietor will likewise have stopped at the Fence and so section 75 of the LRA 1925 cannot have applied to land south of it.

63. In short, my own view is that section 75 of the LRA 1925 did not apply in the present case both:

i) because section 75 was inapplicable where first registration happened only after title had been extinguished by adverse possession; and

ii) because, having regard to the general boundaries rule, the land in respect of which Ms Narga's predecessor became the first registered proprietor did not extend to the Disputed Land, to which the Claphams and Wrights had already acquired title by adverse possession.

The impact of section 29 of the LRA 2002

64. Section 29 of the LRA 2002 provides for a "registrable disposition of a registered estate" to have priority over unprotected interests. This provision would have been in point had the "registered estate" which Ms Narga bought included the Disputed Land. It did not do so, however. Since the Claphams and Wrights had already acquired title to the Disputed Land by the time Brook Barn was first registered, the "registered estate" will never have encompassed the Disputed Land. Brook Barn's title plan might have suggested otherwise, but, having regard to the general boundaries rule, that is immaterial.

65. Mr Gale argued that the present case is similar to the example discussed in paragraph 33.060.03 of *Ruoff & Roper: Registered Conveyancing*. The analysis in that paragraph would have been relevant if the Disputed Land had formed part of Brook Barn, as registered. As I have said, however, I do not think it did.

Conclusion

66. I would allow the appeal.

67. It seems to me that:

i) The Claphams and Wrights had acquired title to the Disputed Land by adverse possession before Brook Barn was first registered;

ii) Although its title plan appeared to show the Disputed Land as part of Brook Barn, the plan depicted only general boundaries and did not result in Brook Barn gaining any of the Disputed Land;

iii) Section 75 of the LRA 1925 had no application both because the Disputed Land did not fall within Brook Barn's registered title and because the

provision did not apply where first registration was effected only after title had been extinguished by adverse possession; and

iv) Ms Narga's purchase of Brook Barn gave her no more than her vendor had had.

68. It follows, in my view, that the Fence continues to represent the boundary between Numbers 24, 25 and 26, on the one hand, and Brook Barn, on the other, and that the Claphams and Wrights are entitled to be registered as the proprietors of the Disputed Land.

Lord Justice Nugee:

69. I agree. I am very grateful to Newey LJ for setting out the facts and issues so clearly, which enables me to explain relatively briefly why I concur in his analysis.

70. Ms Narga was registered as proprietor of Brook Barn under title No. LT352473 on 5 June 2020. The property register of her title referred to her property as follows:

> "(19.03.2003) The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being Brook Barn, Seagrave Road, Thrussington (LE7 4TR)."

The key question is whether that gave her a registered title to the Disputed Land, that is the strip of land between the southern edge of the brook and the line of the Fence. And since that title has not changed since it was first registered on 19 March 2003, that in turn depends on whether the title included the Disputed Land when it was first registered.

71. If one simply looked at the filed plan, it would no doubt appear to include the Disputed Land. But since the title was registered (as almost all land is) with general boundaries, the plan does not purport to show where the actual boundary is. The purpose of the filed plan is to identify the property concerned, namely Brook Barn, not to identify where its boundaries are. The whole point of the general boundaries rule, formerly found in rule 278 of the 1925 Rules and now found in s. 60 LRA 2002, is that the filed plan does *not* determine the exact line of the boundary. As Newey LJ has explained, that was a principle first introduced in 1875 precisely to avoid the disputes that had bedevilled registration under the 1862 Act.

72. So how does one determine in a case such as this where the boundary actually is? I think the answer has to be by looking at where the boundary was when the title was first registered, that is here on 19 March 2003. For this one goes back to the clear and careful findings of Judge Hedley. I can take Number 26 as an example. Judge Hedley identified that it was the conveyance from Mr Crowden to Mr Allen dated 8 October 1982 which first separated Number 26 from Brook Barn, which until then had been in common ownership (paragraphs 64-65 of Judge Hedley's judgment). He found that the boundary of the land then conveyed was the edge of the south bank of the brook (paragraph 99 of Judge Hedley's judgment).

73. That was therefore where the boundary lay in 1982. But it does not follow that that was where the boundary was in 2003. By then the Wrights, who had acquired

Number 26 in 1983 (paragraph 128(b) of Judge Hedley's judgment) and had used the north bank up to the Fence as part of their garden for the whole period of their ownership (paragraph 166(i) of Judge Hedley's judgment), had acquired a title by adverse possession to their part of the Disputed Land (paragraph 167 of Judge Hedley's judgment). The same applies to Number 25 which the Wrights acquired in 1988, and to Number 24 where the Claphams and their predecessors the Barretts had been in possession since the late 1970s.

74. The result was that long before 2003 the Wrights and the Claphams had a good title right up to the Fence. To my mind that means that by 2003 the boundary between Numbers 24, 25 and 26 on the one hand and Brook Barn on the other no longer lay on the south side of the brook, but along the line of the Fence. I do not think it makes any difference that part of this title was a paper title derived from the respective conveyances to them or their predecessors, and part was a possessory title derived from their possession of the land for 12 years. In unregistered conveyancing a possessory title is good against the whole world except someone with a better title; and once the title of the paper owner has been extinguished by 12 years' adverse possession a possessory title is good against the world. Such a title *is* ownership, and in all but the most unusual circumstances as good as any paper title. The Wrights and the Claphams therefore owned the land up to the Fence, whereas the owner of Brook Barn, whose title had been extinguished by s. 17 of the Limitation Act 1980, no longer owned it. If therefore one asks where the boundary between their respective lands was in 2003, I think there is only one possible answer: along the line of the Fence.

75. In this way it can be seen that, at least in unregistered conveyancing, the effect of 12 years' adverse possession was to re-draw the boundary between adjoining properties so that it reflected the position on the ground rather than the position as it was when the land was first conveyed out of common ownership. Indeed I regard this as one of the great virtues of the doctrine of adverse possession as it applied to unregistered land: once neighbours had been in undisputed possession of their respective properties for 12 years, that gave them ownership of the land they each possessed, with the result that the boundary between their lands would follow the *de facto* position on the ground without the need for anyone to go back to the historic conveyances by which their properties were first separated. The practical effect was to favour the claims of those who had long been in peaceful possession of land over those who had, or arguably had, a mere paper title. That I think tended to reduce the number of boundary disputes which all too often arouse great passions but usually cost far more than the property in issue is worth.

76. Reverting to the present case, if one asks where the boundary between Brook Barn and Numbers 24, 25 and 26 lay on 19 March 2003 when the title to Brook Barn was first registered, the answer for the reasons I have given was along the Fence. That meant that the registered title to Brook Barn did not include the Disputed Land in 2003; and if it did not include it in 2003, it did not include it in 2020 when it was transferred to Ms Narga.

77. The upshot is that Ms Narga has no registered title to the Disputed Land. She has no other claim to it, and there is therefore nothing to displace the possessory title that the Wrights and the Claphams had acquired by 2003, and still have today, to the Disputed Land.

78. I therefore agree that the appeal should be allowed. And on all other points, and in particular on s. 75 LRA 1925, I entirely agree with the lucid and compelling analysis of Newey LJ.

Lord Justice Peter Jackson:

79. I agree with both judgments.

80. The combined legal costs of the trial and two appeals arising from this unfortunate boundary dispute now exceed £300,000. How did the dispute come about?

81. Paragraph 13 of Judge Hedley's judgment is in these terms:

> "13. On 9 March 2020 Ms Narga sent a message to Bentons [220], confirming an offer to buy Brook Barn at £265,000 conditional upon a number of things. One of them was written confirmation of the boundary from the neighbours directly adjoining the Brook. She said
>
> > 'I do not wish to enter into any historic adverse possession battles as I have experienced this stressful and extremely costly situation previously. Alternatively, I would accept a written summary/explanation of the boundary to the Brookside with a drawing/land registry plan that the vendor is selling.'
>
> In fact, Mr Taylor (a trustee of the M-Square Pension Trustees) confirmed in oral evidence that he did not agree to the conditions which Ms Narga sought to impose."

82. At paragraph 84, the Judge accepted Ms Narga's evidence that she had visited Brook Barn eight times before buying it, and that she had spent time checking the plot and its boundary against the title plan.

83. From paragraphs 16-27 of the judgment, we learn what then followed. On 12 May 2020, Ms Narga purchased Brook Barn. A dispute about the extent of the property immediately arose, so that on 11 June 2020, she wrote to the Wrights asking them to confirm their understanding of the boundary. They replied that the fence was the boundary, but Ms Narga did not accept this, and set about doing works on the Disputed Land. On 9 November 2020, the Claphams and Wrights issued proceedings.

84. The purchase of Brook Barn took place during the first Covid lockdown. Even so, the sequence of events described above shows that Ms Narga could have consulted the neighbouring landowners before, rather than after, purchasing Brook Barn. Had she done so, this boundary dispute may not have arisen, and much trouble and expense might have been avoided.