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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Case No: F04B1050

Courtroom No. 26

35 Vernon Street
Liverpool
L2 2BX

1.46pm – 4.13pm
Thursday, 8th October 2020

Before:
HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

B E T W E E N:

(1) ROCK FERRY WATERFRONT TRUST
(2) ROCK FERRY SLIPWAY TRUST

Claimants

and

PENNISTONE HOLDINGS LIMITED

Defendant

MR RICHARD OUGHTON (instructed by **Johnson & Boon Limited**) appeared on behalf of the **Claimants**

MR WINSTON HORNE (instructed by **MSB Solicitors**) appeared on behalf of the **Defendant**

APPROVED JUDGMENT

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JUDGE HODGE QC:

1. This is my extemporary judgment on the trial of a claim brought by the claimants, Rock Ferry Waterfront Trust and Rock Ferry Slipway Trust, against the defendant, Pennistone Holdings Ltd, claim number F04B1050. There is also a counterclaim by the defendant.

2. This judgment is divided into six sections as follows: I: Introduction and overview II: Factual background III: Witnesses and findings of fact IV: The transfer to the defendant and the dissolution of Toluca Ltd V: The transfer from the Crown to the first claimant VI: Conclusions.

I: Introduction and overview

3. One of the particular pleasures of sitting as a judge of the Business and Property Courts in Liverpool and Manchester is the insight it has afforded me into the sporting and leisure activities of the citizens of the north of this country. In *Fuller v Kitzing & Anor* [2017] EWHC 810 (Ch), reported at [2017] (Ch) 485, I had to deal with the nature and the incidents of rights to shoot game birds on an estate in Yorkshire. In *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd* [2019] EWHC 2272 (Ch), reported at [2020] 1 WLR 599, but reversed on appeal (see [2020] EWCA Civ 578, [2020] 3 WLR 755), I had to determine the legal nature of the property in stocks of fish contained within a commercial fishery. In this case, I am concerned with the title to a slipway used to launch sailing boats into the River Mersey by members of the Royal Mersey Yacht Club. Both claimants are independent, not-for-profit, charitable organisations associated with the Royal Mersey Yacht Club.

4. The present case also raises an interesting, and apparently novel, point of law although in practice I suspect that it is only likely to arise in a very few esoteric cases: Where a legal estate fails to pass because the land is registered and the transferee omits to register the transfer, does the resulting equitable interest, which passes to the transferee, require to be protected by registration as a land charge of Class C (iv) if the registered estate is subsequently extinguished by an escheat to the Crown as a result of the dissolution of the overseas company which is the registered proprietor?

5. By a claim form issued in the County Court at Birkenhead on 12 August 2019, the first claimant issued a claim for possession of land comprising the former Vestor Oil Site at Bedford Road East, Wirral, CH42 1LS and now comprised in registered titles numbered MS 669689 and MS 672097. Originally the first claimant was the sole purchaser and registered proprietor of the whole of this land and it claimed in these proceedings that the defendant was in possession as a trespasser. The defendant served a defence and a counterclaim seeking a declaration that it was entitled to be registered as sole proprietor in place of the first claimant, and an order directing the Land Registry to alter the register so as to give effect to this on the footing that the register required to be updated. The land in issue is shown on an indicative plan (at page 65 of the trial bundle) and in more detail on the filed plan for the former title to the site (MS 371421) in three ordinance survey plans at pages 329-331. The land comprises three parts: the former Vestor Oil Site, shown on the plan at page 65 coloured crimson; the pier, shown on the plan coloured blue; and the Grade II listed slipway leading into the River Mersey, shown coloured green on the plan.

6. In due course the proceedings were transferred to the County Court at Liverpool. Shortly before the proceedings were commenced, the title to the slipway was transferred by the first claimant to the second claimant, which was then registered as the sole proprietor of the slipway under title number MS 672097. The second claimant was added as a co-claimant by the order of His Honour Judge Gregory at the first pre-trial review in this case on 2 July 2020. The case had previously been the subject of detailed case management directions by District Judge Deane on 21 January 2020.

7. Judge Gregory ordered that the trial be heard at a face-to-face hearing before a Circuit Judge with Business and Property experience. The case was therefore assigned to me and was listed for a second pre-trial review before me on 2 September 2020. At that second pre-trial review the claimants were represented (as they have been throughout) by Mr Richard Oughton (of counsel). The defendant was represented by Mr Nicholas Jackson (also of counsel). Since the ultimate burden of proof in the proceedings rested with the defendant to prove its counterclaim for rectification of the register of title against the claimants as the present registered proprietors of the land in question, by paragraph 2 of my order I directed that the defendant should open the trial and call its witnesses first, and this is how the trial has proceeded.

8. The trial took place before me over three days on 6, 7, and 8 September 2020. Mr Oughton again appeared for the claimants and, on this occasion, the defendant was represented by Mr Wilson Horne (of counsel). He is at least the fourth counsel to appear in the case for the defendant, and he was briefed rather late in the day.

9. On the first morning of the trial I heard a number of informal preliminary applications on which I gave a short extemporary judgment that morning. One of those applications involved an informal application by Mr Horne to amend paragraph 19 of the defence. As originally pleaded, the defendant claimed an overriding interest under paragraph 2 of Schedule 3 to the Land Registration Act 2002, on the footing that the case was concerned with an unregistered interest in registered land which was said to override a registered disposition of that land. Although the land in question had first been registered on 10 November 1995 under title number MS 371421, as a result of an escheat to the Crown, of which I will say more later, that title had been extinguished; and when the Crown later came to transfer the land to the first claimant, a new registered title had been created on 24 May 2019. It therefore seemed to Mr Horne - in my view correctly - that the case in fact concerned an unregistered interest allegedly overriding first registration of title and, as such, was governed by Schedule 1, rather than Schedule 3, to the 2002 Act. Mr Horne therefore sought, and was granted, permission, against objections by Mr Oughton, to amend paragraph 19 of the defence to rely on paragraph 2 of Schedule 1 to the 2002 Act on the grounds that the defendant was a person with an interest in land who was in actual occupation of the land at the time of first registration of title. Mr Horne has produced an amended defence in that form.

10. In the light of my consideration of the case overnight, after the conclusion of all the evidence on the second day of the trial, and having looked at the authorities supplied to me, in particular by Mr Oughton, it seemed to me that, as a result of this amendment and Mr Oughton's response thereto, the case now raised a novel issue of law which merited consideration at the level of the High Court. Therefore, at the commencement of the third

day of the trial this morning, and with the agreement of Mr Oughton and Mr Horne, I transferred the case to the High Court, pursuant to section 42(2) and (3) of the County Courts Act 1984; and I have proceeded to continue to hear the case as a Judge of the High Court pursuant to section 9(1) of the Senior Courts Act 1981.

II: Factual background

11. I can take this from Mr Oughton's trial skeleton argument with certain additions of my own. Between 2002 and 2012 the registered proprietor of the land was a Seychelles company, Metropolitan Investments Ltd, of which Mr Denis Murphy claims to have been the ultimate beneficial owner and controller. By a transfer dated 15 June 2012, and registered on 18 June 2012, Metropolitan Investments had transferred the land to a company incorporated in the Isle of Man, called Toluca Ltd. The consideration expressed in the transfer was a nominal sum of £1. Mr Murphy was not a director or a direct shareholder of Toluca Ltd but the evidence is that he was indirectly the ultimate beneficial owner and controller of that company.

12. On 17 November 2015 a transfer was executed whereby Toluca Ltd transferred its registered title to the defendant. The consideration expressed in the transfer was £2,750, and the transfer was executed by Mr Stuart Foster and Mr James McKenna, who were registered directors of Toluca Ltd. The claimants originally put the defendant to proof of the genuineness of that transfer. After the conclusion of the defendant's evidence, and before calling the claimants' witnesses, on the afternoon of the second day of the trial Mr Oughton conceded that, in the light of the claimants' evidence, the transfer was indeed a properly executed and genuine transfer. I have no doubt that he was perfectly right to make that concession.

13. The defendant deliberately caused its then solicitor not to have the transfer registered at the Land Registry. The solicitor dealing with the conveyancing, but not with any corporate matters, was Ms Laura Harrild, then of MSB Solicitors. In an email to Mr Murphy, dated 18 January 2016, she concluded: "Can you clarify if you still want me to deal with the adverse possession before registering the transfer please? Also I think you were going to put me in contact with a previous owner who could give us a statutory declaration for the adverse possession." No subsequent instruction was given to register the transfer, and the transfer was never registered at the Land Registry.

14. In evidence, Mr Murphy said that the reason for this was because at that time he was in the process of restructuring his various companies; but since he also confirmed in cross-examination that he had had no intention of transferring this property to another company at the time, I fail to see why any proposed restructuring, of which Ms Harrild said that she was ignorant, should have led to the non-registration of the 2015 transfer. I find that the reason for the non-registration was because Mr Murphy did not want the land to appear to be owned by any company in this country which was owned and/or controlled by him. This was because of the potential environmental and contamination issues and liabilities affecting the land by virtue of its status as a former oil site. In any event, it is common ground that, by reason of the failure to register the transfer in accordance with the requirements of the Land Registration Act 2002, the transfer was ineffective to convey the legal estate and only took effect in equity. That is the effect of section 27(1) of the 2002 Act, which provides that: "If a disposition of a registered estate… is required to be

completed by registration, it does not operate at law until the relevant registration requirements are met."

15. On or around 4 September 2016, Toluca Ltd was dissolved in accordance with the laws of the Isle of Man. As a result, the title to the land passed by escheat to the Crown. The claimant accepts that the Crown was not a "purchaser" within the meaning of the Land Registration Act 2002.

16. By a transfer dated 25 April 2019, the Crown transferred the land to the first claimant for £5,000. The transfer contained the following recitals:

> "(1) Immediately before its dissolution, as mentioned below, Toluca Ltd ('the Company') was the registered proprietor with freehold title absolute of the premises comprised in the registered title and the former title registered under the former title number and shortly known as Land and Buildings Pier Extension and Pier Head at the site of the slipway at Rockferry
>
> (2)(a) The Company was incorporated as a company under the laws of the Isle of Man
>
> (2)(b) On 4 September 2016 notice was given by the General Registry of the Isle of Man Government that the Company had been struck off the Register of Companies and was dissolved
>
> (3) It is apprehended that the said premises thereupon became subject to escheat to Her Majesty
>
> (4) The Commissioners have agreed with the Purchaser for the sale to the Purchaser in manner hereinafter appearing of such fee simple estate in respect of the said premises subject to escheat as Her Majesty may now be able to grant the property for the sum mentioned below
>
> (5) The Commissioners have at no time prior to the date of this transfer taken possession or control of the said premises or entered into occupation thereof or effected any actual or presumed acts of ownership or management in regard thereto."

17. Clause (1) provided that, in consideration of £5,000, the Commissioners, to the extent that they were able to do so, thereby granted and transferred unto the Purchaser with no title guarantee ALL THAT the Property to hold the same under the Purchaser in fee simple. Clause (2) provided that this was:

> "Subject to so far as affecting the Property or any part thereof and so far as now subsisting and capable of being enforced and whether legal or equitable and whether or not subsisting at the date of the said dissolution above referred to or arising thereafter All if any: (a) estates and interests… (b) interests rights obligations encumbrances outgoings burdens or encumbrances of whatsoever nature not mentioned above and whether or not similar to anything mentioned above'.

18. That Crown transfer was duly registered at the Land Registry under a new title number which was said to have been created on 24 May 2019. On that date the defendant claims to have been in possession and/or occupation of the land both before, on, and after 25 April 2019. It was that assertion that led the first claimant to bring proceedings for possession of the land against the defendant, and to the defendant's counterclaim for rectification of the registered title on the basis (as amended) that its equitable interest under the 2015 transfer was an overriding interest binding upon the claimants by reason of paragraph 2 of Schedule 1 to the Land Registration Act 2002.

19. I have already mentioned that the slipway was transferred by the first claimant to the second claimant, an associated company of the first claimant. The price paid was £100. The transfer was made on 23 July and registered on 25 July 2019. The claimant originally accepted that that transfer of part gave the second claimant no greater rights than the first claimant. In the light of the amendment to the defence to rely upon Schedule 1, rather than Schedule 3, to the 2002 Act, Mr Oughton, in his oral closing, sought to resile from that concession but, in my judgement, it is unnecessary to consider that aspect of the matter further. Neither party claims mesne profits or any other monetary relief.

20. In paragraph 23(b) of its reply, the claimant made it clear that it did not rely upon paragraph 2(b) of Schedule 3 to the 2002 Act on the footing that, at the time of the transfer from the Crown, it had no knowledge of the existence of the defendant, or of any claim on its part to own the land. In the light of the translation of the defence from one relying on Schedule 3 to one relying on Schedule 1 to the 2002 Act, in the event paragraph 2(b) of Schedule 3 passes out of the picture. However, it remains the case that the claimants say they had no knowledge of the existence of the defendant, or of its claim to the land, at the time they took the transfer from the Crown.

III: Witnesses and findings of fact

21. I heard five witnesses for the defendant. The first three attended court and I received the evidence of the last two of the defence witnesses remotely by Microsoft Teams.

22. The first defence witness was Mr Denis Murphy, the director and principal shareholder of the defendant, and previously the ultimate beneficial owner of both Metropolitan Investments (in the Seychelles) and of Toluca Ltd (in the Isle of Man). He was cross-examined for a little over two hours on the afternoon of Day one of the trial.

23. On the morning of Day two - the court starting at 10am - the court heard from Mr Ian Robertson, a long-standing friend of Mr Murphy and the unpaid caretaker of the Vestor Oil Site on his behalf. He was cross-examined for about an hour. Mr Murphy has previously described Mr Robertson as: "An odd-job man who does secure security and fencing."

24. It is appropriate that I should summarise Mr Robertson's evidence. He explained to the Court that he had grown up with Mr Murphy's father, and that Mr Murphy had asked him to look after the yard. He said he did not get paid, although he expected reimbursement of any money that he laid out in connection with the land. Mr Murphy, earlier in the course of his

own cross-examination, had said that he paid Mr Robertson as little as possible, and that he did his own work on the site. Mr Robertson accepted that if Mr Murphy wanted to give him something, then he was free to do so. He said that his attendance at the site gave him something to do in the daytime, and that he went around checking the security of the site at night. He said it got him out of the house. He said that he had been looking after the site ever since it had first been acquired by the Seychelles company in 2002. He said he visited the site every morning at about 7am, and if it was a sunny day he might work on the machines, and he could do so all day.

25. Mr Robertson explained in re-examination that he never drove on to the site; in the daytime he parked right outside the gate to the yard, and at night-time he parked in the bushes along the public roadway. He had previously explained that he sat in his car to see if he could catch anyone coming on to the site unlawfully. He complained about acts of vandalism on the site. He said that every time he fixed a machine, someone would break into it. He explained that Mr Murphy came to the site if something went wrong, or to pay Mr Robertson money, for railings for example. Mr Robertson was adamant that there had never been any cars on the site; and he berated Mr Oughton for making the suggestion, asking him where he had got that idea from. In fact, Mr Oughton had got the idea from paragraph 11 of the defence, which had pleaded that, over the course of 2016 to 2018, the defendant had: "(7) brought and kept numerous trucks and cars on the site; (8) allowed Mr Robertson to trade on his own account in the sale of second-hand cars from the site". Mr Robertson firmly disputed that pleading. He said that the defence was wrong and that there had never been any cars on the site. He also talked about people getting up on to the pier from the slipway with ladders in order to fish off the end of the pier. Later he said that one could only get on to the pier from the yard (as he put it) "officially". In his closing, Mr Horne colourfully described those who fished from the end of the pier as "daredevils". Mr Robertson said that the only repairs carried out to the site had been to stop people getting in to the yard. Mr Robertson's evidence was that the pier was separate from the slipway. He said that he had put up 14 notices bearing his phone number and the word "Danger" and that someone had taken them all down. He said that during 2018 and the first four months of 2019, until the Crown transfer, he had carried out no work on the pier.

26. A constant theme of Mr Robertson's evidence was that dates and times meant nothing to him; since he was 80 years of age, he said that every day was "a bonus" to him. He said that the site had been cleared some years ago, and certainly before 2018 to 2019. He said that he was there to look after the yard. The same security fence had been in place for the last 10 years, although he said he was going to put up some new security fencing. He later said that the fencing had been installed in 2002. He said that in April 2019, there had been two containers on the site; one white and one which he said was blue, although Mr Renshaw said that the blue container was in fact red, and that is certainly the colour that appears on the photographs. No one enquired whether Mr Robertson might be colour-blind. Mr Robertson said that the word "Pennistone", the name of the defendant, had been on the container and on the machines, and that the word had not been added after this present dispute had blown up. He said he never let anyone into the site and that anyone who was there must have broken in.

27. Mr Robertson talked about storing slings, welding equipment, tools, and two generators in the containers on site, but he said that they were mostly his. His ambition was to catch the people who kept coming on to the site to wreck the machinery. He reiterated that, to his

knowledge, "Pennistone" was written on the container and the machines before the present trouble had blown up. When shown a photograph of a machine (at page 67), Mr Robertson took issue with Mr Oughton's description of it as a JCB, saying that it was "a digger". It had been vandalised, and he said that he had been waiting nine months for parts for it. Someone had set it on fire. He had started fixing it but he had not been able to complete the job.

28. Mr Richardson explained that he was just there to look after the yard and check that no one was smashing the fence. If ever he found that the padlock which prevented access through the main gate facing the refreshment rooms into the Vestor Oil Site had been broken, he said that he would change the lock the same day. He was challenged about Mr Renshaw's conflicting evidence and Mr Robertson said that Mr Renshaw could not tell the truth if he tried. Mr Robertson also talked about having put a concrete block behind the gate, in response to the breaking of the padlock, because he had feared that that had been done by travellers, who might be seeking to get on to the site. In re-examination, he indicated that the block had remained behind the gate for about six weeks until he had moved it when he had discovered that it was not travellers who had put a new padlock on the main gate but a representative of the Royal Mersey Yacht Club.

29. Mr Robertson reiterated that he went to the site twice a day, and that, until April 2019, the yard had been padlocked all the time. He said that there was a second set of gates along the side of the slipway, nearest the road on the landward side, but he said that they had never been opened, and that appears to be common ground on the evidence. In re-examination, Mr Robertson said that the site had "gone a bit dead at the moment", and that the boulder had been moved by him just before the digger had been damaged.

30. In answer to an enquiry from the court as to the fact that Mr Robertson had used exactly the same language, verbatim, in paragraph 13 of his witness statement, describing the work carried out by Mr Murphy's contractors, as Mr Murphy himself had used at paragraph 28 of his own witness statement, Mr Robertson said that they were his own words. That was a summary of Mr Robertson's evidence.

31. The defendant's third witness was Mr Phil Harrison, the defendant's accountant. He gave evidence for about 20 minutes. There was then about an hour's interruption whilst the Court sought to establish contact with the two remaining defence witnesses by Microsoft Teams. When contact was established, I heard for about 10 minutes from Ms Laura Harrild, the solicitor who had acted for the defendant on the transfer from Toluca Ltd. I then heard, for about 15 minutes, from Mr Maurice Singer, a former director of the corporate services company in the Isle of Man which had serviced Toluca Ltd and, as such, was a former director of that company.

32. After lunch, I heard, in person for about two hours, from Mr Cliff Renshaw. He is a Fellow of the Royal Institution of Chartered Surveyors by profession but he was giving evidence in his capacity as Chairman of both of the claimant companies and as a past Vice-Commodore of the Royal Mersey Yacht Club. I then heard, for about 15 minutes, again in person, from Mr Christopher Joseph Kay, the Honorary Commodore, and a trustee, of the Royal Mersey Yacht Club. There was no challenge whatsoever to either the reliability or the credibility of Mr Kay's evidence. That concluded the second day of the trial.

33. This morning, after sitting at 10am, I heard from Mr Oughton in closing for about an hour and a half and then from Mr Horne for about an hour. Mr Oughton briefly replied. I commenced delivering this extemporary judgment at the conclusion of the luncheon adjournment, starting at about 1.45pm.

34. I find that each of Mr Harrison, Ms Harrild, and Mr Singer were all honest and reliable witnesses who were doing their best to assist the Court, and I accept their evidence. I find that both Mr Renshaw and Mr King were honest and reliable witnesses who were also doing their best to assist the Court, and I accept their evidence in full. I do not accept Mr Murphy as a reliable witness and, where his evidence differs from that of Mr Renshaw, I prefer the evidence of Mr Renshaw. Where the evidence of Mr Robertson differs from the evidence of Mr Renshaw, then again I prefer the evidence of Mr Renshaw. Where the evidence of Mr Robertson is consistent with, or does not overlap, with the evidence of Mr Renshaw, but it differs from the evidence of Mr Murphy, I prefer the evidence of Mr Robertson to that of Mr Murphy.

35. What are my reasons for this assessment of the evidence? First, I find that Mr Renshaw was a confident witness, who gave his evidence under cross-examination in a clear and considered manner. Secondly, I find that his evidence is more consistent with the contemporaneous emails which passed between Mr Renshaw and Mr Murphy; I will elaborate upon that in a moment. Thirdly, I find that Mr Murphy clearly has an indirect financial interest in the outcome of this litigation, whereas Mr Robertson does not. Mr Robertson was a forthright, no-nonsense individual, who made it clear that dates and times meant nothing to him. At 80 years of age, he said that every day was "a blessing" to him.

36. Fourthly, I cannot accept that Mr Robertson visited the site as frequently as he claimed because it is inconsistent with the fact that (as I find) the digital combination padlock which was fitted by Mr Renshaw on 6 December 2018 was still in place three weeks later, on 29 December 2018. I find that when Mr Robertson visited the site at night, he merely observed it from bushes in the neighbouring road. He did not park on the site. I find that he must have visited less often than he told the Court.

37. Fifthly, as I have mentioned, paragraph 13 of Mr Robertson's witness statement is a word-for-word recital of the works described by Mr Murphy at paragraph 28 of his witness statement. In response to my question, Mr Robertson said that those were his own words; I cannot accept that. In my assessment, the adjective "remedial", which features in that description, is not characteristic of the language habitually used by Mr Robertson.

38. Sixthly, Mr Robertson vigorously denied ever trading second-hand cars from the site and, when pressed about whether the site had ever been used for car sales, he said that there had never been a car on the site at all; and he questioned the source of Mr Oughton's information when, in fact, Mr Oughton's questions were founded upon paragraph 11(8) of the defence, which had been verified by Mr Murphy's statement of truth.

39. As I have said, I did not find Mr Murphy to be a satisfactory witness. He failed to explain satisfactorily why the land had been vested, first of all, in a Seychelles, and then in an Isle of Man, company. His answer in both cases was simply, effectively because he could. I find that overseas companies were used to conceal the fact of Mr Murphy's indirect

interest in the land. That is why he used offshore companies and nominee directors. That is also why he did not provide a statutory declaration from himself in connection with the dispute over a right of way to the land. That is also probably why Mr Robertson (who would have been a more natural candidate) was not proffered as the maker of any statutory declaration because that would have led anyone making enquiries to Mr Murphy.

40. I do not accept that the registration of the 2015 transfer ever slipped Mr Murphy's mind. I found him to be an astute businessman, and I do not consider that he would have overlooked something like that. He had instructed the solicitor not to register the transfer; and he never rescinded or revoked that instruction. I find that Mr Murphy could give no satisfactory explanation for his failure to do so. He said that he had given Ms Harrild an express instruction not to register the transfer because he was restructuring his companies. That was not consistent with Ms Harrild's evidence, which was that she did not recall having had any conversation about restructuring of companies as a reason for non-registration (although she accepted that she did not recall the matter very well and that she herself did not do corporate reconstruction work, merely practicing in the field of commercial property work). Mr Murphy accepted that he had not been planning to transfer this land to another company within his ownership. Therefore, it seems to me that any restructuring would have been irrelevant to the issue of the registration of the land transfer. It is significant that the defendant never had any bank account. It was described in its name as a holding company but the land never appeared as an asset in the accounts. Mr Murphy could not explain why. I accept that a plausible explanation – although nobody proffered it - is that any entry in the accounts would probably have been at cost, and that the cost - only £2,750 - would probably have been written off within the first year. That explains why Mr Harrison, when asked, said that it had appeared at nil value in the company accounts. However, the fact remains that there was nothing in the company accounts about the ownership of the land.

41. At paragraph 29 of his witness statement, Mr Murphy estimated that he had spent in excess of £200,000 on remedial works in the 19 years that he had been the owner of the property. Unfortunately, he said that he has not kept full records of everything he had spent on the property as he did not think he would need to given that the company owned the property. Mr Murphy attaches a single copy bank statement, showing payment to Powell Demolition Ltd for some of work. That bank statement is, in fact, a bank statement relating to the bank account of a different company, Pennystone Properties Limited, and evidences a bill payment, via Faster Payment, to Powell Demolition North West Ltd in the sum of £30,000 on 17 December 2018. There is nothing else.

42. In an email from Mr Murphy to Mr Renshaw on 21 April 2016 (at page 493), Mr Murphy had said that he would sell the site but that they were spending a lot of money on all the remedial works. As I say, at paragraph 29 Mr Murphy has estimated that he spent in excess of £200,000 on remedial works to the site but the 17 December 2018 payment is the only one that is evidenced by any document. I am satisfied that the bank statement has been produced in evidence as the only documented payment because it was the only payment that was made as late as December 2018. I am satisfied that all the other works were carried out long before December 2018, and that this was the last of any works carried out to the site if, indeed, it is related to this site at all, as to which there is no reliable evidence.

43. In cross-examination, Mr Murphy said that this sum had been paid well after the work had

been done. Powells had been pressing him for a cheque for the works that they had done for some time. He said that he had not thought that he would need an invoice, and then he added that he had not been asked to produce one. At the end of his evidence, I took Mr Murphy to Deputy District Judge Banks's disclosure order, which had made it clear that invoices were required to be disclosed. In the light of that, Mr Murphy accepted that there were no invoices. He acknowledged that the defendant did not have a bank account and that all payments had come out of Pennystone Properties Ltd's account. He again reiterated that Powell Demolition had been owed this money for a long time; and he said that they were still doing work for Mr Murphy.

44. It is clear to me that this bank statement was only produced because had the defendant produced any other documents they would have demonstrated that all the other works had been carried out before 2018 and 2019. I am satisfied that there must have been an invoice leading to this payment. No one would pay as much as £30,000, in documented form, without requiring an invoice which could be used to set-off that payment against any liability to tax. I am satisfied that there must have been an invoice; yet none has been produced. The inference I draw is that that is because any invoice would have shown that the works had been carried out much earlier than December 2018.

45. I reject Mr Murphy's evidence that he ever told Mr Renshaw that the land had been transferred, either to the company in the Isle of Man or specifically to Toluca Ltd; or that Mr Murphy ever told him that it had ever been transferred on to a company in the UK, or specifically that it had been transferred to the defendant. Mr Murphy was asked to point to any document evidencing the fact that he had told Mr Renshaw that the land had been transferred to a UK company or to the defendant. I found Mr Murphy's answer to be telling; it was: "Why should I tell Mr Renshaw that it had been transferred?" There was no suggestion in Mr Murphy's witness statement that he had told Mr Renshaw that the land had been transferred to any UK company, still less that it had been transferred to the defendant. Indeed, paragraph 44 of Mr Murphy's witness statement suggests that the transfer to a UK company had never been mentioned: "Mr Renshaw knew that I claimed ownership of the site through Metropolitan and then Toluca and that Mr Robertson worked for me. Indeed, Mr Renshaw had been negotiating with me to acquire the site since 2009." There is no reference there to any mention of the land having ever been transferred on to a company in the UK, and still less the defendant.

46. I reject Mr Murphy's evidence that he ever told Mr Renshaw that the land had been transferred to an Isle of Man company or, specifically, to Toluca. There was no reaction from Mr Murphy, other than a bare denial, when it was suggested that he had just made up his evidence that he had told Mr Renshaw of a transfer of the land to a UK company, and there was no suggestion that Mr Murphy had ever mentioned the defendant company by name. All he said was that he had told Mr Renshaw that the land had gone from an Isle of Man to a UK company; but, as I say, I reject that evidence. I find it inconsistent with the email which is at page 320. That email is dated 31 January 2018 and is from Mr Renshaw to Mr Murphy. In it, Mr Renshaw said that he was not dealing with the Vestor Oil Site any more but that the new Commodore was very keen to try and resurrect the previous grant applications and that Mr Renshaw had mentioned to him that one of the reasons the last grant had been rejected was because they did not have a letter from Mr Murphy, or the company in the Seychelles, confirming they would sell the site if the club could get the grant: "When we last met you said that you think you would be able to

get such a letter. If that is the case, could you give me a call and I will get the new Commodore to contact you direct?" That email shows that, as of 31 January 2018, Mr Renshaw still thought that the land was vested in a Seychelles company and not in an Isle of Man, still less a UK, company. Mr Murphy never contradicted Mr Renshaw's understanding in writing.

47. There is a further email of 6 February 2018 from Mr Renshaw to Mr Collingwood of the Royal Mersey Yacht Club, which was copied in to Mr Murphy, at page 321. That made reference to Mr Murphy having explained that he was planning to clear the site and fill in the bund at the front, or sea, end of the site to enable it to be built upon. Mr Renshaw had explained that the club wanted to try again to get a Heritage Lottery grant to buy the whole site, including the jetty and the slipway, to undertake repairs and to build on the site, but he still needed a letter confirming in principle that the owners would sell the site, although there was no need to agree a price at this stage, and Mr Murphy should get his solicitor to write to the club confirming this. There was no suggestion in that email that Mr Murphy had told Mr Renshaw about any change in the ownership of the site. I am satisfied that, had Mr Murphy done so, Mr Renshaw would have passed the information on to Mr Collingwood.

48. In the course of his oral closing, Mr Oughton went through the various sub-paragraphs of paragraph 11 of the pleaded defence and he demonstrated how great a disparity there was between the evidence at trial and what had been pleaded in paragraph 11. There it was alleged that over the course of 2016, 2017, and 2018 the defendant: (1) had engaged Powell Demolition North West Limited to dismantle the majority of the site infrastructure and take the same for scrap including, particularly, all of the storage tanks and overground pipes, the offices and the sheds; and (2) arranged for the steel entrance gate to be replaced and substantial sections of the perimeter fence to be renewed. I am satisfied that all of that had taken place much earlier than 2016 to 2018. Mr Murphy himself said that the large storage tanks had been removed by the end of 2012 at the latest, and that was confirmed by Mr Robertson. Mr Murphy, and also Mr Robertson, gave evidence that the security fence had been there for nearly 20 years, and that the original fence was still there now.

49. At subparagraph (3) it was pleaded that the defendant had erected a site office, with the word "Pennistone" written on the side in large letters. Although Mr Oughton accepted that there was a site office, the word "Pennistone" had been added only after the commencement of these proceedings. By reference to the photographs, I have no doubt that that is correct. Again, Mr Oughton accepted that a sign saying "Keep Out" had been erected, but it did not bear the word the word "Pennistone". Again, that is clearly the case. As for subparagraph (5), relating to the various shipping containers, Mr Oughton pointed out that there was contrasting evidence from Mr Murphy, from Mr Robertson, and from the photographs. He accepted that in 2018/2019, there had been two containers on the site but these had largely contained Mr Robertson's own tools and equipment. Indeed, there was no evidence in the defendant's accounts that it owned any plant, machinery, tools, or spare parts. The defendant company was, in fact, a holding company. As for sub-paragraph (6), asserting the purchase and retention of three large JCB loaders on site, each of which had the word "Pennistone" painted on its flank in large letters, Mr Oughton accepted that there was one digger but Mr Robertson had made it clear that it could not even move; and it did not bear the word "Pennistone". Sub-paragraphs 11 (7) and (8) were, according to Mr Robertson, untrue, and that is borne out by the photographic evidence.

50. Paragraph 13 had pleaded that, at all material times since well before September 2016, Mr Robertson had been present working on site most hours of each weekday, apart from very occasional illnesses or holidays, and had asserted that Mr Murphy had attended the site for a number of hours at least weekly. Again, that was contradicted by Mr Robertson's evidence. He would come briefly every morning and evening. In the evening he sat in a parked car outside, simply to keep watch on things. It was clear from the retention of the padlock for at least three weeks in December 2018 that Mr Robertson was there seldom, if at all. Mr Murphy did not attend the site for a number of hours at least weekly. Mr Robertson's evidence was that Mr Murphy only attended if there was a problem, and if Mr Murphy was summoned. Mr Murphy, in cross-examination, said that Mr Robertson had to let him in through the gate. Mr Murphy said that he paid Mr Robertson as little as possible; he said, for argument's sake, £100 per week, possibly less. He then added that Mr Robertson did his own work.

51. The defendant's pleaded case is certainly not borne out by the evidence. The true state of affairs is clear by contrasting the variously dated Google Earth photographs at page 511 (31 December 2005), page 512 (21 April 2015), page 513 (6 June 2016), and page 514 (20 March 2018). Mr Oughton pointed out that there had been little attempt in the defendant's witness statements to substantiate much of what had been alleged in the defence. That is certainly the case; but the pleaded defence had been verified by a statement of truth from Mr Murphy. Mr Murphy and Mr Robertson had contradicted each other in several respects. The claimants' own photographs, and the Google Earth photographs, all support the claimants' case and lead me to reject Mr Murphy's evidence and case.

52. Therefore, for those reasons I prefer the evidence of Mr Renshaw to that of Mr Robertson and Mr Murphy; and, to the extent that it accords with Mr Renshaw's evidence, I prefer the evidence of Mr Robertson to that of Mr Murphy. As between Mr Renshaw and Mr Robertson, I prefer the evidence of Mr Renshaw.

53. I make the following findings of fact. The slipway was open to all members of the public and was used principally by members of the Royal Mersey Yacht Club to launch, and then to access, their boats. I find that the slipway was, at all times, physically separate from the pier. That is clear from the indicative plan at page 65 and from the more detailed plans at pages 331 and 332. It is also clear from the photographs at page 73 (Photo P3), page 77 (photographs S1 and S20, page 78 (photograph S4), and page 121 (photograph CJK5). That was confirmed by the evidence of Mr Renshaw and Mr Kay. Mr Robertson himself accepted that the slipway was separate from the former Vestor Oil Site. All of that is supported by the fact that the Land Registry have registered the slipway under a separate registered title, which they would not have done had there been any concerns of any overlapping physically between the pier and the slipway. I find that the defendant has at no time carried out any works to the slipway. I find as a fact that the defendant has not been in actual occupation of the slipway at any time.

54. Secondly, I find that the defendant carried out no works to the pier in either 2018 or 2019, and not for some time before. That is the evidence of both Mr Murphy and Mr Robertson. I find that Mr Robertson did no works to the pier; that is his evidence. I find that the defendant was not in actual occupation of the pier at any time after 2017, and probably for

many years before that. I find that the site had been cleared, in large part, many years before 2018. I find that no material works were carried out to the site in 2018 or 2019. The only documentary evidence to support paragraph 29 of Mr Murphy's witness statement is the bank statement which I have already dealt with. There is no evidence beyond that bank statement of any works being carried out during 2018. If, and I am not satisfied that they were, the works evidenced by the bank statement were carried out to any part of the Vestor Oil Site, then they were not paid for by the defendant but by a group company; and they were carried out long before the date of the bank statement on Mr Murphy's own evidence.

55. I accept Mr Renshaw's account both of the discovery that the property had been registered in the name of Toluca Ltd and of what he did following on from that; that is all set out in Mr Renshaw's witness statement at paragraphs 13 and following. I accept all of that evidence. Mr Renshaw was asked about that in cross-examination. I accept Mr Renshaw's evidence that he was not told that the land had been sold to a company in the Isle of Man. That is borne out by the email of 31 January 2018. That continued to be the case until May 2018. Mr Horne asked why, when the penny dropped (in May 2018) that he had been misled by Mr Murphy, Mr Renshaw had not then confronted Mr Murphy. Mr Renshaw's answer was: "I could have done, but why should I? Because, as far as I could see, he had no locus in the matter. Why would I contact Mr Murphy?" Mr Horne criticises Mr Renshaw for not having contacted Mr Murphy at that time. I can understand why he did not do so, in the light of Mr Murphy's failure to disclose the previous involvement of Toluca in the site. I accept that Mr Renshaw felt that he had been misled by Murphy.

56. I accept Mr Renshaw's evidence about the locks at paragraph 39 onwards. Mr Renshaw removed the old padlock, which he thought belonged to Toluca and which had by then long since been dissolved, on 6 December 2018; that is borne out by the credit card statement produced this morning. I accept that that lock was still on site over three weeks later, on 29 December. That shows that Mr Robertson, who said that he would have removed any padlock as soon as he spotted one that should not be there, had not visited the site during that period. He was clearly not inspecting twice a day, as Mr Robertson had said. I accept that the photographic evidence shows that there was no boulder against the gate at that time. If that was indeed placed there by Mr Robertson, it must have been at a much later date. It is clear that the padlock, having remained between 6 and 29 December 2018, was removed at some stage before 27 April 2019. The new padlock had been put in place; but I accept Mr Renshaw's evidence that it had not been **secured** in place so as to lock the gate. It was replaced by a new padlock by Mr Renshaw. That padlock had been removed again by 20 June 2019. I accept Mr Renshaw's account in his witness statement.

IV: The transfer to the defendant and the dissolution of Toluca Ltd

57. Mr Oughton accepts that the transfer to Toluca is a genuine document. I have already found that a deliberate decision was taken, on behalf of the defendant company, not to register it at the Land Registry. The effect of that, by virtue of section 27(1) of the Land Registration Act 2002, was that the legal estate remained in Toluca Ltd, although the equitable interest passed to the defendant company. Mr Oughton submits that that equitable interest was disclaimed by the defendant. He has taken me to a passage in the 19th edition of *Underhill and Hayton: Law Relating to Trusts and Trustees*, at paragraph 65.1, relating to the power of a beneficiary to disclaim any benefit under a trust. The editors point out that a person to whom a property interest is purportedly transferred is not obliged to accept it. Whilst it is

presumed that the recipient of the transfer of a property interest will accept it, the presumption can be negatived by appropriate evidence of a refusal to accept it, generally known as a disclaimer. That principle applies to an equitable interest under a trust. However, paragraph 65.3 makes it clear that the process of disclaimer is rather like that of election; once a person has done acts of ownership or otherwise demonstrated acceptance, it is too late to disclaim. Mr Oughton accepts that disclaimer is not his strongest point. There must be clear evidence of an intention to disclaim, in the sense of a refusal to accept the relevant transfer. The mere omission to register a registerable transfer of land does not, in my judgement, or on the facts this case, amount to the disclaimer of the equitable interest resulting from the operation of section 27(1) of the 2002 Act. I do not accept Mr Oughton's submission that the defendant disclaimed its beneficial interest under the trust resulting from the application of section 27.

58. Mr Oughton next submits that the non-registration gave rise to an estate contract within the meaning of section 2(4)(iv) of the Land Charges Act 1972, namely a contract by an estate owner to convey or create a legal estate. Mr Oughton refers the court to the well-known doctrine in *Walsh v Lonsdale* (1882) 21 Ch D 9 whereby, where there is an informal lease which fails to create any legal estate, it may be treated as a contract to grant the lease agreed upon. Both law and equity concur in treating an imperfect lease as a contract to grant a lease, provided it is made for value and is sufficiently evidenced in writing or supported by a sufficient act of part performance. Equity first treats an imperfect lease as a contract to grant the lease, and will then order specific performance of that contract. If that is correct, then Mr Oughton submits that the resulting estate contract requires registration under the Land Charges Act in the case of unregistered land. He accepts that this is a novel point. He says that since a lease which is void at law is treated as an equitable lease, then a transfer which is not effective to convey a legal estate should be construed as having a similar effect.

59. I reject this argument. In my judgement, there is a fundamental difference between the defective transfer of an existing freehold estate and the defective creation of a leasehold interest derived from that estate. Where there is the grant of a defective lease, then the parties have sought to create a lesser interest or lesser estate - or time - in the land. In the case of a defective transfer, the estate is there; it is just that it has not been effectively disposed of. In the case of the defective creation of a lease, the intended estate in the land has not been created at all and therefore it is necessary, by way of a legal fiction, to characterise the transaction as a contract to grant the lease, of which equity will, in appropriate circumstances, decree specific performance. In my judgement, there is no need to engage in the legal fiction of characterising the transaction as a contract to transfer an estate. There is a straightforward, but ineffective, disposition of an existing legal estate. In my judgment, this gives rise to the straightforward creation of an equitable interest, equivalent to the estate which has been ineffectively transferred at law. There is no estate contract requiring registration as a land charge of Class C (iv). In my judgement, the equitable doctrine of notice applies rather than the statutory provisions of the Land Charges Act 1972. The failed transfer does not take effect as any estate contract.

60. That takes one to the doctrine of constructive notice, which is addressed at paragraph 5-019 of *Megarry & Wade: The Law of Real Property* (9th edition). A purchaser is expected to inspect the land and make enquiry about anything which appears inconsistent with the title offered by the vendor. The fact of possession constitutes notice of the rights of the

possessor. The purchaser should therefore ascertain whether there is anybody in possession or occupation of the land apart from the vendor, at least if there are any circumstances from which a reasonable person might infer that there is, and should then make inquiry of any such person. There may, of course, be circumstances in which a person in possession of land is estopped from asserting any interest in it. The instance cited in *Megarry & Wade* is that of an agent who negotiates a sale or mortgage on behalf of his or her principal and who thereby impliedly represents to the purchaser that the property is free from any undisclosed interest of the agent's. That was the case in *Midland Bank Ltd v Farmpride Hatcheries Ltd* [1981] 2 EGLR 147, where directors were residing in their company's property, which they then negotiated and contracted to sell. Footnote 74 to Paragraph 5-019 of *Megarry & Wade* makes the point that a person may be in possession of land without being in occupation of it. The example given is where the land consists of fields or woodland.

61. Mr Oughton took me to a number of authorities, in particular to the judgment of Oliver LJ in the *Midland Bank Ltd v Farmpride Hatcheries* case. There, Oliver LJ said that all the purchaser is required to do, certainly in the case of unregistered conveyancing, is to make such enquiries as a reasonable purchaser would make, and what those enquiries are must depend upon the circumstances of the individual case. In the present case, Mr Renshaw has related how, having agreed the purchase with the Crown, he had visited the site in November 2018 and realised that the old Toluca padlock was still on the gate. On 6 December 2018 he had removed the old padlock and replaced it with his own digital padlock. He had found that padlock still in place on 29 December. He visited the land again, shortly after completion, and found that the padlock he had placed there had been removed. He assumed that that was by Mr Robertson, who was probably not aware that Toluca had been dissolved and the site sold by the Crown to the Trust. He assumed the padlock to be locked but the locksmith later advised him that the new padlock was not actually working, leaving the gate unlocked. He placed a new padlock on the gate. He visited the site again on 20 June, and found that his second padlock had again been removed and another new one fitted; again he assumed that that was by Mr Robertson. On the following day, 21 June, he telephoned Mr Robertson to advise him that the Trust had brought the land from the Crown, and he asked if they could arrange to meet for Mr Robertson to hand over the keys to the padlock. That provoked a telephone call from Mr Murphy and the subsequent events related at paragraphs 46 and following of Mr Renshaw's witness statement.

62. It does seem to me that, knowing that a padlock had been in place in December 2018, Mr Renshaw, or some other representative of the first claimant, should have inspected the land again, shortly before completion, some four months later. Had they done so, they would have found that the padlock placed there by Mr Renshaw had been removed and a new one placed there, even if it was not securely locked. A reasonable purchaser would, in those circumstances, have made enquiry of Mr Robertson. I have no doubt that if Mr Robertson had been told that the first claimant was about to purchase the land from the Crown, he would immediately have got in touch with Mr Murphy, as happened on 21 June. That would have alerted Mr Murphy to the proposed sale, and would have allowed him to step in to assert the defendant's rights, as he did when alerted to the situation in June.

63. I am satisfied that a reasonable purchaser would have made those enquiries. I am satisfied that Mr Renshaw, frustrated by the actions, or more frequently the inaction of Mr Murphy, did not take that step before completion because he was frustrated with the way in which

Mr Murphy had dealt with things. However, I am satisfied that that was sufficient to give constructive notice of the defendant's equitable interest in the land to the first claimant.

64. If I were wrong in that, I would have accepted Mr Horne's alternative argument that by clause 2 of the Crown transfer, the first claimant took subject to any existing equitable interest in favour of the defendant. That seems to me to be the clear effect of clause 2. Mr Oughton says that that is a provision intended to relieve the Crown Estate Commissioners from any liability on their covenants for title; but I cannot accept that submission in view of the fact that, by clause 1 of the transfer, the Crown gave no title guarantee at all.

65. Mr Oughton next asserts that the defendant is estopped from asserting its equitable interest in the property. He relies on a proprietary estoppel, preventing the defendant from asserting its equitable interest in the land. Mr Horne says that there was no representation by the defendant that it was asserting no interest in the land, and no detrimental reliance. Mr Renshaw knew that he had been fobbed off by Mr Murphy, who had never disclosed to him the involvement of Toluca, still less the involvement of the defendant, in the land. In his brief reply, I put to Mr Oughton the proposition that, effectively, he was relying on a representation by omission, in the sense of a failure to comply with the duty under the 2002 Act to register the transfer from to Toluca Ltd to the defendant. Mr Oughton submitted that the representation was holding out Toluca as the registered proprietor of the property. I cannot see that the defendant, in any way, held out Toluca as the registered proprietor of the property; it merely failed to register the transfer to itself. I cannot see that that is a representation by the defendant as to the true equitable ownership of the property which now prevents the defendant from asserting its equitable interest as a result of its failure to register the transfer.

66. Therefore, for those reasons, I find that the defendant is not prevented from asserting an equitable interest in the land, subject to the effect of the subsequent registration of the first claimant as the registered proprietor of the property.

V: The transfer from the Crown to the first claimant

67. I have already indicated that I do not consider that the defendant is prevented from asserting its equitable interest in the face of the transfer from the Crown. However, I need then to go on to consider the effect of the registration of that transfer. By section 11 of the 2002 Act, the effect of first registration is to vest the estate in the registered proprietor of the property subject to entries on the register and unregistered interests falling within any of the paragraphs of Schedule 1. (I can omit interests being acquired under the Limitation Act 1980.) The only relevant interest under Schedule 1 is that contained within paragraph 2: an interest belonging to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for an immaterial exception. The issue then is whether the defendant's equitable interest belonged to a person in actual occupation. I have already referred to the footnote in *Megarry & Wade* which makes it clear that a person may be in possession of land without being in occupation of it.

68. I was taken to a number of authorities on the meaning of "actual occupation" in the present context. In *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 355, at page 372 letters C to D, Robert Walker LJ said that the function of overriding interests in registered conveyancing is

comparable to that of notice, actual, constructive, or imputed, in unregistered conveyancing, but there were significant differences, and that the burden on a purchaser to make inquiries was now heavier than before. However, the duty to enquire only applies where a person is in actual occupation of land. I have already made it clear that I find as a fact that the defendant was not in actual occupation, either of the slipway or of the pier. The relevant date is the date of the transfer which, in this case, is 25 April 2019, although there is no suggestion that there was any change in the relevant state of affairs between the date of transfer and the later date of first registration on 24 May 2019.

69. Mr Oughton, perhaps unsurprisingly since he was junior counsel in the case, has made extensive reference to the Court of Appeal decision in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, reported at [2002] Ch 216. I have been taken by Mr Horne to paragraph 11, where the findings of the trial judge, His Honour Judge Maddocks are recorded. I was taken by Mr Oughton to the way in which the case on actual occupation was put by Mr John Martin QC, leading Mr Oughton, at paragraphs 32 through to 40, in support of Mr Martin's submission that the acts found by the judge to constitute actual occupation were not capable of amounting to such occupation, and amounted to a misuse of that term. Mr Oughton took me to how the matter was dealt with in the leading judgment of Arden LJ at paragraphs 80 through to 82 of her judgment. There Arden LJ made it clear, at paragraph 80, that what constitutes actual occupation of property depends on the nature and state of the property in question. If a site is uninhabitable, residence is not required, but there must be some physical presence, with some degree of permanence and continuity. At paragraph 81 Arden LJ said that: "The requisite physical presence must … in fairness be such as to put a person inspecting the land on notice that there was some person in occupation." She noted that none of the authorities which the court had been shown had dealt with completely derelict land. Arden LJ declared herself unpersuaded by Mr Martin's arguments that the judge had directed himself otherwise than in accordance with the principles which were to be applied when determining "actual occupation". He had not confused actual occupation with possession. Mr Oughton stresses that at the end of paragraph 82, Arden LJ made it clear that no one visiting the rear land at the time of the sale could have concluded that the land and buildings on the rear land had been abandoned; the evidence of activity on the site clearly indicated that someone claimed to be entitled to be on it.

70. Mr Oughton submits that Arden LJ had merely been holding that the trial judge was entitled to find as a fact that there was actual occupation. Another trial judge could have come to the opposite conclusion. She did not hold that maintenance of the fence was equal to actual occupation. Instead, she held that maintenance of the fence, plus the other acts on the land, plus the alternative access from the front land, could together constitute actual occupation. Moreover, she did not state that any of the previous cases had been wrongly decided. Mr Oughton points to the fact that the issue of actual occupation had been one of those upon which the House of Lords had granted the defendant permission to appeal. In the event, the appeal had been compromised on the basis of the Land Registry granting an indemnity.

71. Mr Oughton submits that: (1) The burden of proof of actual occupation is upon the defendant. (2) The words "actual occupation" are ordinary English words. (3) Occupation is less than possession but more than occasionally going onto the land; it denotes some physical presence, with some degree of permanence and continuity. (4) Matters which are not easy to detect are unlikely to constitute actual occupation. He emphasises that, in the

present case, officials of the Royal Mersey Yacht Club, who are behind the claimants, were adjoining landowners who had been interested in developing the land as a joint venture for a number of years, and were able to see what had been happening on the land over a number of years. The fact that they chose to purchase from the Crown is said to be very good evidence that there was no actual occupation on the part of the defendant. (5) There is no evidence that the defendant itself erected any fence or controlled access through its own land. Accordingly, the decision in *Malory* is said to be distinguishable. (6) The totality of the defendant's acts must be looked at. On that basis, it was not in actual occupation. There are no financial records produced by the defendant for any acts done by it on the land. (7) The Court of Appeal's decision in *Malory* on actual occupation (a) was only a decision to the effect that the appeal court could not interfere with the trial judge's decision, (b) did not involve the overruling of any previous authority, and (c) should be narrowly construed. (8) Reliance is placed upon the following authorities, which Arden LJ refused to overrule, namely (a) *Strand Securities Ltd v Casewell* [1965] Ch 958 at 985 A-B, where the presence of furniture, the occasional use of a bedroom, and the retention of a key did not constitute adverse possession; (b) *Stockholm Finance Ltd v Garden Holdings Inc* [1995] NPC 162, where the presence of furniture and clothes and the retention of a key did not constitute actual occupation; (c) *Lloyds Bank Plc v Rosset* [1989] Ch 350; (d) *Abbey National Building Society v Cann* [1991] AC 56 at 93 D – 94 B; and (e) *The Secretary of State v Bayliss* (2000) 80 P & CR 324 at 339 - 340, where the possible presence of drains and street furniture, plus the mowing of a lawn, did not constitute actual occupation.

72. Mr Horne relies upon the observations of Mummery LJ in the later case of *Link Lending Ltd v Bustard* [2010] EWCA Civ 424. Mummery LJ reviewed the authorities at paragraphs 17 and following. At paragraph 27, Mummery LJ said that the trend of the cases showed that the courts are reluctant to lay down, or even suggest, a single legal test for determining whether a person is in actual occupation. The decisions on statutory construction identify the factors that have to be weighed by the judge on this issue. The degree of permanence and continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it, and the nature of the property and the personal circumstances of the person, are among the relevant factors. At paragraph 30, Mummery LJ's conclusion was that the trial judge had been justified in ruling that the defendant was a person in actual occupation of the property. His conclusion was said to be supported by evidence of a sufficient degree of continuity and permanence of occupation, of involuntary residence elsewhere, which was satisfactorily explained by objective reasons, and of a persistent intention to return home when possible, as manifested by her regular visits to the property.

73. At paragraph 31, Mummery LJ agreed with what he described as "the accurate and helpful summary of the authorities" on "actual occupation" by Lewison J in *Thompson v Foy* [2009] EWHC 1076 (Ch). That summary was set out at paragraph 23 of the judgment as follows (omitting citations): "(i) The words 'actual occupation' are ordinary words of plain English and should be interpreted as such. The word 'actual' emphasises that physical presence is required. (ii) It does not necessarily involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy on behalf of his employer; (iii) However, actual occupation by a licensee (who is not a representative occupier) does not count as actual occupation by the licensor. (iv) The mere presence of some of the claimant's furniture will not usually count as actual occupation. (v) If the person said to be in actual occupation at any particular time is not physically present on the

land at that time, it will usually be necessary to show that his occupation was manifested and accompanied by continuing intention to occupy. Those are the applicable legal principles.

VI: Conclusion

74. The conclusion at which I have arrived is this: The defendant was not in actual occupation of the former Vestor Oil Site at the material time. I have already held that it was not in occupation of the jetty or the pier. However, I do not consider that it was in occupation of the remainder of the Vestor Oil Site either. The only physical presence on the land was an abandoned, and immovable, digger and two containers. Those containers, looking at the photographic evidence, again appeared to have been abandoned. I am satisfied that, as at the date of both the transfer and the registration of the Crown transfer, there was no indication that they belonged to the defendant company. They were being used by Mr Robertson to store some tools and other equipment but those were his tools and not the defendant's tools. I am satisfied that they were being used for Mr Robertson's purposes, and not for the defendant's purposes. Essentially, Mr Robertson was being used as an unpaid caretaker, just to keep an eye on the land, because of his friendship with Mr Murphy, originally through Mr Murphy's father.

75. The maintenance of a padlock on the single operable main gate, and the replacement of foreign padlocks as and when they appeared, was sufficient to mean that Mr Robertson was in physical possession of the site and, if approached, that he would have led any enquirer to Mr Murphy, and thus to the defendant company. However, the question is not one of possession but of "actual occupation". Mr Robertson expressed the matter very well when, at the beginning of his evidence, he said that he looked after the yard, and it gave him something to do of a daytime. The defendant had no use that for the land, and it simply allowed Mr Robertson to do whatever he chose to do on the land to keep himself occupied, in return for ensuring that he simply kept an eye on the place and deterred intruders. That, as it seems to me, does not constitute "actual occupation" by the defendant; so I am not satisfied that the defendant has shown the necessary actual occupation on its part for the first claimant to have taken subject to the defendant's equitable interest which had arisen as a result of the non-registration of the Crown transfer.

76. It follows that the counterclaim for rectification of the register to update it fails, and the claim for possession succeeds. Had I taken a different view in relation to the main Vestor Oil Site, I would nevertheless have found that the defendant was not in actual occupation of either the pier or the slipway. In relation to those, which I consider to be entirely separate parts of the registered land, the position is entirely clear: there was no actual occupation by the defendant. I would have arrived at that view, whatever my view in relation to the main Vestor Site. That concludes this extemporary judgment.

End of Judgment

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.