



Neutral Citation Number: [2023] EWHC 3337 (Ch)

CH-2023-BHM-000008

**IN THE HIGH COURT OF JUSTICE**  
**BIRMINGHAM DISTRICT REGISTRY**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY APPEALS (CH D)**

**ON APPEAL FROM THE LEICESTER COUNTY COURT**  
**ORDER OF HIS HONOUR JUDGE HEDLEY DATED 7 MARCH 2023**

**22 December 2023**

Before:

**MR JUSTICE LEECH**

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**B E T W E E N:**

**(1) ANTHONY CHARLES CLAPHAM**  
**(2) AMANDA CLAPHAM**  
**(3) DAVID WRIGHT**  
**(4) LAURA WRIGHT**

**Appellants**

**-- and --**

**DEE NARGA**

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**Respondent**

**MR TOM MORRIS** (instructed by **Crane and Walton LLP**) appeared on behalf of the Appellants.

**MR JONATHAN GALE** (instructed by **Gateley PLC**) appeared on behalf of the Respondent.

**Hearing dates: 12 and 13 December 2023**

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**APPROVED JUDGMENT**

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**This judgment was handed down remotely at 10.30 am on Friday 22 December 2023 by circulation by email to the parties or their legal representatives and by release to the National Archives.**

**Mr Justice Leech:****I. The Appeal**

1. By Appellant's Notice dated 21 February 2023 the Appellants, Mr and Mrs Clapham and Mrs and Mrs Wright, applied for permission to appeal against the Order dated 7 March 2023 (the "**Order**") made by His Honour Judge Hedley (the "**Judge**") dismissing their claims for declaratory relief in relation to (1) the location of the boundary between their properties, 24 to 26 the Green Thrussington Leicestershire, and the property of the Respondent, Ms Narga, at Brook Barn, Seagrave Road Thrussington Leicestershire; and (2) their claim that they were entitled to be registered as proprietors of two strips of land between their properties and hers.
2. The Judge dismissed these claims after a full trial which took place on 28 to 31 March 2022 and on 18 May 2023 and he handed down a reserved judgment on 15 September 2022 (the "**Judgment**"). On 6 February 2023 he dealt with consequential matters before making the Order. Where I refer to paragraphs below in square brackets, I intend to refer to paragraphs in the Judgment (unless otherwise stated or coupled with a citation from authority). I also adopt the defined terms and abbreviations which the Judge used in both the Order and the Judgment.
3. In the Grounds of Appeal which were filed with the Appellant's Notice the Appellants advanced three grounds of appeal. The first ground ("**Ground 1**") was that the Judge had been wrong to hold as a matter of law that the Appellants were not entitled to be registered as the proprietors of the two strips (defined as the "**Wrights' Strip**" and the "**Claphams' Strip**") located between the north of the Brook and the Fence. Ground 1 turns on the application of both the Land Registration Act 1925 (the "**LRA 1925**") and the Land Registration Act 2002 (the "**LRA 2002**") to the rights of a squatter who establishes adverse possession to land before first registration at the Land Registry and on a subsequent transfer of the land by the owner of the paper title to a purchaser.
4. The Appellants' second ground ("**Ground 2**") was that the Judge erred as a matter of law in finding that the boundary between No 25 and Brook Barn followed the line of the north edge of the south bank of the Brook. Their third ground ("**Ground 3**") was that the Judge also erred as a matter of law in finding that the boundary between No 26 and Brook Barn

followed the same line of the north edge of the south bank of the Brook. Brook Barn, No 25 and No 26 were formerly in common ownership and Ground 2 turns on the construction of the 1982 Conveyance by which Mr Crowden, who formerly owned all three properties, conveyed No 26 to Mr Allen, Mr and Mrs Wright's predecessor in title. Ground 3 turns on the construction of the 1988 Conveyance by which Mr Crowden's executors conveyed No 25 to Mr and Mrs Wright (who had by this time already purchased No 26).

5. The Judge refused permission to appeal. In relation to Ground 1 he explained his reasons for refusing permission as follows. He recorded that he had found that the Claimants had acquired title by adverse possession under section 15 of the Limitation Act 1980 but that their title was defeated by the operation of sections 11 and 29 of the LRA 2002 because it had not been registered. He recorded the Claimants' argument that the 2002 does not operate to resurrect a title acquired by adverse possession but considered that they had no real prospect of success because the 2002 Act has a specific mechanism to deal with the position where (as in this case) no exact boundary has been determined. In relation to Grounds 2 and 3 he refused permission for the following reasons:

“(2) and (4) each raise issues about the factors which I have taken into consideration in construing the conveyances of Nos 25 and 26 the Green. As to No.25 (the 1988 conveyance): it is said that I erred in considering in the factual matrix the earlier plan to the conveyance of No.26 in 1982 and that this plan could not be a relevant fact in considering the later conveyance of No.25. However, as a matter of fact it was plainly a plan which the parties to the conveyance had in their possession at the time of the 1988 conveyance. As to the 1982 conveyance of No.26 it is said that I placed too much weight on the conveyance plan. Both of these issues are in reality evaluation of the facts.

For the reasons set out in my judgment the clear interpretation of the conveyances of both 25 and 26 lead to the conclusion that the boundary was the north edge of the south bank of the brook. The presumption does not apply either as a presumption in its own right (because there are conveyances to construe) or, on the facts, as an aid to construction.”

6. By Order dated 17 May 2023 Zacaroli J granted permission to appeal on Ground 1 and ordered that the appeal should be heard with a time estimate of 1 day. He considered the Judgment to be “thorough and compellingly reasoned” but that the Appellants' Skeleton Argument contained arguments which were “more than fanciful” and that this appeared to be an issue on which there was no direct authority. He agreed with the Judge in relation

to Grounds 2 and 3 and refused permission to appeal. By letter dated 2 June 2023 the Appellants' solicitors, Crane and Walton LLP ("C&W"), applied to renew the application for permission to appeal orally on Grounds 2 and 3. For ease of reference I will refer to the appeal on Ground 1 as the "**Appeal**" and the oral renewal on Grounds 2 and 3 as the "**PTA**".

7. The Appeal was listed before me for hearing in person at 10.30 am on 12 December 2023 and the PTA was listed before me remotely at 2 pm on 13 December 2023. Mr Tom Morris appeared on behalf of the Appellants and Mr Jonathan Gale appeared on behalf of the Respondent at the hearing of the Appeal. Mr Morris appeared together with C&W on the remote hearing of the PTA. I am grateful to both Mr Morris and Mr Gale for the quality of their submissions at both hearings. For the reasons which I set out in this judgment, I dismiss the Appeal but grant permission to appeal on Grounds 2 and 3.

## **II. The Proceedings Below**

### **A. The Statements of Case**

8. Mr Morris settled the Amended Particulars of Claim dated 5 December 2021 (the "**Particulars of Claim**") which set out succinctly and clearly the nature of the Appellants' claims. In paragraphs 1 to 20 he identified the parties and their respective properties together with the relevant physical features of the land. In paragraphs 21 to 26 he alleged that on the true construction of the 1982 and 1988 Conveyances the legal boundary between No 25, No 26 and Brook Barn lay along the line of the Fence. In paragraph 27 he alleged that Mr and Mrs Wright had been in exclusive possession of No 26 and No 25 respectively since the date of each conveyance and in paragraph 28 he pleaded that in the premises:

“(i) the Wrights were in possession of the Wrights’ Strip for a period of at least 12 years prior to the coming into force of the Land Registration Act on 13<sup>th</sup> October 2003; (ii) throughout this period, the title to Brook Barn was unregistered; (iii) by reason of section 15(1) of the Limitation Act 1980, the title to the Wrights’ Strip of the Defendants predecessors in title was extinguished; (iv) the Wrights have since then held a new legal estate in the Wrights’ Strip and are entitled to be registered as the freehold proprietors of the Wrights’ Strip; (v) the Defendant did not obtain any title to the Wrights’ Strip when Brook Barn was conveyed to her; (vi) alternatively, even if the Wrights did not obtain a new title to the Wrights’ Strip by a date prior to the coming into force of the Land Registration Act

2002, then the Wrights are entitled to be registered as the freehold proprietors of the Wrights' Strip pursuant to paragraph 5(4) of Schedule 6 to the Land Registration Act 2002 or by reason of paragraph 18 to Schedule 12 to the Land Registration Act 2002.

9. The Particulars of Claim did not contain a claim by Mr and Mrs Clapham in relation to the line of the boundary between No 24 and Brook Barn (because it was not possible to locate the relevant conveyance) and their case was limited to a claim for adverse possession. In paragraphs 29 to 32 Mr Morris alleged that they and their predecessors in title had been in single and exclusive possession of the Claphams' Strip for at least twelve years prior to 13 October 2003. In paragraph 32 he set out the Claphams' case in the same way as he had done for Mr and Mrs Wright in paragraph 28 (above).
10. Paragraphs 33 to 35 of the Particulars of Claim set out the Claphams' claim in relation to the Treehouse Land (which is not the subject matter of either the Appeal or the PTA). Paragraphs 36 to 39 contained a claim for damages against the Respondent for trespassing on the Appellants' land and paragraphs 40 and 41 set out the relief which the Appellants claimed. The relief which Mr and Mrs Wright claimed was as follows:

“(i) a declaration that the boundary between 26 The Green and Brook Barn is the line of the Fence; (ii) alternatively, a declaration that they are entitled to be registered as the proprietor of the extent of the Wrights' Strip to the north of 26 The Green; (iii) a declaration that they are entitled to be registered as the proprietor of the extent of the Wrights' Strip to the north of 25 The Green; (iv) an injunction to restrain the Defendant, her contractors and agents from entering the Wrights' Strip or any other part of 25 The Green and 26 The Green; (v) an injunction restraining the Defendants, her contractors and agents from removing plants, shrubs and materials from the Wrights' Strip or any other part of 25 The Green and 26 The Green; and (vi) damages in the sum of £604.”

11. On 22 December 2021 (although dated 2022) the Respondent served her Amended Defence (the “**Defence**”). Unfortunately, a complete copy was not included in the Appeal bundle but it is clear from every other page that the Respondent challenged the Appellants' case on the facts but also took the point that any interest which they had acquired was postponed to the interest of the Respondent by virtue of section 29 of the LRA 2002.

## B. The Evidence

12. Thruslington is an attractive village 10 miles north of Leicester. Mr and Mrs Wright own No 25 and 26 the Green and were registered as the freehold proprietors of No 26 on 13 February 1984 and of No 25 on 25 November 1988. Mr and Mrs Clapham own 24 The Green and were registered as the freehold proprietors on 18 November 1996. The Respondent owns Brook Barn and she purchased it on 12 May 2020 and was registered as the freehold proprietor on 5 June 2020.
13. Brook Barn lies to the north of the Appellants' three properties and is separated from them by the Brook which is 1.1m to 1.3m wide and flows west to east. On the north side of the Brook is a steep bank at the top of which the Fence is located. A bridge crosses the Brook at the eastern end of the southern bank of the Brook. Brook Barn, No 25 and No 26 were originally in the single ownership of Mr John Crowden. By the 1982 Conveyance dated 8 October 1982 he sold No 26 to Mr David Allen, Mr and Mrs Wright's predecessor in title. By September 1986 Mr Crowden had died and by the 1988 Conveyance dated 28 October 1988 his executors sold No 25 to Mr and Mrs Wright who converted No 25 and No 26 into a single property.
14. The Judge heard live evidence over four days between 28 March 2022 and 31 March 2022. The plan annexed to the 1982 Conveyance (the "**1982 Plan**") was expressed to be for identification purposes only but a number of versions of the plan existed and were put in evidence. Mr Wright gave evidence that Mr Allen sent Mr Wright to see Mr Crowden before he and his wife purchased No 26 and gave him a copy of the 1982 Plan and that they discussed its features on site. Mr Wright's evidence was that given the presence of the bridge and the Fence "it would simply not make sense for that strip of land not to be part of our garden." The strip to which he was referring was the strip on the north side of the Brook between the northern edge of the Brook itself and the Fence, i.e. the Wrights' Strip. Mrs Wright and Mr and Mrs Clapham also gave evidence about the physical features which they had seen. I continue to use the terms the Wrights' Strip and the Claphams' Strip adopted by the parties and the Judge. But for convenience, where I intend to refer to both strips of land together I will use the simple term the "**Strip**".
15. On 18 March 2003 title to Brook Barn was first registered and planning permission was granted to convert it into offices. In 2008 the property was acquired by M-Square Associates Ltd and in August 2008 it transferred Brook Barn to M-Square Pension Trustees Ltd. Mr Taylor, who was a director of both companies gave evidence that he

believed that the boundary was half-way up the south bank of the Brook and that by January 2010 his solicitors had asserted that the boundary between Brook Barn and the Appellants' land was on the south side of the Brook.

16. In 2020 Brook Barn was put up for sale. The agents' particulars included a general description which stated that the property included "formal gardens sloping down to the brook and access to the barn itself". The Respondent gave evidence that although she attempted unsuccessfully to obtain assurances from the estate agents about the line of the boundary, she visited Brook Barn eight times before purchasing the Property. She also gave evidence that the Fence was dilapidated and the north bank overgrown. Her evidence was supported by the evidence of her partner, Mr Fothergill, and the contractor, Mr Chapman, who undertook works to Brook Barn. The Judge also heard anecdotal evidence from a number of other witnesses.
17. The Judge was satisfied that all of the witnesses gave evidence honestly and that they were trying to assist the Court but he approached their oral evidence cautiously because it was bound to be impressionistic: see [55] and [56]. He also had the benefit of maps or plans dating back to 1903, photographs taken at various times from 1985 and a report dated 5 May 2021 prepared by a surveyor from the Ordnance Survey. He also undertook a site visit himself. He carefully assessed all of this evidence and there was no challenge to any of his findings of primary fact.

### C. The Judgment

#### *(1) Construction*

18. The Judge set out the legal principles in relation to the construction of a parcels clause and the effect of registration in the Judgment at [30] to [41]. He went on to describe the photographs, the site visit, the witness evidence which he had heard and the historical evidence of the boundary at [42] to [62]. He had well in mind, therefore, both the physical features of the relevant land and the available evidence of changes to those features which had taken place when he came to construe the 1982 Conveyance.
19. The Judge recorded that it was common ground that Brook Barn, No 25 and No 26 had all been in the common ownership of Mr Crowden and continued at [64] to [66]:

“64. By a conveyance dated 8 October 1982 (“the 1982 Conveyance”) Mr Crowden conveyed No.26 to David William Allen (“Mr Allen”) [66]. Paragraph 1 of the conveyance states

“ . . The Vendor or as Beneficial Owner HEREBY CONVEYS onto the purchaser ALL THAT parcel of land TOGETHER WITH the dwelling house erected thereon or on some part thereof and known as Number 26 the Green Thrussington Leicestershire All of which property is delineated for the purposes of identification only on the plan annexed hereto and thereon edged RED . . .”

The conveyance was also expressed to be subject to the reservations and declarations in the 1949 conveyance. This conveyance is also referred to in the registered title for Brook Barn (see [92]) and it appears that the land conveyed to Mr Crowden in 1949 included both No.26 and Brook Barn. This accords with the 1920 map above.

65. Because the 1982 Conveyance was the instrument by which No.26 and Brook Barn were divided, it is the interpretation of the 1982 Conveyance (in accordance with the legal principles summarised above) which is key in determining the boundary. I make the obvious comment that the parcels clause above is of no direct assistance in determining the correct boundary.

66. The plan attached to the conveyance to Mr Allen [69] (part of which I have copied below as Figure 2) has handwritten upon it the words “for identification purposes only”. It appears to be hand drawn and number 26 is marked edged by a thick black line of rectangular shape. That black line appears to extend across what is marked on the plan in blue as the Brook. The edges of the Brook have a thin black line. Inside the thick black line at the edge of number 26 is a thick red line. The red line (which is clearer in colour in the bundle than in what I have copied below) is adjacent to (but inside) the black line until the black line crosses the brook. At that point the black line then returns along the north side of the Brook but the red line appears below the blue line of the Brook and is no longer immediately adjacent to the black line. I emphasise that there is no reference to a black line in the words referring to the plan in the 1982 Conveyance.”

20. Very helpfully for the Appeal court, the Judge had copied the relevant part of the plan which he had been describing (above) and inserted it into his judgment. He also recorded that there were a number of versions of it and quoted Mr Wright’s evidence at [71]:

“Mr Crowden confirmed to me that 26 The Green included both banks of the Brook. That was consistent with the position on the ground. At the time, Mr Crowden did not make any use of the north bank between the Brook and the stock-proof fence and, indeed, his tenants – the Swinglers – actively gardened the north bank as it ran past 25 The Green. Jack also gave me a plan, a copy of which is at page 5 which appears to be a copy of the plan attached to the conveyance of 26 The Green to Mr Allen, to illustrate what he meant. The court will see that the red line showing the land conveyed very clearly runs to the north of the Brook, indicating that



land to the north of the Brook was part of the conveyance. The same plan was sewn into our HMLR office copies.”

21. The Judge then recorded that by the 1988 Conveyance Mr Crowden’s executors had conveyed No 25 to Mr and Mrs Wright. He set out the parcels clause of the 1988 Conveyance and drew attention to the fact that there was no plan attached to it at [75] and [76]:

“75. By September 1986 Mr Crowden had died. By a conveyance between Mr Crowden’s executors and the Wrights dated 28 October 1988 [81] (“the 1988 Conveyance”), the executors conveyed No.25 to the Wrights. The description of the property was in the Second Schedule as being

“ALL THAT freehold property being the land dwellinghouse and premises situate and known as Number 25 The Green Thrussington in the County of Leicester subject to and with the benefit of as the case may be all such rights easements and appurtenances appertaining or belonging or to which the said property hereby conveyed is now subject.”

There was no conveyance plan, nor any other description of No. 25 or its boundaries. The Wrights registered the title on 25 November 1988 (Title No.LT213164) [85]. The title plan [87] appears to be smaller version of that used for No.26. The northern boundary of No.25 has the same two almost parallel lines running east-west, with the northern boundary marked on the plan running to the southernmost of those two lines. As with No.26, the title was also subject to the same reservations under the 1949 conveyance.

76. As the 1988 Conveyance separated No.25 from Brook Barn, it is the proper interpretation of that conveyance which is in issue with regard to No.25.”

22. The Judge then dealt with the evidence and the rival submissions of the parties on the true construction of the 1982 Conveyance before setting out his analysis and conclusions: see the Judgment at [93] to [102]. He pointed out that the parcels clause in the 1982 Conveyance did no more than refer to the plan and that it was necessary to determine the boundary by reference to other evidence including inferences to be drawn from the relevant physical features known to exist at the time: see [93] to [95]. He also pointed out that there were no contemporaneous photographs showing the land or the condition of the Fence or the planting. However, he was able to make the following findings:

“96. As to the evidence available to the parties to the 1982 Conveyance at the time, there is very little which is before me. There are no photographs of how the land then looked, the position or condition of the Fence or the

planting then in existence. However, I find that the physical features of the Brook and the Bridge were then present as they are today. In addition there are photographs which show the condition in the years which followed. Although the existence of trees and foliage has changed (see below under Adverse Possession), I find the steepness of the banks on each side each of the Brook were also as they are now. The tree planting came later (see for example the photograph taken not long after the Wrights' purchase of no.26 at [525]).

97. I am also satisfied on the balance of probabilities that at the time of the 1982 Conveyance there was a stock-proof fence which ran along the north bank of the Brook. I find that the position of this stock-proof fence was in substantially the same position as indicated on the 2019 plan at [454]....

...98. I also accept that the Wrights and Claphams have maintained the Fence opposite their respective properties over the years although inevitably over a period of 36 years from 1984 to 2020 there will have been parts of it which have fared better than others and I accept that by 2020 some parts of it may have appeared dilapidated. As to the maintenance of the Fence, in a letter dated 25 January 2010 [173] the then owners of Brook Barn complained to Mr & Mrs Clapham that they had been making repairs to the wire fencing and asserted that it did not belong to them. I find that notwithstanding that complaint Mr & Mrs Clapham continued to maintain the Fence from time to time. It remained in existence until Ms Narga's purchase of Brook Barn although I accept that parts, and particularly the sections at the western end opposite No.24 had become dilapidated. This was noted in the survey plan drawn in 2019 for Mr Taylor [513] and it was this part of the Fence which I find enabled Ms Narga, Mr Fothergill and Mr Chapman to reach the Brook. Although their recollections were understandably not entirely clear as to how they had descended to the Brook, both Mr Chapman and Mr Fothergill described going to the western side of Brook Barn closer to the electricity substation."

23. Despite these findings of fact and, in particular, the finding that the Fence was present at the date of the 1982 Conveyance, the Judge reached the conclusion that the true boundary intended by the parties to both the 1982 Conveyance and the 1988 Conveyance was the edge of the south bank of the Brook. He reached this conclusion for the following reasons:

"a. As to the 1982 Conveyance, I agree with Mr Gale that the plan which is to be interpreted is the one attached to the 1982 Conveyance (and not any of the other apparent iterations of it). I also agree that the discussion between Mr Wright and Mr Crowden (and the version of the plan which I accept was produced by Mr Crowden at the meeting) is not admissible evidence on the construction of the 1982 Conveyance. It was Mr Crowden's subjective view of what he had meant to convey. Although I accept Mr Wright's evidence that the conversation took place and that Mr Crowden gave him the copy of the plan which he produced in evidence, that discussion is not admissible evidence of the proper interpretation of

the conveyance and I disregard it.

b. Although I agree with the Claimants that the 1982 Conveyance Plan cannot be used to delineate precise boundaries, nevertheless it is the only descriptor of what was intended to be conveyed. The red line on the 1982 Conveyance Plan is quite clearly to the south side of, and adjacent to, the blue line which is obviously intended to denote the Brook. Although I am unable to reach a concluded view as to the meaning of the black line to the north of the brook, it is not the red line. It is likely to have been drawn round the boundary of the red line to add definition and was drawn north of the Brook to avoid confusion because the red line was at the Brook. Although the plan is not to scale and neither it nor the 1982 Conveyance give measurements, the fact remains that the red line does not extend north of the Brook but abuts it to the South.

c. The Brook is a natural feature which has been in existence for many years prior to the division. If there was going to be a division at or close to the Brook, it would be an obvious boundary feature to choose.

d. I find that the Fence - a stock-proof fence to the north of the Brook - is not delineated on the 1982 Conveyance Plan as a feature. The black line to the north of the Brook immediately abuts the Brook and does not extend north up the bank. This is contrasted with the Fence as it appears on the later Brook Barn title plan at [94]. In my judgment the black line on the 1982 Conveyance Plan does not represent the Fence, which did not stop behind No.26 but ran further to the west past No.25 and then No.24. The erection of a stock-proof fence whilst the land was in single ownership does not assist the proper construction of the 1982 Conveyance when there was an obvious purpose for it in preventing livestock from reaching the Brook. It was not erected as a boundary fence.

e. Although the Bridge plainly allowed access to the north bank from No.26, equally it would allow access to No.26 from the Barn and Seagrave Road beyond. When the land was in single ownership, it would allow passage both ways. Accordingly, the presence of the Bridge at the time when the land was separated gives no indication or assistance in understanding whether the north bank was to be conveyed to Mr Allen or not. The existence of the Bridge for many years (going back to at least 1903) does not assist the proper construction of the 1982 Conveyance.

f. There is no evidence to suggest that the Fence was erected by Mr Crowden to denote the boundary. Indeed, as I have set out above, in my judgment the Fence had been erected at an earlier stage to avoid animals getting into difficulty and well before there was a boundary to be created.

g. As to the suggestion by Ms Narga that there was a boundary on the southern bank, I find that there was no boundary fence in place on the southern bank of the Brook at any time. In fact, there is no evidence whatsoever that there was any boundary fence along the south bank of No.26 at the time of the 1982 Conveyance or of No.25 of the time of the 1988 Conveyance. Ms Narga has referred to what appears to be chicken wire under the Wrights' studio as depicted in the photographs taken in 2020 [627]. I accept the explanation given by Mr Wright and I find that

the purpose of this fencing was to keep wildlife out from under the studio. It was also suggested that there was fencing on the south bank of No.26 [533]. Again, I accept Mr Wright's explanation that this is not a boundary fence but an ornamental pergola. Other (and clearer) pictures of it are at [531], [527] and [541]. It obviously does not run along the length of the southern bank. The absence of any clear boundary fence on the south bank also supports my view (see paragraph 102 below) that the two lines on the title plans of No.26 (Figure 5 above) and Brook Barn (Figure 1 above) were intended to denote the banks of the Brook.

h. Although I accept that at no time after the 1982 Conveyance did Mr Crowden or his family attempt to stop or disturb the Wrights' use of the northern bank up to the Fence nor did they attempt to make any use of it themselves, equally I find (as indeed is argued on behalf of the Claimants) that the northern bank below the Fence has very limited utility. I accept that no objection had been taken by the Crowdens to the use of the land on the northern bank opposite No.25 by their tenants the Swingers but as farmers they were, I find, more concerned about animals getting into the Brook in difficult conditions (see eg the photographs at [542]). In my judgment there is nothing to be derived from the conduct of the owners of Brook Barn after the two conveyances to support the interpretation for which the Wrights contend."

24. As he had earlier indicated, the Judge accepted that the 1988 Conveyance fell to be construed separately from the 1982 Conveyance. But he found that the parties must have had the same intention as the parties to the 1982 Conveyance for the following reasons (at [101]):

"I accept that the 1988 Conveyance of No.25 falls to be construed separately to the 1982 Conveyance of No.26, but I find that the knowledge of the parties at the time of the 1988 Conveyance was similar to those of the parties to the 1982 Conveyance, save that by then the Wrights had started their planting on the northern bank of the Brook (see further below). However, although the trellis was in place on the north side of the Bridge and I accept that the Wrights had planted holly and one or two other trees on the north bank, they were not substantially established (see eg the 1989 photograph at [541]). In 1988 the one key document which the parties had (or knew of) was the 1982 Conveyance and Plan. Of course the 1982 Plan does not show what was conveyed in 1988, but in my judgment there is no good reason to suppose that the parties to the 1988 Conveyance intended anything other than a continuation of the boundary line as created in 1982."

(2) *Adverse Possession*

25. Since there is no challenge by any of the parties to the Judge's findings of fact or his application of the law of adverse possession to the facts, I can summarise those findings and conclusions very briefly. After a detailed and exhaustive examination of the facts,

the Judge concluded that both Mr and Mrs Wright and Mr and Mrs Clapham had acquired title by adverse possession to the north bank of the Brook up to the Fence prior to the first registration of the title to Brook Barn on 19 March 2003: see [78] and [167] He also held that Mr and Mrs Clapham had acquired title by adverse possession to the Treehouse Land: see [175] to [181].

26. The Judge dealt with the legal issue on the Appeal at [125] to [142]. He recorded Mr Gale's submission that the effect of section 29(1) of the LRA 2002 was to postpone the Appellants' interests in the Strip to rank behind the Respondent's interest unless the priority of those interests fell within any of the categories of protected interest in section 29(2) of the Act. He also recorded Mr Gale's submission that their interests in the Strip would only have been protected if they had been in actual occupation and that occupation had not fallen within the exception in Schedule 3, paragraph 2(c), namely, that their occupation would not have been obvious on a reasonably careful inspection at the time of the transfer to the Respondent and she did not have actual knowledge of it at the time: see [129] to [137].
27. The Judge then set out the submissions made by Mr Morris on behalf of the Appellants. He recorded Mr Morris's submission that the LRA 2002 did not have the effect of resurrecting a title which had been extinguished by adverse possession by some form of "statutory magic": see [138] and [139]. He then set out at [139] the general boundaries rule in section 60 of the LRA 2002 (below) and recorded Mr Morris's submission at [140]:

"Accordingly, say the Claimants, the effect of Ms Narga's registration is not to vest in her a title to the disputed land, as her predecessor had no title to convey. The provisions of Schedule 3 are not engaged where there is no determined boundary and the land to which title is claimed falls within the scope of the general boundaries rule. If the Claimants' adverse possession extinguished the title of the previous owners to the disputed land then the Claimants are entitled to be registered as proprietors and can make an application for the boundary to be determined accordingly."

28. The Judge rejected Mr Morris's argument that because the boundary between Brook Barn and No 24, No 25 and No 26 was a general boundary only and its exact line had not been determined, the Respondent did not acquire title to the Strip. He set out his reasons for this conclusion at [141] and [142]:

“a. The effect of the 2002 Act was to change the law with regard to adverse possession. Under section 96(1), no period of limitation under section 15 of the Limitation Act 1980 runs against any person in relation to an estate in land the title to which is registered. By section 96(3) section 17 of the Limitation Act (extinction of title on expiry of time limit) does not operate to extinguish the title of any person where, by virtue of that section, a period of limitation does not run against him.

b. I accept the reasoning set out in Jourdan of Adverse Possession (para 21-48, authorities bundle p.441):

“Where a squatter claims that, before the title to the land in dispute was registered in the name of a person with the paper title, the squatter had already acquired title to it by adverse possession, his claim may not fall under Sch 12, para 18 of the 2002 Act. If title to the land was first registered before 13 October 2003, it seems likely that the Land Registration Act 1925, s.75 would have applied, so as to make the registered proprietor the trustee for the title for the squatter from the moment the title was registered. In that case, Sch 12, para 18 will apply. 21-49: However, if title is not registered until on or after 13 October 2003 then Sch 12 para 18 has no application ...”

c. The position here is that title to Brook Barn was registered before 12 October 2003 (see above) and therefore, although the Wrights claimed to have acquired title by adverse possession by 29 October 2000 at the latest, that gave rise to the then owner of Brook Barn holding the title to the disputed land relating to Nos.25/26 as trustee for the Wrights under section 75 of the Land Registration Act 1925 and therefore the 3 year transitional period applied and lapsed on 12 October 2006. In the absence of registration of title by adverse possession, section 96 applied.

d. Although under the new provisions under the 2002 Act, Schedule 6 (given effect by section 97), a person may apply to the Land Registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application, I am not the Land Registrar and this claim is not being pursued under that provision.

e. Mr Morris argues that if no boundary has been fixed then if the land in dispute would be within the general boundaries provision, the provisions as to adverse possession in the 2002 Act do not apply. It is clear, however, that that very issue is canvassed by paragraph 5 of Schedule 6: the applicant under Schedule 6 is only entitled to be registered as the new proprietor of the estate if any of the following conditions is met.

“ . . .(4) The third condition is that— (a) the land to which the application relates is adjacent to land belonging to the applicant, (b) the exact line of the boundary between the two has not been determined under rules under section 60, (c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and (d) the

estate to which the application relates was registered more than one year prior to the date of the application.”

f. It follows that the 2002 Act has a specific mechanism to deal with the very situation where no exact boundary has been determined. It does not take the situation outside the scope of the 2002 Act. To the contrary, it deals with it directly.

142. In my judgment, in order to give effect to the title by adverse possession which is claimed by the Claimants, it is therefore necessary for them to show that they were in actual occupation of the disputed land and that their occupation would have been obvious on a reasonably careful inspection of the land at the time of the disposition to Ms Narga in 2020. Actual occupation means something more than a right to occupy, but in my judgment it does not have to be continuous occupation existing at the time of an inspection. Actual occupation is a question of fact to be determined in accordance with the nature of the land concerned, in a similar way to adverse possession itself. Whether the occupation is obvious is also a question of fact, but viewed on an objective basis by the reasonably careful inspector. This is the approach which I shall adopt below.”

29. Given his conclusion on the law, it was necessary for the Judge to go on and consider whether the Claimants were in actual occupation of the strip on the North Bank of the Brook and the Fence and, if so, whether this would have been obvious on a reasonably careful inspection by the Respondent: see [168]. He found that the Claimants were in actual occupation but that their occupation was not obvious at [169] to [173]:

“169. As to “actual occupation”, for the same reasons which I have set out relating to possession above, in my judgment the Claimants were in actual occupation of the north bank.

170. However, as I have set out above, by the time that Ms Narga inspected Brook Barn prior to her purchase the Fence had deteriorated in places. As I have said in 2019 the survey noticed that it was dilapidated at the section opposite No.24. I accept Mr Chapman’s evidence that he did not notice a fence on the north bank when he was on the site on 18 May 2020 (before any site clearance was carried out by Ms Narga), having gone down the bank on the side of Brook Barn nearer the electricity substation. This is on the No.24 side of the Bank. This also accords with Mrs Clapham’s evidence that it had not been thought necessary to take steps to exclude people until Ms Narga came along. I find that at the No.24 end the Fence was dilapidated and did not operate to keep people out, certainly at the western end.

171. I also find that in the Spring of 2020 the Claimants had allowed the vegetation down by the Brook to grow extensively and had not cut it back to any significant or noticeable extent. Although I accept that the Claimants may have been content to allow the north bank to develop a less manicured appearance than the rest of their garden, I accept that even on a

reasonably careful inspection it would not have been apparent that the Claimants were in occupation of the north bank. The photographs taken by Ms Narga in April to June 2020 [613-659] do not demonstrate any current cultivation or plant management. In my judgment the Claimants' own photographs confirm the general impression (see for example the pictures of the Clapham's son in the Brook on 2 May 2002 [555, 556]).

172. Ms Narga (on her 8 visits), Mr Fothergill and Mr Chapman all came to the view that the vegetation on the north bank was overgrown and unkempt. Having seen the photographs of the site at that time I find that the conclusion was not unreasonable or that they were closing their minds to the obvious.

173. I therefore find that the occupation by the Claimants of the north bank was not "obvious" (the word used in paragraph 2 to Schedule 3 of the 2002 Act) on a reasonably careful inspection of the land."

30. For these reasons the Judge dismissed the Claimants' claim for declarations that they were entitled to be registered as owners of the Strip by virtue of the doctrine of adverse possession. For completeness, I add that the Judge also found that Mr and Mrs Clapham were in actual occupation of the Treehouse Land and that their interest was an overriding interest because they were in actual occupation and that their occupation was obvious on a reasonably careful inspection: see [182] to [186].

D. The Order

31. Because Mr Morris placed some reliance on the form of the Order, it is necessary for me to set out the relevant provisions here. In two of the recitals to the Order the Judge recited both his findings that the Appellants had been in adverse possession of the Strip and also his holding that their interest in the Strip was not an overriding interest which fell within Schedule 3 to the LRA 2002. He then made the following declarations and orders:

**"IT IS DECLARED THAT**

1. The First and Second Claimants are entitled to be registered as the freehold proprietors of the Tree House Land pursuant to sections 15 and 17 of the Limitation Act 1980.
2. The boundary between the Wrights' Property and Brook Barn is the northern edge of the south bank of the Brook (which for the avoidance of doubt includes the areas built up and reinforced as at March 2022).

**IT IS ORDERED THAT**

In relation to the Claimants' claim for declaratory relief:

3. The Claimants' claim for a declaration that the boundary between the Wrights' Property and Brook Barn is the Fence is dismissed.



4. The Claimants' claim for declaratory relief in respect of their entitlement to be registered as proprietors of the Claphams' Strip and the Wrights' Strip is dismissed."

### III. The Law

#### E. Unregistered Land

32. The Judge held that the Claimants had acquired title to the Strip by adverse possession both before the first registration of title to Brook Barn and also before the 2002 Act came into force. I begin, therefore, with a consideration of the law of adverse possession as it applies to unregistered land. The editors of Megarry & Wade *The Law of Real Property* 9<sup>th</sup> ed (2019) explain the history briefly at 7—069:

"The effect of adverse possession upon the title of the owner of unregistered land is as follows. Before 1833 the effect of the Statutes of Limitation was merely to bar rights of action. They extinguished remedies not rights. Thus a person whose right to recover land had been barred might, if it was possible to recover it peaceably, reassert his or her old title. This principle still applies to pure personalty, other than chattels; but as regards land it was abolished by the Real Property Limitation Act 1833. The rule now is that, at the end of the limitation period, both the right of action to recover the land and the claimant's title to it are extinguished. This applies equally to redemption and foreclosure actions. When title to land has been extinguished by adverse possession, the rights which that title carried are also extinguished. The former owner cannot thereafter sue the squatter either for rent that fell due before title was extinguished or for damages for trespass."

33. The present rule is reflected in the Limitation Act 1980 (the "**LA 1980**"). Section 15 provides 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 them (or, if it first accrued to some person through whom he claims, to that person) and section 17 provides that subject to section 18 (which is not relevant for present purposes):

"...at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished."

34. The Judge directed himself that time began to run as soon as the owner had been dispossessed (or had discontinued possession) and that before 13 October 2003 the effect of adverse possession by a squatter for in excess of 12 years was that the owner's title

was extinguished: see [107] to [109]. There is no appeal by either party against that finding and it follows, therefore, that the effect of the Appellants' adverse possession of the Strip was to extinguish the title of the Respondent's predecessors in title at all events before first registration of title to Brook Barn. I did not understand Mr Gale to challenge this proposition.

F. The LRA 1925

*(1) First Registration*

35. Section 5 of the LRA 1925 provided that the effect of first registration was to vest absolute title in the proprietor of registered land subject to any overriding interests. The section was headed "Effect of first registration with absolute title" and before 13 October 2003 it 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; and (c) Where the first proprietor is not entitled for his own benefit to the registered land subject, as between himself and the persons entitled to minor interests, to any minor interests of such persons of which he has notice, but free from all other estates and interests whatsoever, including estates and interests of His Majesty."

36. Section 69(1) also provided that the nature of the title which was vested in the registered proprietor on first registration was a legal estate in fee simple in possession but subject to any overriding interests. Section 70 was headed "Liability of registered land to overriding interests" and (subject to certain amendments which are not relevant) it provided as follows between the date of the 1982 Conveyance and 13 October 2003:

"(1) All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say):—....(f) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts;...."

37. The 1925 Act expressly provided, therefore, that first registration of title would not have any effect on the rights of a squatter who had acquired title by adverse possession (or, indeed, was in the process of acquiring such a title). It follows, therefore, that between 19 March 2003 and 13 October 2003 first registration of Brook Barn took effect subject to the Appellants' rights acquired by adverse possession. Moreover, the overriding nature of the Appellants' interest did not depend on whether they were in occupation or, indeed, whether that occupation would have been apparent to a purchaser.

(2) *Section 75*

38. Section 75 of the LRA is headed "Acquisition of title by possession" and it modified the rule applicable to unregistered land to create a statutory trust under which the registered proprietor held the relevant land on trust for the squatter. I will have to consider whether the section had any application at all where the squatter had acquired title by adverse possession before first registration. But there was no dispute that it applied where first registration took place before the 12 year period in section 15 of the LA 1980 had expired. The section provided as follows (my emphasis):

"(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."

(3) *Rectification of the register*

39. Although section 75(2) (above) conferred an express right to be registered as the proprietor of the registered land upon a squatter, Mr Morris also argued (and I accept) that section 82 of the LRA 1925 gave jurisdiction to both the Land Registrar and the Court to rectify the register of land to give effect to the rights of a squatter. It conferred jurisdiction to rectify the register 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": see section 82(1)(g). Section 82(3) also permitted rectification against a legal proprietor

in possession for the purpose of giving effect to an overriding interest.

40. In *Chowood Ltd v Lyall (No 2)* [1930] 1 Ch 426 Chowood Ltd was registered as proprietor of a large estate which included a number of substantial strips of woodland. Chowood was not registered under the 1925 Act but under the Land Transfer Acts 1895 and 1897 but only very shortly before the LRA 1925 came into force. It brought proceedings for trespass against Mrs Lyall who claimed to have been in possession of the strips of woodland since 1893 and, therefore, to have acquired title by adverse possession. She counterclaimed for rectification of the register under section 82 of the LRA 1925 and Luxmoore J held that the power to rectify the register extended to land registered under the earlier Land Transfer Acts. He stated as follows at 438:

“Now apply this to the present case. The plaintiff company has by its own act, that is, by the registration of a conveyance, which by itself is inoperative to pass the pieces of land in dispute, caused the mistake; that is, the inclusion of the pieces of land in dispute in the registered title, and it is in consequence of that mistake that the defendant, Mrs. Lyall, seeks rectification. Again, I think that sub-para, (c) is also material; that is the sub-paragraph which says: " Unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against the registered proprietor." If, as I have held to be the case, Mrs. Lyall was in fact entitled to the fee simple of the two pieces of land in dispute immediately before the registration, and the registration has in fact taken place, as I hold it has, without her assent or knowledge, and she has against her will and in ignorance of what has happened, been deprived of that fee simple, it would in my view, be manifestly unjust not to rectify the register, and the case falls within sub-para, (c) as well as within sub-para. (a).”

(4) *The general boundaries rule*

41. Both before and after the LRA 2002 came into force the general boundaries rule applied to registered land. That rule provides that the boundary as shown on the filed plan of a title to registered property does not fix the exact line of the boundary. Rule 276 of the Land Registration Rules 1925 (the “**LRR 1925**”) contained a specific rule enabling the registered proprietor to apply to fix the boundary but in the absence of such an application Rule 278 headed “General Boundaries” governed the boundaries of the relevant land:

**“276. Fixed boundaries.**

If it is desired to indicate on the filed plan or General Map, or otherwise to define in the register, the precise position of the boundaries of the land or

any parts thereof, notice shall be given to the owners and occupiers of the adjoining lands, in each instance, of the intention to ascertain and fix the boundary, with such plan, or tracing, or extract from the proposed verbal description of the land as may be necessary, to show clearly the fixed boundary proposed to be registered; and any question of doubt or dispute arising therefrom shall be dealt with as provided by these rules.”

**“278. General boundaries.**

(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.”

42. In *Lee v Barrey* [1957] Ch 251 the parties had purchased plots of adjoining land from the same vendor and the claimant brought a claim for trespass against the defendant on the basis that he had built over the boundary. The defendant relied on the filed plan as showing the line of the boundary even though the contract for sale had included detailed measurements which showed a different line. The Court of Appeal held that the general boundaries rule did not fix the exact line of the boundary which was determined by the contract and subsequent transfer. Lord Evershed MR drew the following distinction between “boundary disputes” and “property disputes” at 260 to 261:

“But with all respect to Mr. Plowman's argument, which he has put before us with his customary skill and force, I find myself to be in this respect of entirely the same opinion as was Jenkins L.J. I would go with Mr. Plowman this far, that 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, as Mr. Plowman invited us to do, 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.”

43. *Lee v Barrey* did not involve a claim for adverse possession and the real issue was whether a discrepancy between the filed plan and the underlying contract and transfer of 10 feet fell within the scope of the general boundaries rule or whether it required an application to rectify the register. The Court of Appeal held that the dispute fell within the general boundaries rule even though the whole frontage of the plot in question was only 42 feet. The point was (and remains) one of practical importance. If the Land Registry Adjudicator could determine the boundary between two registered titles, it was unnecessary for the registered proprietor who won the dispute to apply to rectify the register and the registered proprietor who had lost the dispute would not be entitled to apply for compensation.
44. Both Mr Morris and Mr Gale agreed that it was a question of fact and degree whether a dispute over the location of the boundary should be treated as a property dispute rather than a boundary dispute and, therefore, whether it fell outside the general boundaries rule. I agree. However, neither of them was able to point to a decision in which it had been held that a registered proprietor was entitled to apply to the Land Registry to fix the boundary (or to ask the Land Registry to determine where the line of the general boundary ran) on the basis that he or she had acquired title to the disputed strip by adverse possession.

G. The LRA 2002

*(1) First registration*

45. Section 4 of the 2002 Act imposes a requirement to register land where there is a transfer of a qualifying estate (which includes an unregistered legal estate in land). Section 11 of the 2002 Act replaces sections 5 and 69 (above) and now governs the effect of first registration of freehold title. Section 11(1) to 11(3) provides as follows:

“(1) This section is concerned with the registration of a person under this Chapter as the proprietor of a freehold estate. (2) Registration with absolute title has the effect described in subsections (3) to (5). (3) The estate is vested in the proprietor together with all interests subsisting for the benefit of the estate. (4) The estate is vested in the proprietor subject only to the following interests affecting the estate at the time of registration— (a) interests which are the subject of an entry in the register

in relation to the estate, (b) unregistered interests which fall within any of the paragraphs of Schedule 1, and (c) interests acquired under the Limitation Act 1980 of which the proprietor has notice.”

46. Schedule 1 to the LRA 2002 is headed “Unregistered interests which override first registration” and contains a number of miscellaneous overriding interests which would be protected on first registration. For present purposes the only relevant provision is contained in paragraph 2 which preserves the rights of a person in actual occupation of the relevant land.

(2) *Registered dispositions*

47. Section 29 of the LRA 2002 now governs the effect of a disposition of a registered estate in land on unregistered interests. It used the concept of “postponement” familiar to conveyancers and land lawyers used to working with the 1925 legislation:

“(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration 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.

(2) For the purposes of subsection (1), the priority of an interest is protected— (a) in any case, if the interest— (i) is a registered charge or the subject of a notice in the register, (ii) falls within any of the paragraphs of Schedule 3, or (iii) appears from the register to be excepted from the effect of registration, and (b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.

(3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.

(4) Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has effect as if— (a) the grant involved such a disposition, and (b) the disposition were registered at the time of the grant.”

48. Schedule 3 mirrors Schedule 1 in that it contains a list of overriding interests which bind a purchaser of the registered estate. Paragraph 1 deals with leasehold estates granted for a term of less than 7 years and paragraph 1A with social housing tenancies. Paragraph 2 deals with the rights of persons in actual occupation of the land and it provides as follows:

“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— (a) an interest under a settlement under the Settled Land Act 1925; (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so; (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; (d) a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition.”

49. Paragraph 3 deals with easements and profits a prendre, paragraphs 4 and 5 with customary rights, paragraph 6 with local land charges and paragraphs 7 to 9 with mines and minerals. I deal with paragraphs 14 and 15 in the context of the transitional provisions (below). But it can be seen immediately that the LRA 2002 did not reproduce section 70(1)(f) and the rights of a squatter acquired (or in course of being acquired) under the Limitation Acts are no longer treated as a separate overriding interest for the purposes of the LRA 2002. It follows that those rights will not take priority over the registered disposition unless the squatter is in actual occupation and their interest does not fall within any of the exceptions in sub-paragraph (c) (above).
50. The decision not to reproduce section 70(1)(f) was based on the recommendation of the Law Commission in its final report “Land Registration for the Twenty-First Century A Conveyancing Revolution” No 271 published on 9 July 2001 (the “**Report**”). It contained both the draft bill which ultimately became the LRA 2002 and also the Law Commission’s commentary on its provisions. In the Report, §8.76 to §8.78 the Commission stated as follows:

“8.76 As we explain in Part XIV of this Report, the Bill introduces a completely new system of adverse possession in relation to registered estates. The circumstances in which a squatter becomes entitled to be registered as proprietor in place of an existing one will be considerably reduced. However (1) there will still be cases where there is such an entitlement to be registered; and (2) there will be cases where a person had become entitled to be registered before the Bill is brought into force.

8.77 In the Consultative Document, we recommended that section 70(1)(f) of the Land Registration Act 1925 should not be replicated. We noted that (1) a squatter who had acquired a right to be registered as proprietor had a proprietary right that he or she could protect by actual occupation; but (2) as the law stood, once a squatter was entitled to be registered, his or her rights constituted an overriding interest even if he or she thereafter ceased



to be in actual occupation. If a squatter ceased to occupy the land after he or she had become entitled to be registered as proprietor, the following events might occur. The registered proprietor might resume possession of the land and then sell it to a buyer before the squatter's right to be registered was itself barred by the registered proprietor's own adverse possession. The buyer would then be bound by the squatter's overriding interest even though he or she had bought the land from a registered proprietor in possession. The buyer would not be entitled to any indemnity should the register be rectified in favour of the squatter, because he or she would not have suffered loss by reason of the rectification, but because he or she was subject to the squatter's overriding interest.

8.78 Our recommendation to abolish this category of overriding interests was supported by 80 per cent of those who responded to the point on consultation and the Bill does not, therefore, replicate section 70(1)(f). However, the Bill does contain two provisions that relate to the rights of squatters. First, there are limited transitional provisions to protect vested rights. For three years after the Bill is brought into force a squatter, even if not in actual occupation, will have an overriding interest (1) on first registration, where he or she had extinguished the title of the person who is registered as first registered proprietor prior to the coming into force of the Bill; (2) in relation to any registered disposition, where he or she was entitled to be registered as proprietor of registered land prior to the coming into force of the Bill. These transitional provisions will provide a reasonable opportunity for any squatter who is no longer in actual occupation of the land which he or she claims, to register his or her rights. Secondly, as we have explained in Part III of this Report, on first registration, the legal estate is vested in the first registered proprietor subject to interests acquired under the Limitation Act 1980 of which he or she has notice at the time of registration. We consider that these provisions strike a fair balance between the vested rights of squatters and the need to protect innocent buyers who cannot discover the existence of those rights."

51. Sections 11 and 29 gave effect to these recommendations. On first registration under the 2002 Act the rights of a squatter are protected if the registered proprietor has actual notice of them or the squatter is in actual occupation. But on subsequent registered dispositions a squatter's rights are only protected if they are in actual occupation and that occupation is apparent to a purchaser. The LRA 2002 also changed the substantive law in relation to the acquisition of title by adverse possession (as I now explain).

(3) *Adverse possession*

52. As the Judge observed at [141](a) the LRA 2002 "disapplied" sections 15 and 17 of the LA 1980 and introduced an entirely new regime for adverse possession. Section 96 is headed "Disapplication of periods of limitation" and it came into force on 13 October 2003. It provides as follows:

“(1) No period of limitation under section 15 of the Limitation Act 1980 (time limits in relation to recovery of land) shall run against any person, other than a chargee, in relation to an estate in land or rentcharge the title to which is registered. (2) No period of limitation under section 16 of that Act (time limits in relation to redemption of land) shall run against any person in relation to such an estate in land or rentcharge. (3) Accordingly, section 17 of that Act (extinction of title on expiry of time limit) does not operate to extinguish the title of any person where, by virtue of this section, a period of limitation does not run against him.”

53. Schedule 6 introduced a qualified right for a squatter to apply to be registered as proprietor of the relevant land after 10 years. Paragraph 1 provides that a person may apply to the registrar to be registered as proprietor of a registered estate in land if they have been in adverse possession for 10 years. Paragraph 2 provides that the registrar must give notice of the application to the proprietor of the estate to which the application relates and paragraph 3 provides that the proprietor may require the application to be dealt with under paragraph 5 which provides as follows:

“(1) If an application under paragraph 1 is required to be dealt with under this paragraph, the applicant is only entitled to be registered as the new proprietor of the estate if any of the following conditions is met.

(2) The first condition is that— (a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and (b) the circumstances are such that the applicant ought to be registered as the proprietor.

(3) The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.

(4) The third condition is that— (a) the land to which the application relates is adjacent to land belonging to the applicant, (b) the exact line of the boundary between the two has not been determined under rules under section 60, (c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and (d) the estate to which the application relates was registered more than one year prior to the date of the application.

(5) In relation to an application under paragraph 1(2), this paragraph has effect as if the reference in sub-paragraph (4)(c) to the date of the application were to the day before the date of the applicant's eviction.”

(4) *Transitional provisions*

54. Although the new regime under the LRA 2002 came into force on 13 October 2003 it gave effect to the Law Commission's recommendations and preserved the old statutory

regime for a transitional period of three years. Schedule 12 contained the relevant transitional provisions and paragraph 18 provided as follows:

“(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. (2) A person has a defence to any action for the possession of land (in addition to any other defence he may have) if he is entitled under this paragraph to be registered as the proprietor of an estate in the land. (3) Where in an action for possession of land a court determines that a person is entitled to a defence under this paragraph, the court must order the registrar to register him as the proprietor of the estate in relation to which he is entitled under this paragraph to be registered.”

55. Paragraph 18 did not itself contain a time limit on the application of these provisions. But the statutory technique which the Law Commission recommended and which Parliament accepted was to insert temporary overriding interests into both Schedule 1 and Schedule 3 for the limited period of three years. Schedule 12, paragraph 7 inserted a new paragraph 15 into Schedule 1 for first registration: “A right acquired under the Limitation Act 1980 before the coming into force of this Schedule.” Schedule 12, paragraph 11 also inserted a new paragraph 15 into Schedule 3: “A right under paragraph 18(1) of Schedule 12.” Both paragraphs were then repealed after three years. The explanatory notes to Schedule 18, paragraph 11 explained the reason for the transitional provisions as follows:

“It is necessary to make transitional provisions to accommodate the very substantial changes to the law relating to adverse possession and registered land that the Act will make, and to ensure that vested rights are preserved. Where, immediately prior to the coming into force of the Act, a squatter has been in adverse possession for the requisite period, the registered proprietor will hold the registered estate on a bare trust for the squatter under section 75 of the 1925 Act. Such a squatter will have become entitled to be registered as proprietor of an estate under section 75. The Act adopts a double strategy. It preserves the rights of those who are entitled to be registered prior to its coming into force, but it also abolishes the trust in their favour. The trust is abolished by the repeal without replication of section 75 of the 1925 Act. Instead, the Act confers, by paragraph 18(1), on a squatter who is a beneficiary under a trust under section 75 immediately before it comes into force an entitlement to be registered. That entitlement will be a proprietary right. As such, as long as the squatter is in actual occupation the priority of his right will be protected in relation to registered dispositions. It will also constitute a defence to any proceedings for possession (paragraph 18(2)). If a squatter does establish this defence in such proceedings, the court must order the registrar to register him or her as proprietor of the estate to which his entitlement relates (paragraph 18(3)).”

(5) *The general boundaries rule*

56. Section 58 enshrines the principle that once all the requirements of registration are met the register of title is conclusive. It expressly provides that if, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration. However, section 60 preserves the general boundaries rule:

“(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.

(3) Rules may make provision enabling or requiring the exact line of the boundary of a registered estate to be determined and may, in particular, make provision about— (a) the circumstances in which the exact line of a boundary may or must be determined, (b) how the exact line of a boundary may be determined, (c) procedure in relation to applications for determination, and (d) the recording of the fact of determination in the register or the index maintained under section 68.

(4) Rules under this section must provide for applications for determination to be made to the registrar.”

57. Parliament accepted the Law Commission’s recommendation to retain the general boundaries rule and because of its importance to enact it as a section in the LRA 2002 itself rather than to include in the new rules. The Law Commission observed that although the LRR 1925 had contained a power to fix boundaries it had been used rarely for two reasons: first, because it was expensive to do so and, secondly, because any application was likely to generate a boundary dispute: see the Report, §9.10. The Commission also recommended that the power to fix boundaries should be retained and this is reflected in section 60(3) (above). The Report stated at §9.12 and §9.13 (footnotes removed):

9.12 There are two points that emerge from this rule-making power. First, it will be open to the Lord Chancellor to prescribe a means of fixing boundaries that is less demanding than that which is presently employed. The development of modern mapping techniques is likely to make this possible. It is anticipated that, if this can be done, wider use may be made of voluntary fixing of boundaries, for example, when a development is laid out.

9.13 Secondly, there may be circumstances in which it will be possible to require that the boundary be fixed. One particular case arises in the context

of adverse possession. We explain in Part XIV of this Report that the Bill introduces a new system of adverse possession in relation to registered estates. In general, a person who has been in adverse possession of a registered estate for at least 10 years will be able to apply to be registered as proprietor of it. However, if the proprietor (or certain other interested persons) serves a counter-notice, the application will be rejected. There are certain exceptions to this. In particular, where:

- (1) an adjacent landowner has been in adverse possession; and
- (2) for at least 10 years of that period of adverse possession, he, she or any predecessor in title has reasonably believed that the land to which the application relates belonged to him or her

the applicant will be entitled to be registered. The thinking behind this exception is that legal and physical boundaries do not always coincide, as where an estate is laid out and the fences are not where the plans on the register say that they are. If, in such circumstances, a neighbour has acted in the reasonable belief that he or she owned the land, his or her claim should succeed. The exception does not, however, apply where the boundary has been determined by rules under Clause 60(3). Furthermore, rules under Clause 60(3) are likely to require that where an applicant does come within the exception and acquires title to the land, he or she will be required to have the boundary fixed when he or she is registered. This will ensure that he or she (or any successor in title) cannot ever invoke this exception again.”

58. In *Drake v Fripp* [2012] P&CR 4 the Adjudicator to HM Land Registry determined that the boundary between two registered titles ran along the line of a fence rather than a hedge. The area of land in dispute amounted to 1.5 acres and the disappointed landowner appealed on the basis that the correction to the title plans required an application for rectification of the register and could not be made under the general boundaries rule. The Court of Appeal dismissed the appeal. Lewison LJ stated this at [20]:

“In substance this 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. Mr Falkowski’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. Mr Falkowski 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.”

59. Lewison LJ cited the passage from the judgment of Lord Evershed MR (which I have set out above) and stated that if the distinction between a boundary dispute and property dispute was a question of fact and degree, then it would be right for an Appeal court to accord the Adjudicator’s decision the “weighed deference” to a finding of primary fact. He concluded that “alteration of the register to reflect the true boundary more accurately does not, in my judgment, prejudicially affect SLA’s title”: see [21]. The guidance given by the Court of Appeal is reflected in the current version of HM Land Registry’s Practice Guide 77 “altering the register by removing land from a title plan” which was last updated on 16 March 2020. The authors of the guide state this at §1.2:

“The general boundaries rule means that removal of land from a title plan does not necessarily remove any land from the registered title. Land within the scope of the general boundaries rule may be outside the registered title though within the red edging (or, equally, within the registered title though outside the red edging). Where it would be a mistake for land within the scope of the general rule to be in the registered title, then the registered title will be treated as not extending to this land. So, in *Drake v Fripp* [2011] EWCA Civ 1279, Lewison LJ stated (at [20]) that the registration of the proprietor “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 [the proprietor] never had title to the disputed strip. [Counsel’s] proposition that [the proprietor] has ‘lost’ 1½ acres of land is thus either question begging or wrong.” Thus removing land which is within the scope of the general boundaries rule from the title plan does not mean that any land is being removed from the registered title; rather it is merely producing “another general boundary in a more accurate position than the current

general boundary” (*Derbyshire County Council v Fallon* [2007] EWHC 1326 (Ch) at [26]). The courts characterise a dispute over this type of alteration as a “boundary dispute”. On the other hand, where the land is outside the scope of the general boundaries rule, removal of that land from a title plan means that it is being removed from the registered title. The courts characterise a dispute over this type of alteration as a “property dispute”.”

## **V. The Appeal**

60. The Judge directed himself correctly that the LRA 2002 changed the law and disapplied section 17 of the LA 1980: see [141](a). He relied on Jourdan and Radley-Gardner *Adverse Possession* 2<sup>nd</sup> ed (2017 supplement) (“**Jourdan**”) at 21—48 and held that because first registration of Brook Barn had taken place before 12 October 2003 section 75 applied and the registered proprietor held the Strip on trust for the Appellants. He also held that section 96 applied once the three year transitional provisions had expired: see [141](b) and (c). The Judge did not spell out the consequences of this conclusion. But he went on to point out that a squatter may now apply to be registered under Schedule 6: see [141](d). He also rejected Mr Morris’s reliance on the general boundaries rule on the basis that Schedule 6, paragraph 5 provides a specific mechanism to deal with the situation in which there was a dispute over the line of the boundary: see [141](d) and (e).

## **H. Section 75**

### *(1) Does it apply?*

61. Mr Morris challenged the Judge’s decision on the basis that he failed to distinguish between those cases in which the squatter had already acquired title by adverse possession when first registration of the title took place and those cases in which the squatter was in the course of acquiring title by adverse possession when title was first registered. He submitted that under the system of unregistered conveyancing the Appellants had already acquired legal title to the Strip and the effect of the 1925 Act could not have been to “re-vest” legal title in the new registered proprietor and to create a new statutory trust of the land. He also submitted that the position was otherwise in relation to the second category of case where a squatter only ever obtained a beneficial interest under a statutory trust created by section 75. This was the argument to which the Judge referred when refusing permission to appeal (above).

62. Mr Morris's argument turns, therefore, on the construction of section 75(1). He submitted that section 75(1) did not apply where the registered proprietor's estate had already been extinguished by the date of first registration. He argued that the words "except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished" were forward looking and were only intended to apply where title would be extinguished after first registration. He also argued that if the section had been intended to be backward looking and to apply in cases where first registration had already taken place, it would have included the words "has been extinguished".
63. Mr Morris also submitted that if the Appellants' title did not fall within section 75, then the Judge was wrong to find that their right to register title to the Strip lapsed when the transitional period for the application of Schedule 12, paragraph 18 came to an end. He suggested that the Judge had misunderstood the passage in Jourdan (above) and that the authors were dealing with the first category of case in the first sentence when they stated: "Where a squatter claims that, before the title to the land in dispute was registered in the name of a person with the paper title, the squatter had already acquired title to it by adverse possession, his claim may not fall under Sch 12, para 18 of the 2002 Act."
64. In support of these arguments Mr Morris relied on the decision *Re Chowood's Registered Land* [1933] Ch 577 which involved the same parties in *Chowood Ltd v Lyall (No 2)*. Following the decision of Luxmoore J to grant rectification of the register under section 82 the registered proprietor applied for an indemnity under section 83 of the LRA 1925. However, Clauson J dismissed the claim on the basis that Chowood had suffered no loss because Mrs Lyall's interest as a squatter was at all times an overriding interest within section 70(1)(f). He stated this at 581-2 (my emphasis):

"On the facts as they appeared in the case of *Chowood Ltd v Lyall* (and the findings of fact in that case are by agreement to be treated as binding between the present parties), Lyall was in possession of the strip when Chowood's title was registered, and, of course, also when the Land Registration Act, 1925, came into force, and also immediately before and at the date of the rectification of the register. Further, that possession was, at each of those dates, protected against any claim by Chowood to enter upon it, the protection flowing from the fact, established by Lyall in the former litigation, that Lyall and her predecessors had had possession for such length of time as would be an answer under the Limitation Acts to any such claim by Chowood. It appears to me to follow that Lyall's rights were accordingly rights acquired under the Limitation Acts. It was suggested that the words "subject to the provisions of this Act" affect the



matter. I cannot see why. The reference seems to be to s. 75, which contains very special provisions which prevent rights acquired under the Limitation Acts from operating under certain circumstances to extinguish the estate of the registered proprietor. This does not seem to have any operation upon the position in the case with which I am now dealing. It was further suggested that Lyall's title depended to some extent on what was called a paper title, and not solely on the Limitation Acts. I do not say what the position might have been if Lyall's paper title had disclosed, for example, a grant to her by Ralli's predecessor in title which could be used to defeat Chowood's claim to the strip without recourse to the Statute of Limitations. Such a case can be dealt with when it arises. In the present case Lyall's paper title was of value simply as some evidence of length of possession, and had no other operation; the paper title, save in so far as it supported a plea of possession for the statutory period, would not have helped to defeat Chowood's claim. It results from this that Chowood's title was all along subject to the rights which Lyall has succeeded in establishing; and the loss, if it may properly be so called, which Chowood has suffered is that they have not got, and since the Act of 1925 came into force (whatever may have been the position before) have never had title to the strip, except subject to an overriding right in Lyall. That loss was occasioned by Chowood failing to ascertain that, when they bought, Lyall was in possession, and in possession under such circumstances that Ralli could not make a title to the strip. The loss was occasioned by paying Ralli for a strip to which Ralli could not make title. The rectification of the register merely recognized the existing position, and put Chowood in no worse a position than they were in before.”

65. Finally, Mr Morris relied on the general principle that a statute should be construed prospectively and not retrospectively and it should not be construed to take away existing rights or to expropriate (or interfere with) property rights without compensation: see Bennion, Bailey and Norbury on Statutory Interpretation 8th ed (2020), sections 27.1 and 27.6. In support of these principles he cited *Wainwright v Home Office* [2002] QB 1334, *R (O) v Secretary of State for the Home Department* [2022] 2 WLR 343 and *Jepsen v Rakusen* [2023] 1 WLR 1028.
66. In my judgment, the Judge was right to conclude that section 75 applied to the title which the Appellants had acquired under the LA 1980 even though they had established 12 years adverse possession before the first registration of Brook Barn. I have reached this conclusion for the following reasons:
  - (1) In my judgment, 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. It provides that the Limitation

Acts applies to registered land “in the same manner and to the same extent” as those Acts apply to land not registered. If the section had been intended to apply on a limited basis and to exclude cases where title had already been acquired, these general words would not have been used. Indeed, it would have been very easy to draft a proviso or exception to that effect.

- (2) I am not satisfied that the words “would be extinguished” carry with them the temporal distinction which Mr Morris drew. Section 75(1) is a deeming provision and the drafters of the legislation used the words “would be extinguished” in the conditional sense to describe the imagined situation which would arise if registration had not taken place at all. The imagined situation does not depend on when first registration takes place. It could be before or after the 12 year period has expired.
- (3) Moreover, no distinction was drawn between the two different classes of squatters in section 70(1)(f). That paragraph applied both to rights which had already been acquired and rights which were being acquired under the Limitation Acts. Indeed, if first registration had no effect on the rights of squatters who had already acquired legal title by adverse possession, it would have been unnecessary to categorise those rights as overriding interests under section 70(1) at all.
- (4) I also place some weight upon the discussion in the Report, §8.76 to §8.78 (above). There is no dispute that Parliament intended to accept the Law Commission’s recommendation and to change the law so that the priority of a squatter who had acquired title by adverse possession would only be protected as an overriding interest if accompanied by actual occupation and occupation was obvious upon reasonable inspection. The reasons which the Law Commission gave for their recommendation clearly applied to all categories of squatter and if they had understood or intended that the change in the law would not apply to the interests of squatters who had acquired title before first registration, they would surely have said so.
- (5) I also reject Mr Morris’s wider argument that the LRA 1925 should not be construed as expropriating the legal title to the Strip and re-vesting it in the registered proprietor. This argument ignores the practical effect of section 75 which

was intended to be beneficial to squatters rather than penal. Section 75(2) conferred an absolute right to be registered as owner of the land. Mr Morris did not suggest that the transitional period was unreasonable or that the Appellants would not have applied to register title to the Strip if they had been properly advised before it expired. Indeed, I note that the Particulars of Claim contained a claim that the Appellants could still apply to register under Schedule 12, paragraph 18: see paragraph 28(iv) (above).

- (6) But in any event, I do not accept Mr Morris's argument that the effect of section 75 was to take away or expropriate the Appellants' legal title to the Strip or, at least, not without heavy qualification. Mr Gale reminded me that the doctrine of adverse possession does itself involve the expropriation of property rights. In *JA Pye (Oxford) Ltd v United Kingdom* (2007) 23 BHRC 405 the ECHR held that there had been a violation of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms although the LA 1980 struck a fair balance between the public interest and the individual's property rights. In the present case, the clear intention of Parliament was to change that balance and to protect the priority of squatters on a disposition of registered land only where they were in occupation and that occupation was apparent to a purchaser.
- (7) Finally, I do not consider *Re Chowood's Registered Land* (above) to be either binding or persuasive authority that section 75 does not apply in the present case. Clauson J accepted that the words "subject to the provisions of this Act" in section 70(1)(f) referred to section 75 but had no application to the case before him. But, as Mr Gale pointed out, it is difficult to identify the point which he had to decide. There is no reference to section 75 in the report of counsel's argument although the report does record that counsel for the registered proprietor submitted that the words "subject to the provisions of this Act" reproduced the same words in the Land Transfer Act 1897. It may be that the argument advanced by counsel for the HM Land Registrar was that section 75 and section 70(1)(f) were mutually exclusive.
- (8) But whatever the argument was, the sentence which I have emphasised above did not form part of the ratio decidendi of the decision nor indeed the critical reasoning.

Mrs Lyall had already obtained an order for rectification and the issue for the Court was whether to grant an indemnity. This involved an assessment of her rights before she obtained an order. She had resisted possession proceedings and had been held to have obtained title by adverse possession. On any view her rights were protected by section 70(1)(f) whether or not she could have made an application for registration under section 75(2).

67. I am satisfied, therefore, that the Judge's reasoning at [141](a) to (c) was correct and that he was right to cite and apply the observation in Jourdan (above) at 21—48 that section 75 applied because Brook Barn was first registered before 13 October 2003. It is entirely understandable that the authors expressed their view tentatively because of the absence of any clear authority. But, in my judgment the Judge interpreted their view accurately and the view which they expressed was correct.

(2) *If so, what is the consequence?*

68. It was unnecessary for the Judge to spell out the consequence of his conclusion that the Appellants' rights fell within section 75 and that the Appellants had failed to make an application for registration under section 75(2) during the transitional period. It was unnecessary because Mr Gale conceded before the Judge (as he did before me) that the Appellants' rights were not extinguished altogether and they continued to have priority over any registered disposition of Brook Barn whilst the Appellants remained in occupation and that occupation was apparent: see Schedule 3. For this reason, therefore, the Judge went straight on to consider these issues: see [142].

69. It seems to me that it was arguable that the effect of section 96 was that the Appellants lost their title to the Strip by adverse possession altogether once the transitional provisions had expired and section 75 had been repealed and replaced with an entirely new set of provisions. As the Judge pointed out, section 97 enabled the Appellants to apply to register their title under Schedule 6 provided that they were able to satisfy one of the conditions in paragraph 5. Moreover, once section 75 had been repealed it is difficult to see how the Appellants could have registered title to the Strip at all unless they used the new procedure in Schedule 6: see the Judgment, [141](d) to (f).

70. However, on reflection I am satisfied that Mr Gale was right to make the concession which he did and I limit my views on this point to a few brief observations. I would have

been extremely reluctant to conclude that section 96 could take effect retrospectively rather than prospectively or that it operated to deprive the Appellants of title by adverse possession which they had acquired under the LRA 1925 when they had done so both before it was repealed and before the LRA 2002 had come into force. Mr Morris's wider submissions on statutory interpretation clearly support this conclusion even though I have found against him on the construction of section 75.

## I. The General Boundaries Rule

71. Mr Morris argued that it was critical to distinguish between two types of case in order to appreciate the operation of the general boundaries rule: first, where a squatter had obtained title by adverse possession to all of the land in question, the registered proprietor obtained no title to an estate in the land and the squatter had to obtain an order for rectification of the register. Secondly, where there was a genuine boundary dispute, then registration of the land was not conclusive and could be resolved either by the Court or the Adjudicator under the general boundaries rule. He described this second category in his Skeleton Argument as follows:

“19. The second class of case is where a person was registered with title to an estate, but some of the land on the boundary of that estate had previously been extinguished by adverse possession under the limitation acts. In that case, the proprietor should have been registered as the estate-holder. But the operation of the general boundaries rule meant that registration was not conclusive as to where the boundaries of the registered estate were located. In such a case, there would be no need to apply for rectification of the register, or to rely on having an overriding interest. In the event of a dispute, the adverse possessor's remedy would be to apply for the boundary to be fixed under rule 276 of the Land Registration Rules 1925 so as to reflect the actual limits of the registered estate, leaving the adverse possessor's title to the land unaffected by first registration. The general boundaries rule introduced by the 1925 Act was therefore of vital importance, taking the 'edge' off the conclusiveness of registration and leaving the precise location of a boundary to be determined elsewhere.

20. In a boundaries case, then, where a person was rightly registered as the estate-holder to a piece of land and where title to some land on the boundary had previously been extinguished by adverse possession, the effect of first registration was not to re-vest title in the registered proprietor or to take away the adverse possessor's title under the limitation acts. Unless a boundary had been fixed, the estate-holder could only convey a registered estate in a piece of land the precise extent of which could only be determined by looking 'underneath' the register.”

72. Finally, Mr Morris argued that the LRA 2002 left the position unchanged and that the general boundaries rule continues to apply in the same way. He submitted, therefore, that section 29(1) did not apply to postpone the Appellants' interest in the Strip to rank behind the Respondent's registered title. Again, I set out the various steps in his reasoning from his Skeleton Argument:

“(1) The Claimants extinguished the paper title to the land south of the fence under the 1980 Act prior to the first registration of Brook Barn.

(2) The first registration of Brook Barn under the 1925 Act did not vest any title to the disputed land in the Defendant's predecessor, because of the operation of the general boundaries rule. The Claimants' rights would, in any event, have overridden first registration.

(3) The coming into force of the 2002 Act on 13th October 2002 left the position unchanged. Since the boundary to Brook Barn was an undetermined boundary, the fact of the Defendant's predecessor being registered was conclusive as to their title to Brook Barn, but not to the extent of the land included within that title.

(4) The subsequent dispositions of the title to Brook Barn operated to convey only the land forming part of that estate, being the interest under the disposition. That land did not include any land to the south of the Fence.

(5) The Defendant does not by virtue of the 2002 Act have any title to the disputed land. If she applied for a determination of the boundary so as to include it, the Claimants would have a complete defence to that application. It is they who have title to the disputed land by virtue of having obtained it under the 1980 Act before Brook Barn was registered.

(6) The Claimants are therefore entitled to be registered as the proprietors of the land up to the Fence and to have the boundary to their properties determined under section 60 to the 2002 Act to reflect that.”

73. As this passage from Mr Morris's Skeleton Argument makes clear, the 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 Mr Gale'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: see [99] and [100]. Mr Morris 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: see [167]. But as Mr Morris 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 Mr Morris's 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.

## J. Conclusion

77. There is no appeal against the Judge's findings that the Appellants' occupation of the Strip was not obvious on a reasonable inspection and the Appeal must, therefore, be

dismissed. Although the Appellants may consider the Judge's decision to be a harsh one given his finding that they had acquired title to the Strip by adverse possession even before first registration, that decision cannot be faulted as a matter of law. Moreover, I consider there to be no injustice in that decision. The Appellants had a reasonable time to apply to register their title to the Strip during the transitional period and could have made an application under Schedule 6 to HM Land Registry (although I express no view on whether such an application would have succeeded). Furthermore, and as Mr Gale submitted, Parliament addressed the anomaly created by section 70(1)(f) in the LRA 2002 and struck the balance between the interests of a squatter and a purchaser of a registered estate by reference to apparent occupation. The Judge clearly upheld that principle in reaching his decision.

## **VI. The PTA**

### **K. No 25**

78. Mr Morris addressed me first on Ground 3. He reminded me that the parcels clause in the 1988 Conveyance did not define No 25 by reference to a plan and a description limited to the property "situate and known as" No 25. He also reminded me that the Judge had accepted Mr Wrights' evidence about the meeting with Mr Crowden and the physical descriptions given by all of the Appellants. He submitted that the Appellants had a real prospect of persuading an Appeal court that the Judge erred as a matter of law in excluding that evidence because it formed part of the factual matrix and placed too much reliance on the 1982 Conveyance.

79. I am satisfied that Ground 3 has a real prospect of success. In particular, I am satisfied that the Appellants have a real prospect of persuading the Appeal court that the knowledge of Mr Wright and Mr Crowden formed part of the factual matrix. Put simply, they were neighbours who both knew the physical features and the sale took place between the executors of one neighbour to the other. The absence of a plan or a detailed physical description can be explained on the basis that they both fully understood what land was being sold. The extent to which the Judge could and should have placed reliance on that evidence independently of his findings in relation to No 26 will be a matter for further argument. But I grant permission to appeal.

### **L. No 26**



80. The Judge considered all of the relevant evidence and placed most reliance on the Brook as the natural boundary between No 26 and Brook Barn. Mr Morris criticised him for failing to give any weight to the Fence, the Bridge and the subsequent conduct of the owners. I am not entirely satisfied that the Appellants have a real prospect of persuading the Appeal court that it is entitled to interfere with these findings of fact. But in my judgment, the fact that I have granted permission in relation to No 25 provides another compelling reason why I should grant permission to appeal. In my judgment, the argument on Ground 2 will not significantly increase the length or costs of a second hearing.

**V. Disposal**

81. I dismiss the Appeal on Ground 1 but grant permission to appeal on Grounds 2 and 3. I will hand down this judgment remotely and adjourn the hearing of any consequential matters until the further hearing of the appeal on Grounds 2 and 3. At the hearing of the PTA Mr Morris suggested that I should stay the hearing of Grounds 2 and 3 until any application for a second appeal has been determined by the Court of Appeal. However, given the outcome the parties may wish to list Grounds 2 and 3 and any consequential matters for further hearing immediately. I invite the parties to agree a form of order and a time estimate and to liaise with each other and the Court to list the further appeal on Grounds 2 and 3. If either party wishes to apply for a stay in the meantime I will deal with that application on paper.