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Case No: PT 2018 000472

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (CHANCERY DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 May 2019

Before :

Mark Anderson QC sitting as a judge of the High Court

Between :

GLYNIS ELIZABETH STANNING	**Claimant**
- and -	
DAVID REGINALD BALDWIN	
KATHARINE MARY FULLARTON BARBER	**Defendants**

Philip Sissons (instructed by Iliffes Booth Bennett Solicitors) for the claimant
Paul Wilmshurst (instructed by Allan Janes LLP) for the defendants

Hearing dates: 9, 10, 11 & 15 April 2019

JUDGMENT

Mark Anderson QC :

Background

1. The claimant owns **The Coach House**, which borders the north-east corner of Gerrards Cross Common (**the Common**). Access to the Coach House is by an unsurfaced and unadopted track over the Common (**the Track**). I visited the site on the first morning of the trial in the company of counsel.

2. The defendants, brother and sister, are the lords of the Manor of Chalfont St Peter, and freehold owners of the Common. They acquired their title in 1986 from their father, who bought it in 1962 for £100.

3. The dispute concerns (i) the position of the legal boundary between the Coach House and the Common, (ii) the right of way over the Track and (iii) the existence and extent of an easement of drainage in favour of the Coach House to connect into a drain beneath the Common.

The Coach House

4. The Coach House is accessed by a gateway at the south-western corner of its plot. It is the northernmost of a number of houses accessed by the Track, which connects with an adopted road to the south. Both the adopted road and the Track are known for postal purposes as West Common.

5. After the gateway to the Coach House, the Track narrows to a pedestrian footpath and continues northwest towards Bulstrode Way. On the other side of the Track lies Latchmoor Pond.

6. There is a man-made earthen slope between the Common and the Coach House. The parties refer to it as the **bund**. On top of it (for part of its length) is a fence which I shall call the **paling fence**. The gate between the Coach House and the Track was removed in 2018, though its posts remain (the **old gateposts**). These are roughly in line with the paling fence.

7. To the north of the Coach House lie 55 and 57 Bulstrode Way, originally named **Harewood Lodge** and **Rokeles** (now called Skene Lodge, but I will use the original name). Harewood Lodge was the first of the three properties to be built, in 1906. Its plot included all the land upon which it, Rokeles and the Coach House now stand (the **Harewood plot**). Within this plot is an outbuilding (**the old coach house**) which served originally as a coach house for Harewood Lodge, later as a triple garage and since about 2008 as a residential annexe to the Coach House. The Track was used to gain access to the old coach house since Harewood Lodge was built in 1906.

8. In 1968 the claimant's father (Mervyn Jeanes, a property developer) purchased Harewood Lodge and moved in with his family, including the claimant. In 1969 he built Rokeles within the Harewood plot. He sold Harewood Lodge (but not the old coach house) and the family moved into Rokeles. Thereafter the gate from the Track was used for access to Rokeles, but not for Harewood Lodge.

9. In 1978 Mr Jeanes built the Coach House near to (and named after) the old coach house. He and his family moved into it and sold Rokeles. The Track has always been the only means of vehicular access to the Coach House. Harewood Lodge and Rokeles are both now accessed from Bulstrode Way.

10. Mr Jeanes died in 2008 and the claimant inherited the property.

The dispute

11. In July 2017 the claimant obtained planning permission to demolish the Coach House and to erect four terraced houses, with underground parking for nine cars. Access will continue via the Track.

12. Mr Baldwin raised concerns about the proposed development in 2017, after planning permission had been granted. Negotiations ensued, in which without prejudice privilege has been waived. The parties' recollections of the negotiations differed slightly, but it is common ground that the defendants offered to grant rights for the purpose of the development, in return for a payment of £100,000. Mr Baldwin says that when he realised that the development would encroach onto the Common he tried, unsuccessfully, to negotiate an increased payment.

13. I will briefly set out the three issues before turning to the evidence.

The Boundary issue

14. I shall use the term **Boundary** to mean the legal boundary. Otherwise references to a boundary are to physical boundary features.

15. The defendants assert that the Boundary is correctly shown on the registered title plan to the Common. They have not marked it out on the ground but say that it lies approximately in the position of the paling fence and old gateposts.

16. The claimant says that the paling fence and old gateposts do not mark the Boundary, her version of which is based on her title plan. Her surveyor marked out this version on the ground in 2018. It lies to the west of the paling fence and old gateposts. The claimant caused a new fence (**the blue fence**) to be erected in the position marked by the surveyor, and removed the original gate (but not the old gateposts or the paling fence). The claimant says that the blue fence marks the Boundary.

17. The parties' positions for the Boundary differ by about 2 metres.

The right of way issue

18. It is common ground that the claimant as owner of the Coach House has a private right of way over the Track on foot and with vehicles. The Track is the sole means of vehicular access to the Coach House and the right of way arose by prescription, based on use since Harewood Lodge and the old coach house were built.

19. The claimant seeks a declaration that the right of way is sufficient to accommodate the construction and subsequent use of the intended development. The defendants say (in paragraph 27 of the defence) that the right of way is

> *limited to the use of a single dwelling and that the intended use of the right of way would materially increase the volume of traffic over what is an unmade up track over the Common, a local beauty spot registered as common land under the Commons Registration Act 1965 over which the public enjoy recreational rights. The intended usage would effect a radical change in the character of the Common and the Track and would impose a substantial increase in the burden on the Common, materially interfering with the rights of the Defendants and the public to enjoy this common land as a recreational space.*

20. This was elaborated in a Part 18 response to emphasise that the Track only serves a single house at present, and that its use will be multiplied if four dwellings are built. It was said that this increased use will damage the track, which could only be made suitable for it by upgrading its surface, which the claimant has no right to do.

The drainage issue

21. The claimant intends to connect the drains of the new houses to the existing drains underneath the Coach House, which are already connected to drains underneath the Common, through which she claims a right of drainage.

22. The defendants do not accept that the claimant has any drainage rights. They say that use of the drains under the Common has not given rise to a prescriptive easement because it was either permissive or secret, or perhaps both at different times.

The evidence

23. The evidence takes the form of photographs, maps, manor court records and other documents, supplemented to a limited extent by largely uncontested evidence from the parties. Where I mention such evidence, I accept it.

24. I also heard expert evidence (Mr Paul Gough, a chartered surveyor, and Mr Tristram Hambly, an engineer, for the claimant; and Mr Steven McLaughlin, a chartered surveyor, for the defendants).

The Ordnance Survey County Series map, 1899 edition (1:2500)

25. This edition of the OS map pre-dates Harewood Lodge and Bulstrode Way, but shows the Track (or a predecessor version of it). It shows that the land which later became the Harewood plot was then part of an agricultural field (number 112), bounded to the north, west and east by other fields, and by the Common to the southwest. To the south of Field 112 was Waterside House, which still stands today. It is common ground that Field 112 and the Common were already in separate ownership by this time.

26. The map shows the boundary of Field 112 as a straight black line. Mr McLaughlin thinks that this boundary was probably a hedge, being the norm for local agricultural land at the

time. The line on the map would represent the centre of it, without indicating its width. The map shows a gap between the boundary and the Track.

Manor court records 1906 to 1909

27. The defendants adduced records of the court of the lord of the Manor of Chalfont St Peter between 1906 and 1908. The following entries are relevant. Though not all relate to the Common, they all concern the Manor of which the Common forms part:

11 January 1906

It was also presented that the representatives of late Mr A Fass have opened a gate on the Gold Hill Common, which is used by tradesmen and others, and it is assessed at 6d.

It was also presented that the Amersham, Beaconsfield and District Waterworks Company Limited have encroached on Gerrards Cross Common by laying its pipes and mains across common within this manor, and it is hereby assessed at the annual quit-rent of £5.

10 January 1908

And at this court it is also presented that encroachments are continued by the following persons respectively, namely... the Amersham, Beaconsfield and District Waterworks Company Limited ...

And at this court it is also presented that John Green, the owner of Holly Tree Farm and House occupied by Darvill on Austin Wood Common has made an encroachment by laying a service pipe from the water main in Bull Lane to his said premises, and the same is ordered to be taken up, unless the said John Green pays the annual rent of 5s [later halved as recorded in March 1909]

...

And at this court it is also presented that Frank P Knox of Seaton Cottage... has made an encroachment on the lord's waste at Gerrards Cross Common opposite his said house by laying a water supply pipe from the mains of the Amersham, Beaconsfield and District Waterworks Company Limited to his said house, and the same is ordered to be taken up, unless the said Frank P Knox pays an annual rent of 1s 6d for the easement.

23 March 1909

And it was also presented that Leonard Percy Kerkham had encroached upon Austin Wood Common by widening a ditch three feet and taking in common land all round his house there.

...

And it was also presented that James Langstone had encroached on Gerrards Cross Common by enclosing a small piece of wasteland on the

frontage to his new houses there, and the same is assessed at an annual rent of 1s.

The 1907 Plan

28. This plan is dated 1907 and is entitled "Plan of Building Sites at Gerrards Cross, Bucks, for sale". It shows the land along the new Bulstrode Way, including Field 112, divided into building plots for sale. The Harewood plot was marked as already sold, and Harewood Lodge is shown as already built. The plan shows its boundary with the Common as a straight line with a significant gap between it and the Track. The boundary is represented by a thick line which Mr McLaughlin interprets as a hedge.

The OS County Series map 1925 edition

29. This differs from the 1899 edition in that the gap between the boundary and the Track has disappeared. The map shows the boundary as curving outwards towards Latchmoor Pond. It appears to have moved outwards since 1899.

30. It appears from this map that the development of Bulstrode Way involved the redirection of the Track. The alteration begins at a point just north of the gateway to Harewood Lodge, where the new Track veers to the left of the position of the old Track, nearer to Latchmoor Pond.

The OS County Series map 1938 edition (1:2500)

31. This again shows a curve in the boundary, which coincides with the edge of the Track for most of their shared length. The clear gap between the boundary and the Track, as shown in the 1899 edition, is absent at the southern end.

Photographs c.1950 and c1960

32. There are two photographs from an online archive dated to c.1950 and c.1960. Both show the bund with a hedge on its summit, roughly where the defendants say the Boundary lies. Also visible is a bench, in approximately the same position as a bench stands today. The reproductions which I have of these photographs are of poor quality, but the hedge appears to be neatly trimmed, with an even top surface. It appears mature and thick. In the c.1960 photograph, to the north of the bench the hedge appears to encroach down the bund.

33. To the south of the bund is a gate. This is shown in the c.1960 photograph. It is difficult to discern much detail, but it appears to be tall and close boarded. It is set back and lies slightly to the east, further from the Track than the front of the bund. In both photographs the hedge and the bund give the appearance of a single, composite boundary feature. My impression, from small photographs taken from some distance, is that the front of the bund and the gate mark the physical boundary.

1952: application for first registration of Harewood Lodge

34. In 1952 the owner of Harewood Lodge applied for first registration of its title. Her solicitor's statutory declaration in support of the application stated that she had been in

possession since the date of a conveyance dated April 1940. It also stated that the title deeds to Harewood Lodge had been destroyed by enemy action in 1941.

35. The application plan was based on the 1938 edition of the OS map. The application was supported by a certificate that "The boundaries of the said land are defined by fences, walls or other physical features". The application was accepted and title was registered. The resultant title plan was also based on the 1938 OS map. It therefore shows the boundary as coinciding with the edge of the Track for most of its length, the two features only parting at the northern end of the boundary.

OS maps published in 1962 and 1976

36. The 1962 map is the first edition of the OS at 1:1,250. It shows the boundary further to the east than the 1938 and 1925 editions, and both the Track and the boundary are shown running parallel in a straight line. This was the position also in the 1976 edition, which is the latest I have. These two maps therefore show the boundary closer to the position favoured by the defendants. Just as the boundary appears to have moved outwards between 1899 and 1925, it appears to have moved back again between 1938 and 1962.

1969

37. Rokeles was constructed in 1969. The architectural drawings show an existing drain from Harewood Lodge into which the new Rokeles was to connect. This was shown to connect into a pipe leading out of the plot and underneath the Common.

1978

38. The claimant has photographs taken during the construction of the Coach House. These show an excavator with earth piled up near the top of the bund. The claimant recalls that excavated earth was spread on top of the bund, raising its height.

39. The then owner of the Common, the defendants' father Mr Baldwin, wrote on 17 November 1978 to the claimant's father, to assert that the gate between the Coach House and the Common was unlawful. The allegation echoed the complaint made about Mr Fass's gate in 1906 by the defendants' predecessor. Mr Jeanes rejected the complaint and there is no evidence that Mr Baldwin pursued it further.

40. It is apparent from photographs taken in 1971 and 1978 that the neat hedge depicted in the c.1950 and c.1960 photographs had given way to thick vegetation by the 1970s. It is unclear whether the hedge had been subsumed or removed. The claimant could not remember.

Application for first registration of title to the Common

41. This application was made by the defendants in November 1990. The plan in support was based on the 1938 edition of the OS. The application for registration was accepted, but the Land Registry used the more up-to-date 1976 OS map for the file plan. This resulted in the Common's title plan showing the boundary further east than is shown in the title plan for the Coach House.

2008

42. In 2008 the claimant inherited the Coach House and moved in with her family. She caused the paling fence to be erected near the top of the bund to keep in the family's dog. She told me that she chose this location for convenience, and not because of any pre-existing boundary feature or any belief that it represented the position of the Boundary. At the conclusion of his cross examination I reminded Mr Wilmshurst that he had not challenged this evidence. He told me that he did not wish to do so.

43. Also at about this time the claimant undertook work to the old coach house, to turn it into residential accommodation as an annexe to the Coach House. The Track was used for construction traffic.

The Boundary issue

The available material

44. The usual way to resolve a boundary dispute is to construe the disposition by which ownership of the properties was first separated. Here, however, the title deeds to Harewood Lodge were lost; and no one knows when ownership of the Common and the Harewood plot were separated. Therefore the only way of locating the Boundary is to infer where it was originally set by reference to the evidence outlined above about the nature and location of boundary features over the years.

Expert evidence

45. The parties each instructed a surveyor. For the claimant, Mr Gough plotted the physical boundary features as shown on the 1952 title plan onto other maps and later onto the ground, and provided a report about what he had done. His evidence did not extend to the interpretation of historical boundary features. For the defendants, Mr McLaughlin did not undertake a topographical survey and did not prepare any plans. He relied on plans prepared by his colleague Mr James Human, a mapping technician. Mr McLaughlin concentrated instead on the historical evidence and physical features, drawing on his expertise and knowledge of history and topography to provide an opinion about where the Boundary lies.

46. Mr Gough was unexpectedly unable to attend the trial. I admitted his report into evidence without objection from Mr Wilmshurst. I remind myself that Mr Wilmshurst did not have the opportunity to cross examine him and that I must be cautious when assessing his evidence.

Mr Gough's evidence

47. Mr Gough undertook a topographical survey in 2015. In 2018 he prepared an overlay of 1952 title plan onto his topographical survey. A version of this was annexed to the particulars of claim. Later in 2018 Mr Gough staked out on the ground the position of the boundary shown on the title plan. His evidence was that this followed the front of the bund. Subsequently the claimant caused the blue fence to be erected by reference to Mr Gough's stakes. In 2019 Mr Gough prepared another overlay with more details from his topographical survey. He confirmed that the blue fence was within the stakes which he had set, and

therefore within the boundary on the title plan (and therefore also on the 1938 OS map upon which the title plan was based).

Mr McLaughlin's evidence

48. Mr McLaughlin said that physical features are often the best indication of the parties' intentions, and that inaccuracies can arise in historic plans plotted by "relatively crude methods". Of the physical features to be considered in this case, however, he dismissed the "relatively recent" bund as irrelevant. He would have placed more significance on the paling fence, but concluded that "the earliest plan is the best indication of the true position of the legal boundary." However, although the earliest map mentioned by Mr McLaughlin was the OS 1899 edition, he placed more emphasis on the 1907 Plan (which also featured heavily in Mr Wilmshurst's submissions).

49. Mr McLaughlin said that it would have been usual practice for the boundary to have followed a straight line because this was agricultural land. This favoured the position as portrayed in the Common's title plan over the Coach House title plan. He said that the movement of the boundary which appears to have occurred between the 1899 and the 1925 OS editions and between the 1938 and 1962 editions probably reflected the waxing and waning of a hedge or undergrowth.

50. Mr McLaughlin did not mark out on the ground the position of the Boundary. However in reliance on the 1907 Plan he concluded that there was a significant strip of land between the Track and the Boundary, wider than the strip which has been left in front of the blue fence.

51. One of Mr Human's plans plotted the position of the blue fence onto the 1938 OS map and, contrary to Mr Gough's view, suggested that the blue fence was further west than the 1938 map boundary.

Counsel's submissions

52. Mr Philip Sissons appeared for the claimant. He submitted that although the general boundaries rule did not permit reliance on his client's title plan to determine the Boundary, the 1938 OS map itself was elevated to the status of a title document because the application for registration was based on it, and was accepted. This had the effect (under section 69 of the Land Registration Act 1925) that the registered proprietor had title to the land as registered which, in the circumstances, meant the plot shown in the 1938 OS map. Thus, he said, the claimant is entitled to a declaration that the boundary is in the position shown on that map. There is therefore no need to consider all the historical maps and other evidence pre-dating 1952. The registered title is what matters.

53. Mr Sissons' alternative submission was that the physical features on the land are the safest guide to the position of the boundary. He relied on the bund as the oldest surviving feature. He invited me to the hedge and ditch presumption as approved by the House of Lords in *Alan Wibberley Building Ltd v Insley* [1999] WLR 894:

> *No man, making a ditch, can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw*

> *the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on top of it...*

54. Mr Sissons invited me to find that the bund was created in 1906 when Harewood Lodge was built. He says that excavated soil which formed the bund cannot have been deposited onto the Common, since that would have constituted a trespass, so the bund must have been created on the Harewood Lodge side of the boundary.

55. Mr Paul Wilmshurst appeared for the defendants. He refuted Mr Sissons' argument based on section 69 on the basis that it offends the general boundaries rule.

56. As to the historical evidence of physical features, Mr Wilmshurst supported Mr McLaughlin's opinion that the oldest plans provide the most assistance. He developed this submission by reference to the 1907 Plan which shows the boundary as a straight hedge, with a discernible gap between it and the Track. He submitted that straight line boundaries are the most likely in an agricultural setting and that the curved line shown in the 1938 map is unlikely to accurately describe the position of the boundary.

57. Mr Wilmshurst invoked measurements scaled from the 1907 Plan to show that the old gateposts marked the boundary on that plan. Mr Wilmshurst also relied on the c.1950 and c.1960 photographs as consistent with the 1907 Plan. Mr Wilmshurst argued that the bund is not good evidence of the boundary's position. He says it is pure speculation that it was created in 1906. He says that anyway I should conclude that the original boundary feature was a hedge as shown on the 1907 Plan which he says is likely to have been present since at least the 19th century.

Discussion

58. I reject Mr Sissons' argument based on section 69 of the Land Registration Act 1925. Mr Wilmshurst is right that the argument runs into insuperable difficulty with the general boundaries rule (now contained in section 60 of the Land Registration Act 2002):

> *(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.*

59. This not only means that the claimant's title plan does not define the Boundary. It means that registration left the Boundary undefined.

60. I must therefore look to the historical evidence to ascertain what physical boundary features were present, and where, and to decide what inferences can be drawn. As to that, I would mention six points.

i) OS maps can be relied on to depict boundary features within accepted tolerances. Mr McLaughlin mentioned a tolerance of ±2.3 metres (in relation to the 1:2500 OS maps), which is about the same as the extent of the parties' disagreement as to the position of the Boundary. However he added that even ±2.3 metres cannot be guaranteed: it is not possible "to state definitively that

this means that the distance scaled between two points on a plan will be within 2.3m of the same distance when measured on the ground".

ii) However that does not mean that it is unsafe to rely on maps in deciding this dispute. They can provide very helpful evidence.

iii) I agree with Mr McLaughlin that earlier maps have the advantage over later ones that they are closer to the time when the titles were separated.

iv) However I also agree with him that earlier plans may suffer from having been plotted, as he put it, by "relatively crude methods".

v) I take into account Mr Gough's point that OS maps rendered at a small scale can show boundary lines straighter than they are on the ground.

vi) I also note the Land Registry Practice Guide 40, "*Living boundary structures such as hedges can be prone to a certain degree of movement: for example, if a hedge is left untended it might take root where it touches the ground and become very wide, making its original line hard to discern. So even if it is clear that the legal boundary ran along the hedge, identifying this boundary on the ground may become very difficult.*"

61. Mr McLaughlin's evidence was that the 1907 Plan should be accorded particular weight because it effectively formed a 'paper title'. I found this evidence surprising and unconvincing. I consider the 1907 Plan to be of little assistance. We do not know who drew it, nor under what conventions as to accuracy. Mr McLaughlin said that it appears hand-drawn and not OS-based. There is no evidence that it was used for the purpose of any documents of title, and its author was obviously not concerned with the issues now before the court or anything to do with them. It depicts a number of building plots fronting Bulstrode Way, but very little else. Its author's attention was focussed on the building plots, their dimensions and their positions relative to each other. Few surrounding features are shown. I am unpersuaded that the position of the Track relative to the neighbouring land would have been of any significance to anyone reading the plan, or to its author. Given that it was a plan associated with an intended development, we do not even know whether the boundary features it shows were actually present on the ground or reflected the developer's intentions.

62. Mr McLaughlin himself pointed out some of the deficiencies of the 1907 Plan when answering written questions. In particular he concluded that the plan was either not drawn to scale or had been distorted in copying. He rejected an invitation to draw conclusions by scaling from this plan. Under cross-examination Mr McLaughlin again accepted its limitations and in re-examination declined to place any reliance upon it for the purpose of attempting to measure the boundary.

63. As to physical features, Mr McLaughlin concluded that the bund was irrelevant. He accepted that it is a man-made feature but said that it was "relatively recent". However neither party was able to suggest any occasion for its creation except for the construction of Harewood Lodge in 1906. Mr Wilmshurst submitted that it was pure speculation that the bund was made at that time, and that it might just as readily have been made from some other operation such as dredging of Latchmoor Pond. However it is a known fact that Harewood

Lodge was constructed in 1906, and that fact provides a more than speculative possibility for the origin of the bund. There is no evidence of any other operation in the vicinity, whether dredging or otherwise; and therefore such other possibilities are properly described as purely speculative. In the absence of any evidence of any other operation which might explain the existence of the bund, I conclude on the balance of probabilities that the bund is likely to have been formed at the time of construction works in 1906. Mr McLaughlin accepted this in cross examination.

64. Mr McLaughlin was under the misapprehension that the position of the paling fence provided "far more convincing evidence" of an intention to mark the boundary. This was based on the defendants' understanding, as recorded in a Part 18 response, that this fence had been present for 40 years. However Mr Wilmshurst did not challenge the claimant's evidence that that fence was erected in 2009 without reference to the position of the Boundary. In fairness to Mr McLaughlin, he was not aware of that evidence when writing his report, but his evidence is undermined by it.

65. The bund is therefore the earliest known physical feature. When constructing Harewood Lodge, its owners cannot have had less information than is available today, and are likely to have had more. There is likely to have been a pre-existing boundary feature, probably a hedge. Both the building owner and the owner of the Common are likely to have paid careful attention to the position of the Boundary at the time of creation of the bund. I place some reliance on the manor court records in this respect. These suggest that the lord of the manor was vigilant about encroachments. I can see no reason why the owner of the Harewood plot would have wanted, or would have been allowed, to dump excavated soil onto the Common. The Harewood plot was of more than adequate size to accommodate it and excavated soil could have been deposited within it.

66. My reasoning is analogous with the reasoning behind the hedge and ditch presumption, but there is no ditch here and I have not made any presumption. My conclusion is based on inferences which I have explained. I appreciate that the dumping of soil to form a bund is not so invasive as digging a ditch, and it is not impossible that the owner of the Common would have overlooked the creation of a bund on his land. But landowners tend to prefer that their neighbours keep within their own borders and the manor court records do not suggest that the lord would take a sanguine view of any form of encroachment. Anyway I have to decide this issue on such evidence as there is, and it is the early physical feature of the bund that I find the most helpful.

67. Insofar as the 1899 or 1962 OS maps, or the 1907 Plan, suggest that the boundary feature then lay nearer the present-day top of the bund, I find those materials less persuasive than the considerations so far discussed. I have already explained my mistrust of the 1907 Plan. The 1899 OS map also has the limitation of being created when techniques were, as Mr McLaughlin says, relatively crude; and OS maps of that scale do not always show every physical feature in exactly the right place. I note that it was the defendants' pleaded case that the claimant's title plan (which reproduces the 1938 OS map) was "poor" because of its scale, and unreliable to show the location of the Boundary (defence paragraph 4, reply to defence to counterclaim paragraph 4.4). I agree, but the same goes for the 1899 OS map as well. In fact that map appears (from an overlay onto the modern OS map, prepared by Mr Human) to plot Latchmoor Pond, the Track and the boundary further east of where they are shown on the

modern map. Although the Track may well have moved, there is no evidence that the pond has moved. I do not think that the 1899 OS map provides reliable evidence of the position of the Boundary. I prefer the physical evidence in the form of the bund.

68. It is possible, as Mr McLaughlin says, that the movement of the boundary which appears to have occurred between the 1899 and 1925 OS maps might reflect growth of a hedge or expansion of undergrowth, causing the surveyor to plot the boundary nearer to the Track; or it may be that the 1938 surveyor just interpreted the physical boundary differently from his predecessor. The c1950 photograph certainly suggests to me that the bund and hedge form a composite boundary feature and Mr McLaughlin agreed in evidence that it was feasible that a person looking at the c1950 photograph would interpret the boundary as the front of the bund. I agree with Mr McLaughlin that these changing features make it unsafe to place much reliance on the 1925 or 1938 OS maps. The same is true of other editions which show a larger gap between the boundary and the Track. It is the man-made underlying bund which, in my judgment, provides better evidence.

69. I have taken into account Mr McLaughlin's evidence that an agricultural boundary such as this was likely to be formed by a straight line, and that it is shown as a straight line on the 1899 and other editions of the OS. The Boundary as now plotted by Mr Gough is not a straight line. I would conclude that either the Boundary is a straight line which includes all of the bund, or the Boundary was for some reason never straight, despite its appearance in most of the maps. The first possibility would mean that the curved line of the 1938 OS, and therefore the 1952 title plan, and therefore the blue fence, all plot the boundary too conservatively from the claimant's perspective. There is an apparent area of no man's land shown at [3/119] which might allow for this possibility. But either way, I am satisfied that the bund is within the claimant's land.

70. I have considered whether the bund itself, as opposed to the vegetation upon it, may have moved over the years since it was constructed in 1906, but there is no evidence of this. I accept the claimant's evidence that her father's contractors deposited earth on top of the bund in 1979, but that would have added to its height, not the position of its front edge. There is no other evidence of such movement, and Mr McLaughlin did not suggest that it had occurred.

71. I have also taken into account that the bund does not extend along the entire length of the boundary. There has always been a gate at the southern end of the boundary, and the bund for obvious reasons does not extend in front of it. The bund ends west of northern gatepost. This is consistent with the early photographs, and with the more recent ones taken before erection of the blue fence, where the gates were set back (eastwards) from the front of the bund. This gives rise to the question whether there is a kink in the Boundary, so that it turns east at the end of the bund, until it meets the historical position of the gates, and then turns south along the line of the gates until it meets the boundary with Waterside House.

72. I see no reason why the Boundary would suddenly change direction in this way unless it was following some physical feature on the ground. Apart from the bund, there is no such physical feature; and the bund was not there when the Boundary was created. It is more likely that this kink was created with construction of the bund. We know that a hedge was planted on top of the bund, and it would have been aesthetically and practically satisfactory to place the gates in line with the hedge. I therefore think it likely that the pre-1906 physical boundary

followed a straight line, which was also Mr McLaughlin's view. This is likely also to have represented the legal Boundary.

73. Having concluded that the bund lies within the legal boundary, I turn to address the claimant's claim for a declaration that the legal boundary is as shown on her title plan.

74. The defendants challenged Mr Gough's overlay of the topographical survey with the title plan on the basis of a plan prepared by Mr Human. Mr Human overlaid the line of the blue fence onto a copy of the 1938 OS map. The copy with which I was supplied is barely legible, but I am told that it shows that the blue fence lies just outside the boundary as shown on the 1938 and title plans.

75. Some parts of Mr Gough's plan are obviously distorted and the distortion has not been corrected. However this problem does not affect the lines with which I am concerned, specifically those which show the title plan. Mr Gough explained his technique in written answers, and no criticism has been made of the technique as so described. In cross examination, Mr McLaughlin acknowledged that the scaling up and down of plans would produce distortions, but he was unable to advance any reason why that would be more of a problem with Mr Gough's plans than with Mr Human's.

76. Mr Gough is an experienced surveyor acting within his expertise and his report contains a confirmation that he has complied with his duties as an expert witness. Mr Human is also experienced, but he has not made an expert's declaration and the defendants did not have permission to rely on his evidence. I doubt that permission for an additional expert would have been granted even if sought, which underlines the undesirability of attaching weight to such evidence now. I have borne carefully in mind that Mr Gough was not called to give sworn testimony to enable Mr Wilmshurst to test his evidence on this point, but neither of course was Mr Human.

77. In any event, Mr Human's overlay plan is so poorly reproduced in every version I have seen that I could not rely on it as demonstrating that the blue fence lies outside the line of the boundary as depicted in the 1938 plan. I note also that Mr McLaughlin himself did not even mention this point. He deployed Mr Human's plan for another purpose, namely to compare the positions of the boundary as shown on the 1938 and most recent OS maps. Although Mr Human's plan depicts the blue fence, nowhere does Mr McLaughlin say that this demonstrates that it is outside the 1938 OS version of the boundary.

78. For these reasons I accept Mr Gough's evidence that the blue fence and the bund are within the boundary as depicted on the 1952 title plan.

The defendants' claim to title by adverse possession

79. The defendants contend, in the alternative, that they have acquired title to the front slope of the bund by adverse possession. Their pleaded case is that they took possession of the bund for the requisite period by arranging for periodic trimming of its vegetation with the belief and intention of possessing it as owners.

80. In J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419 it was said by Lord Brown-Wilkinson at [40] that

> *there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ('factual possession'); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess').*

81. Mr Wilmshurst reminds me that factual possession by an agent is enough, and that personal possession by the defendants is unnecessary. He also points out that in deciding this issue, I must take into account the nature of the land, and the purpose for which it is commonly used or enjoyed. It is possible to be in possession of rural land by periodic acts of maintenance, without the need for continuous physical presence by anyone. He also urged upon me the particular nature of this land. Though owned by the defendants, the Common is managed by the Town Council under a scheme made pursuant to the Commons Act 1899.

82. The evidence does not bear out the defendants' contention that they arranged for the bund to be maintained. In September 2018 Mr Baldwin emailed the Council to ask *"have the Council from time to time trimmed the hedge and undergrowth between the Stannings' house and the Common?"* That is not a question I would have expected him to ask if the work had been arranged by him and his sister; and the response from the Council was negative: *"I believe we have only strimmed back undergrowth from the footpath in my era from 2016."*

83. Mr Baldwin explained in his second witness statement that all maintenance work has been undertaken by the Town Council *"on our behalf"*. However by a Part 18 response the defendants stated that they did not allege that the Council trimmed the vegetation as their agent. Mr Wilmshurst instead invited me to find that the Council must have maintained the bund lawfully, and therefore with the implied or presumed permission of the defendants. However there is no basis for inferring or presuming that the defendants permitted the Council to maintain the bund if, as I have found, they did not own it. Mr Wilmshurst's submission would only work if his clients were able to give lawful authority for the Council's works.

84. Moreover the extent of the work undertaken by the Council is unproved. I heard no evidence from the Council, and have no evidence at all of any work for any particular period. I can discern no evidence of any intention by the defendants to possess the bund, nor any evidence that they did possess it for any period, let alone for the periods claimed. The claim to adverse possession fails.

The right of way

The parties' submissions

85. In reliance on dicta of Neuberger LJ in *McAdams Homes Ltd v Robinson* [2005] 1 P & C R 30 at [50] to [52], Mr Sissons submitted that in order to defeat the claimant's right to use the easement for the development, the defendants must establish both (i) that the development would involve a radical alteration of the use of the Coach House, and (ii) that this would substantially increase the burden on the Common. He said that the defendants could not satisfy either requirement.

86. Mr Wilmshurst submitted that it is not the right test. In reliance on dicta of Neuberger LJ in the same case at [27], he submitted that excessive use is not permitted even if there is no

radical alteration in the character of the dominant tenement. He submitted that the proposed use will be excessive because it will infringe public rights over the Common, in particular:

i) Byelaws made in 1981 pursuant to the Scheme mentioned in paragraph 83 above, in particular that no person shall wilfully obstruct, disturb or annoy any person engaged in the lawful use of the Common.
ii) Rights of access for air and exercise (section 193(1) of the Law of Property Act 1925).
iii) The prohibition against works which impede access over common land or which involve resurfacing it (section 38 Commons Registration Act 1965).
iv) The public footpath over the Track.

87. Mr Wilmshurst says that construction vehicles will necessarily cause obstruction to pedestrians. He further submits that the construction vehicles will damage the surface of the Track, and that it is no answer that the claimant might repair it: an offence under the Byelaws will already have occurred. After the development has been built, he says, the increase in use will require walkers to be constantly vigilant for cars. He points out that there are no alternative paths over the Common. All this, he says, connotes excessive use.

The McAdams case

88. In *McAdams Homes Ltd v Robinson* [2005] 1 P & C R 30 Neuberger LJ reviewed the authorities dealing with intensification of use of an easement following a change in the dominant tenement. He observed (at [54]) that the cases were "not entirely consistent and clear", so he analysed them in order to find "a principled, consistent and coherent basis" for determining the issue whether a new use is permitted.

89. He began by analysing the authorities and the principles to be derived from them in four categories:

> *24. First, where the dominant land ... is used for a particular purpose at the time an easement is created, an increase, even if substantial, in the intensity of that use, resulting in a concomitant increase in the use of the easement, cannot of itself be objected to by the servient owner ...*
>
> *27. Secondly, excessive use of an easement by the dominant land will render the dominant owner liable in nuisance ...*
>
> *28. In most cases where the extent, and even the nature, of the grant is in dispute, the question of excessive use will be unhelpful, because one can only determine whether the use is excessive once one has decided the extent of the grant. However, there will obviously be cases where the user has been self-evidently excessive. An example, in relation to drainage, would be the case where, after the acquisition of the easement, the dominant owner has substantially intensified, or altered, the use of his property with the result that the liquid being discharged from the land is increasing to such an extent that is causes the drain to overflow. ...*
>
> *29. Thirdly, where there is a change in the use of, or the erection of new buildings on, the dominant land, without having any effect on the nature or*

> *extent of the use of the easement, the change, however, radical, will not affect the right of the dominant owner to use the easement. ...*
>
> *34. Fourthly, there are a number of cases which bear on the converse question, namely the effect of a change in the use of the dominant land which results, or may result, in an alteration in the manner or extent of the use of the easement.*

90. Neuberger LJ did not offer a summary of the principles to be derived from the many cases he discussed under this fourth category, except to say at [37] that

> *It seems to me that the determination of such a question in each case must depend upon the facts of the case, and must inevitably involve a question of degree*

91. Neuberger LJ then went on to discuss how the authorities which he had reviewed were to be applied to the case before him:

> *49. The issue before the judge was whether the drainage easement, impliedly granted in 1982 at a time when the dominant land was used as a bakery, could continue to be enjoyed following the redevelopment of the dominant land for the purpose of two residential houses.*
>
> *50. The authorities discussed above appear to me to indicate that that issue should have been determined by answering two questions. Those questions are:*
>
> *i. whether the development of the dominant land, i.e. the site, represented a "radical change in the character" or a "change in the identity" of the site ... as opposed to a mere change or intensification in the use of the site...;*
>
> *ii. whether the use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land...*
>
> *51. In my opinion, the effect of the authorities in relation to the present case is that it would only be if the redevelopment of the site represented a radical change in its character and it would lead to a substantial increase in the burden, that the dominant owner's right to enjoy the easement of passage of water through the pipe would be suspended or lost.*
>
> *52... The satisfaction of only one of the two requirements will not, at least on its own, be sufficient to deprive the dominant owner of the right to enjoy the easement, in light of the first and third principles which I have suggested can be extracted from the cases. However, where both requirements are satisfied, the dominant owner's right to enjoy the easement will be ended, or at least suspended so long as the radical change of character and substantial increase in burden are maintained.*
>
> *53. I do not consider that this analysis is called into question by the decision of this court in Ray v Fairway. Leaving on one side the point that it was a case concerned with a rather different sort of easement, it seems to me that, on analysis, it is consistent with the approach I have suggested. It would not appear that the building work which had been carried out on the dominant land resulted in there being a radical change in its character. In*

> *those circumstances, the servient owner could only satisfy one of the two requirements I have identified, namely a substantial increase in the burden on the land... He therefore had to rely on what I have identified as the second principle to be derived from the cases, namely that the extra burden on the servient land resulting from the development of the dominant land represented excessive use of the easement. The passages I have quoted from the judgments in the Court of Appeal were ultimately concerned with the question of whether, in relation to the easement of support, the extra burden imposed by the development of the dominant land resulted in the use of the easement of support (if one may put it that way) being excessive.*

92. I have quoted at length from the judgment of Neuberger LJ, but all three members of the court gave judgments; and although the other judges agreed with Neuberger LJ's conclusions, they did not express agreement with his analysis. Peter Gibson LJ gave a short judgment in which he said that he agreed with the conclusion of Neuberger LJ for the reasons given by Sir Martin Nourse; who in turn also agreed with Neuberger LJ's conclusions, for reasons provided in his own judgment. At [79] he formulated the law as follows:

> *(iii) The authorities on rights of way, from the leading case of Williams v James (1867) L.R. 2 C.P. 577 onwards, establish that the right impliedly granted or prescriptively acquired is a right for all purposes according to the ordinary and reasonable use to which the dominant tenement might be applied at the time of the implied or supposed grant.*
>
> *(iv) The authorities on rights of way subsequent to Williams v James fall into two broad categories: first, those where there has been a change in the character of the dominant tenement leading to a substantial increase in the burden of the easement, in which cases use of the right has been restrained; secondly, those in which there has been no such change but a considerable increase in the use of the right, in which cases the use has been allowed to continue.*

Application of these principles to this case

93. Mr Wilmshurst conceded that the claimant's proposed use does not involve a radical change in the character or identity of the Coach House, as opposed to a mere change or intensification in its use. That was a correct concession. Although each case turns on its own facts, it would be difficult to find any basis of distinction between this case and *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P & C R 978 where Brightman J held that a right of way could continue to be used after two houses had been demolished and replaced by a three-storey block of six flats, a bungalow, a house and eight garages. Therefore the defendants' case could not survive the formulation of Sir Martin Nourse quoted above, nor Neuberger LJ's two-stage test.

94. But that is not an end of the matter. Neuberger LJ's test will dispose of a dispute where both its requirements are satisfied, but not necessarily where they are not. As is made clear from the passages quoted from [27]-[28] and [52]-[53], there will be cases where the new use is self-evidently excessive. This is apparent from Neuberger LJ's treatment of *Ray v Fairway Motors* (1969) 20 P & C R 261. A increase in the weight of a supported building may be too great to allow the right of support to continue. Another example provided by Neuberger LJ is

increased use of a drain causing it to overflow. Sir Martin Nourse did not deal with self-evidently excessive use of this kind, no doubt because such considerations did not arise in that case. His sub-paragraph (iii) quoted in paragraph 93 above would however cover the matter. I would therefore conclude that if the proposed development must self-evidently involve excessive user, then the claimant's right of way will not accommodate it. But if this is not self-evident, then Neuberger LJ's two-stage test must be applied (which, for present purposes, is no different from Sir Martin Nourse's formulation).

95. Mr Wilmshurst submitted that the proposed use will be excessive because it will infringe the public rights mentioned in paragraph 86 above. He concentrated in particular on large vehicles using the Track during demolition and construction. This led to considerable debate about the extent to which the owner of a Common might be able to grant an easement to do acts which interfere with the rights of the public. However I bear in mind Neuberger LJ's warning that it is not helpful to complain that use is excessive where the issue depends on a dispute about the extent of the grant. In my judgment the debate I have just mentioned demonstrated that the excessive use which Mr Wilmshurst invokes depends on the extent of the presumed grant. The issue to which it gives rise is whether the defendants could have granted an easement to use the Track for construction vehicles and thereafter for four dwellings. Whatever the answer to that question, the need to ask it shows that excessive use is not self-evident.

96. However I will not leave matters there, because I considered the evidence in detail and have been able to come to a clear view about it.

The evidence of excessive use

97. I should begin by clarifying the issue which I am addressing. I did not understand Mr Wilmshurst to submit that the easement which is agreed to have arisen by prescription could not accommodate use of the dominant tenement for building works. Bovill CJ in *Williams v James* (1866-67) L.R. 2 CP 577, at 580 said that where a prescriptive right of way is proved, the right acquired is "*a right of way for all purposes according to the ordinary and reasonable use to which the land might be applied at the time of the supposed grant*". Mr Wilmshurst did not submit that this would not extend to housebuilding. Indeed it was used for just that in 1978 and in 2009 (to a lesser extent). His submission concentrated on the excessive use that this particular development will involve.

98. I have no expert or lay evidence as to the size, type and number of construction and delivery vehicles which will attend the site, nor as to the likely duration of the works. I can only make a broad assessment from the nature of the development, having seen the documents associated with the planning application and having visited the site for myself. The planning documents reveal that excavated materials will have to be taken off site, and I accept Mr Wilmshurst's point that that will involve a lot of material in view of the excavation for an underground car park. Obviously the demolition of the current dwelling will also generate a lot of waste material. I have considered the Construction Logistics Statement. At section 6 this mentions a "new access road base", but I think that means within the Coach House site, because the purpose of the new base is said to be "to allow delivery vehicles good hard standings from which to unload". At section 7 the Statement again mentions the

provision of hardstanding to ensure the correct conditions "for operations", but again I think this refers to offloading within the site. The claimant does not have the right to change the surface of the Track, and I have seen no evidence that she intends to do so.

99. In my judgment the planning documents come nowhere near making the case that construction of the development will self-evidently involve a public nuisance or anything akin to it; or excessive use.

100.Construction vehicles have used the Track in the past. I have seen photographs of excavators on site in 1978, during construction of the Coach House. Mr Baldwin agreed that large vehicles would have used the Track in 2009 when the old coach house was converted for residential use. He acknowledged that large vehicles are sometimes required for structural or roofing repairs. The defendants do not object to such use of the Track. They did not object to the owners of Walpole House using the Track for construction vehicles recently, and in 2014 they granted an easement in favour of land adjoining Latchmore House which permitted use of the Track by construction traffic.

101.Although the Track has been used for these construction projects over the years, the defendants adduced no evidence to demonstrate that such use caused a public nuisance, or involved a breach of the Byelaws or of other statutory rights. Mr Baldwin said in cross examination that construction vehicles did block the Track when works were being undertaken next to Latchmore House in 2014. But there is no reason to conclude that that will be repeated with the works proposed by the claimant. I accept Mr Sissons' point that proposals for management of traffic flow during construction will need to be approved before development can commence.

102.Moreover the defendants were in some difficulty in suggesting that infringements of public rights will inevitably occur with the claimant's development, given that they were prepared to grant her all the rights she needed if she paid them a sufficient amount of money.

103.For all these reasons I conclude that the evidence does not justify the contention that the construction of this development will self-evidently involve a public nuisance or a breach of the Byelaws or of any other laws in relation to the Track.

104.Neither am I persuaded that the use of the Track for construction vehicles will be bound to damage its surface. I have no expert evidence to that effect, and no lay evidence that this has occurred with past construction works. The defendants disclosed a letter written by Mr Baldwin to the owners of Walpole House in 2016, asserting that their construction vehicles had caused potholes in the Track; but that letter drew a denial and an answer that the potholes predated the construction work. I do not regard that as providing any satisfactory evidence that the Track will be damaged by the claimant's construction vehicles. Even if I were to assume that large vehicles are likely to cause some disturbance to the surface of the unmade Track, that is a long way from concluding that such damage would amount to a public nuisance or to a breach of the Byelaws; or to excessive use.

105.As to the use which will occur in the ordinary course of occupation of the new dwellings, notwithstanding the claimant's evidence that a large number of car users sometimes occupied the Coach House at the same time, I think it likely that use of the Track will intensify once the four houses are built. However the intensification will not be fourfold or fivefold as the

defendants contend in their pleaded case. Six houses currently use the Track for vehicular access. With this development, that will increase to nine. But although the construction of four houses where one now exists will be likely to increase the use of the Track, there is no basis for concluding that that will result in a public nuisance, or a breach of section 193(1) of the Law of Property Act 1925 or of any byelaws. And the bald assertion in the defendants' Part 18 response that the increased use will necessitate resurfacing was not supported by any evidence of any kind.

106.The proposed use will not self-evidently be excessive.

Conclusion

107.For these reasons I find that the claimant is entitled to the declaration which she seeks, subject to two matters. First, this is obviously not a licence to breach the Byelaws or to use the Track in a manner which would create a public nuisance. I have no reason to think that the claimant has any such intention. Second, nothing in this judgment determines the precise dimensions or boundaries of the vehicular easement to which the claimant is entitled.

The right of drainage

The existing drains

108.The position of the existing drains was described by Mr Hambly, whose evidence (as to the capacity as well as the position of the drains) was not challenged and which I accept.

109.The shared 100 mm sewer from Harewood Lodge and Rokeles runs south underneath the garden of Harewood Lodge. The sewer continues south underneath the Coach House where it joins into a larger sewer ("the 150mm sewer") at a manhole in the garden of the Coach House (**MH1**). The 150 mm sewer emanates from the northeast, but does not appear to be in use upstream of the Coach House. These arrangements already existed in 1968, as can be seen from the architectural drawings for the construction of Rokeles.

110.The drain from the Coach House connects into the 150mm sewer at a manhole (**MH4**) a short distance upstream of MH1, within the Coach House plot.

111.The 150mm sewer runs southwest from MH1 for approximately 9.4 metres before (as Mr Hambly says) "turning south and dropping into another sewer at what appeared from the CCTV camera to be a manhole" close to the entrance to the Coach House. This part of the CCTV survey was not recorded, so Mr Hambly has not seen it. No manhole can be seen on the ground. Elsewhere his report speaks of the 150mm sewer turning south, rather than connecting into a different sewer.

112.There is a manhole (**MH2**) some 50m south of the Coach House, in the Track. This gives access to the Thames Water public sewer, which has a diameter of 225 mm. The CCTV survey established that it carries on north of MH2 for at least 23 metres, but the camera could not be pushed any further.

113.Mr Hambly confirmed that the sewer at MH1 is the same as the 150 mm sewer which turns south near to the boundary and joins into the public sewer. He was unable to say at what point its diameter changes from 150 mm to 225 mm.

114.Mr Hambly exhibited an extract from the Thames Water Asset Search plan. For some reason which no one can explain, this omits the drains underneath the Coach House, and also the stretch between the Coach House and MH2. It shows the public sewer from Harewood Lodge to its boundary with the Coach House, at which point the sewer appears to end abruptly. It recommences, equally abruptly, at MH2. This is not the actual position on site. The actual arrangement is as described above.

The parties' submissions

115.For the claimant, Mr Sissons argued that the builder of Harewood Lodge must have connected into the public sewer underneath the Common in 1906, that that connection must have involved excavation of part of the Common for all to see, and would have brought home to its owner that the right to connect was being asserted. That, he says, is enough for all future use of this sewer to have been open.

116.Mr Sissons accepts that if the sewer in question is the pipe referred to in the 1906 manor court record, then use would have been initially permissive but he submits that the permission would have expired (at the latest) upon the first change in ownership of the Common after rent ceased to be paid, which was long ago. The continued use of the sewer by the owners of Harewood Lodge thereafter was as of right. Therefore, a prescriptive easement was acquired for the benefit of Harewood Lodge 20 years after the last instalment of rent was paid or the first change in ownership thereafter.

117.Alternatively Mr Sissons submitted that an easement has arisen by virtue of use since 1978. He says that the defendants and before them their father knew or could have known that the new Coach House was to be connected to the existing sewers when it was built in 1978, so from that date at least the use has been open. There is no question of permission having been sought or given in or since 1978.

118.Mr Sissons submits that whether the prescriptive easement is sufficient to accommodate the claimant's proposed development depends on Neuberger LJ's two-stage test mentioned in paragraphs 88 to 91 above. There is no radical alteration in the use of the Coach House nor any substantial increase in the burden on the Common involved in the use of the existing sewer for the purposes of the proposed development.

119.It was pleaded in the defence that at the time of the construction of Harewood Lodge, the lord of the Manor lived several miles distant and would not necessarily have been aware if a drain had been constructed secretly. However Mr Wilmshurst did not submit that the installation of the Harewood Lodge drain in 1906 was done secretly. He focused on permission rather than openness. He cited *Welford v Graham* [2017] UKUT 297 (TCC), in which Morgan J held that if a party opposes a claim to a prescriptive easement on the basis that use was permissive, then that party bears the burden of adducing evidence of permission. It is an evidential burden, and once discharged the legal burden of proof falls onto the would-be dominant owner to prove that use was not permissive. Mr Wilmshurst argued that the

defendants have discharged the evidential burden in relation to the 1906 connection because it is likely to have been undertaken with the permission of the owner of the Common. He submitted that I could infer that there was a "permanent, express and limited" permission, but stressed that he does not need to persuade me of that because the legal burden of proving absence of permission lies upon the claimant, who has not discharged it.

120.As to Mr Sissons' alternative submission based on the new connection to the Coach House in 1978, Mr Wilmshurst submitted that that connection would have been undertaken within the Coach House site without any means of knowledge being available to the owner of the Common. He therefore says that the making and use of that connection since 1978 has not been open.

Discussion

The test

121.For an easement to arise by prescription the use "must be peaceable, open and not based on any licence from the owner of the land" (per Lord Rodger in *R (Lewis) v Redcar and Cleveland Borough Council (No. 2)* [2010] 2 AC 70 at [87]). There is no question of unpeaceableness in this case, so an easement will have arisen if drainage has been enjoyed openly and without permission over an uninterrupted period of 20 years.

1906

122.The architectural drawings for the construction of Rokeles in 1968 show that the current arrangements for drainage of Harewood Lodge already existed by then, and in the absence of any evidence (or suggestion) that those arrangements changed between 1906 and 1968, I conclude that the pipe connecting Harewood Lodge with the main sewer underneath the Common was laid in about 1906.

123.The public sewer was 225mm in diameter (see paragraph 112 above) and Mr Hambly's investigations as to where the 150mm connects to it were inconclusive. It is impossible to be certain where the public sewer ended before Harewood Lodge was built. It may be that Waterside House was already connected to it, in which case the 1906 excavation would have been as far south as that connection point. But it is clear that the connection must have involved excavation of the Common over an unknown but significant distance, at least as far south as any connection from Waterside House. In view of the level of vigilance evidenced by the manor court records, I do not think that it would have escaped the attention of the lord of the manor.

124.It is possible that the manor court record for January 1906 (paragraph 27 above), which mentions the new pipes and mains of Amersham, Beaconsfield and District Waterworks Company Limited ("**the Company**"), might have related to the drainage connection for Harewood Lodge. "Pipes and mains" is capable of including drains. But the 1908 records of Messrs Green's and Knox's connections make no mention of drainage, only of water supply. So it may be that the 1906 entry had nothing to do with sewers. But even assuming it did, the record only mentions the Company's pipes and mains, not specific locations or specific individuals' connections into them. I infer that that is why the quit-rent was assessed on the

Company and not on any individual, and this may also explain its relatively high amount of £5. This would also be consistent with the later entries which do detail individuals' connections to the Company's pipes, referring to specific locations and specific landowners (Messrs Green and Knox). I therefore think it likely that the 1906 entry relates to main sewers, if it refers to sewers at all. If it had referred to the connection between Harewood Lodge and MH2, it would have referred to the property by name and would have assessed a rent due from its owner, just as the 1908 entry referred to Seaton House and Mr Knox.

125.The defendants' pleaded case was that since these court records do not mention an encroachment by the owner of Harewood Lodge, the drainage connection cannot have been made openly. However no evidential basis was laid for that contention. In particular I have no way of knowing whether householders' connections into the main sewers would have been mentioned in the manor court at all. It is conspicuous that no other such connections are mentioned, whereas connections into the water main are. There is no evidence of the arrangements between the lord of the manor and the Company in respect of drainage, nor between the Company and local householders, nor for that matter between the lord and the householders. I cannot assume that a drainage connection for Harewood Lodge would have found its way into these records, when no other drainage connections did so. Neither do I have any means of knowing whether excavation to connect to the sewer would have entitled the lord of the manor to a payment beyond the £5 levied upon the Company.

126.However I do agree that the manor court records (not only those which I have quoted) demonstrate that the lord of the manor was vigilant for encroachments. Since construction of the drain for Harewood Lodge must have involved excavation of the Common, which would have been open and obvious, it is improbable that the connection could have been made without coming to his attention (even if such a connection would not have entitled him to a payment). For the reasons given, I am not deterred from finding that it did so by the absence of any reference to it in the court records. I therefore find that the excavation must have come to the attention of the lord of the manor.

Was use permissive?

127.The fact that the lord of the manor knew about the excavation provides some evidence that he must have permitted it, and I accept Mr Wilmshurst's submission that the burden of proof therefore rests upon the claimant to prove a period of trespassory use.

128.I have already mentioned that I have no evidence that the owners of Harewood Lodge were ever required to pay the lord of the manor for their drainage connection. Mr Baldwin told me that the defendants, owners of the Common since 1986, have never received any rental payment for drainage rights. There is no evidence that their father, owner since 1962, ever received any such payment either. There was some discussion at trial about whether payments might have ceased with the abolition of quit rents in 1922, even though such payments would not have been quit rents properly so-called. This is not implausible, and in fact provides the only explanation which I have heard of why such payments would have ceased, if they were ever made in the first place. I find that if any payments were ever made at all, they ceased with the 1922 reforms.

129.Mr Wilmshurst submits that the absence of rent does not necessarily mean that use was as of right. He says that the claimant must disprove that a "a permanent, express and limited" agreement for drainage was granted, whether for a capital consideration or not, and whether in 1906 or later when any rental payments ceased. He says that this has not been proved.

130.However I accept Mr Sissons' submission, based on *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356, that any personal licence for drainage came to an end no later than the first change in ownership of the Common or of Harewood Lodge after any permission was given and after any periodic payments for drainage had ceased. The continued use of the sewer after that was no longer permissive. Any permission for drainage cannot have been permanent (so as to survive a change of ownership and cessation of payments) unless it took the form of a formal easement or some other interest in land. It is theoretically possible that there was an easement with the title deeds which were destroyed in 1941, but it is highly unlikely since there is no evidence of the lord of the manor ever granting easements of drainage to anyone. Anyway the burden of proof which the claimant bears requires her to disprove that the relevant use was precarious. A claimant asserting a prescriptive easement does not have to disprove that an express easement was granted.

131.In summary, the legal burden lies upon the claimant to prove when permission ceased. That burden has been discharged by the evidence that the title to Harewood Lodge changed hands in 1940 and the Common in 1962, and by my finding that payments for drainage, if ever made at all, ceased in the 1920's. Therefore the permission expired in 1940, alternatively in 1962. I therefore find that the use of the drain ceased to be permissive on one or other of those dates.

Was use open?

132.Dealing with the requirement of openness in the *Redcar* case, Lord Walker observed at [30] that the claimants

> *must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off or eventually finding that they have established the asserted right against him.*

133.In most cases, imperceptible use of underground drains is not sufficiently open to give rise to a prescriptive easement. However both counsel cited parts of this passage from *Gale on the Law of Easements (20th ed.)* at 6-88:

> *As to prescription, the test is whether successive owners of the servient land, assuming them to have been reasonable persons, diligent in the protection of their interests, either must have known or must be taken to have had a reasonable opportunity of becoming aware of the existence of the pipe or drain in question under or through their property. Where (a) it is obvious that the dominant tenement requires a water supply or drainage, (b) the pipes in question were originally installed with the servient owner's knowledge and (c) the course of a pipe or drain can readily be inferred, given the known source of supply or point of discharge, this requirement is unlikely to defeat a prescriptive claim. Where, however, there was no*

> *evidence of the regular presence of the dominant owner on the servient land, the servient owner was not aware of the presence of the pipe and the user, though not surreptitious, was unknown to and unsuspected by the servient owner, it was held that no prescriptive right had been acquired.*

134.I would not take the three features labelled (a) to (c) as a checklist. Those features merely comprise one set of facts illustrating the wider test, which is whether the servient owners had a reasonable opportunity of becoming aware of the existence of the pipe, and whether therefore it would have been reasonable to expect them to resist the exercise of the right. See the speech of Lord Hoffmann in *R v Oxfordshire CC, ex p Sunningwell PC* [1999] 3 WLR 160 at 350H-351C, approving the opinion of Fry J in *Dalton v Angus* (1881) 6 App Cas 760 that

> *the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.*

135.I have found that the lord of the manor knew about the drain in 1906, when it was first laid. So its use at that stage was open. However it has not been proved that the use of the drain was trespassory until 1940. Was use thereafter sufficiently open for the purposes of acquisition of a prescriptive easement?

136.Mr Sissons cited *Schwann v Cotton* [1916] Ch D 120 (Astbury J), in which a claim to a prescriptive easement of drainage was upheld even though the existence of the underground pipe was not known to the servient owner or his immediate predecessor, because the pipe had been laid openly and would have been obvious to the owner at that time. However in that case the laying of the pipe fell within the 20 year period of trespassory use. That is not the position here. It has not been proved that the use was trespassory until 1940. How, in or after 1940, was it brought home to the owner of the Common that a right of drainage was being asserted against him?

137.I have come to the conclusion that the use of the drainage pipe in connection with the Coach House has been open since that house was built, for the following reasons.

138.The drain was connected in 1978, within the Coach House plot at MH4. There was no excavation of the Common at that time, but the defendants' father knew of the construction of the Coach House and wrote to object that the gate between the Coach House and the Common was unlawful. His letter did not mention the drainage arrangements for the new house. It may be that he did not appreciate the possibility that the new house was to use a drain running under the Common. I take into account that no works were needed on the Common itself. It was therefore not visible and not otherwise obvious that the Coach House was to connect to the public sewer under the Common. I have already mentioned that the Thames Water Asset Search plan is incomplete and I bear in mind that similar records are unlikely to have been any better in 1978.

139.However neighbours with an interest adverse to a new development are always likely to be alive to the need for water pipes and drains, and are always likely to ask themselves where these are to be routed. In this case there are other properties to the south of the Coach House which have always needed drains, and the presence of a drain under the Common was not difficult to infer; indeed the public sewer south of MH2 is shown on modern public records and is likely to have been so in 1978.

140.I would not have concluded that these factors alone should have led Mr Baldwin to conclude that the Coach House was to use a drain under the Common. But they were enough to put him on inquiry. In *Dalton v Angus* (1881) 6 App Cas 760, a case dealing with a right of support, Lord Selborne LC said this about the knowledge that is to be attributed to a servient owner:

> *The inquiry on this part of the case is, as to the nature and extent of the knowledge or means of knowledge which a man ought to be shewn to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant. But there are some things of which all men ought to be presumed to have knowledge, and among them (I think) is the fact, that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure, must be visible and ascertainable by the adjoining proprietor during the course of its erection. When (as in the present case) a private dwelling-house is pulled down, and a building of an entirely different character, such as a coach or carriage factory, with a large and massive brick pillar and chimney-stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever maybe its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected, where no building stood before. Having this knowledge, it is, in my judgment, by no means necessary that he should have particular information as to those details of the internal structure of the building on which the amount or incidence of its weight may more or less depend. If he thought it material he might inquire into those particulars, and then if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shewn to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different. But here there was no evidence from which a jury could have been entitled to infer any of these things. Everything was honestly and (as far as it could be) openly done, without any deception or concealment. The interior construction of the building was, indeed, such as to require lateral support, beyond what might have been necessary if it had been otherwise constructed. But this must always be liable to happen, whenever a building has to be adapted to a particular use. The knowledge that it may or may not happen is in my opinion enough, if the adjoining proprietor makes no inquiry.*

141. Although their Lordships did not speak with one voice on all issues in that case, the passage quoted is authoritative (see the judgment of Stirling LJ in *Union Lighterage v London Graving Dock* [1902] Ch 557 at 574, and the judgment of Roth J at first instance in *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2010] EWHC 2749 (Ch) at [81]).

142. So here: when Mr Baldwin senior saw that the Coach House was being constructed, he was put on inquiry as to how it was to be drained, and could have asked. Ownership of the Common is a property right which offers the opportunity of payment from neighbouring landowners who need access over or under the Common. The first defendant did not hesitate to acknowledge in oral evidence that it is a source of income. The manor court records speak very clearly to that effect. Mr Baldwin senior was alert to the existence of the gate and to the possible rights which it afforded him, and he wrote to assert those rights, albeit that he did not purse the matter. He could very readily have included in that letter an inquiry about drainage and could have expected an answer. Mr Jeanes had commissioned a drainage survey in 1968 for Rokeles, and so would have been in a position to tell Mr Baldwin that the new house was to be connected into the 150mm drain and thence into the public sewer underneath the Common. If Mr Baldwin had asked the question and that information had been withheld, then the subsequent use of the drain by the Coach House would not have been open. But Mr Baldwin did not ask that question, in circumstances where it was an obvious inquiry to make by a person in his position.

143. I therefore find that the development of the Coach House and its connection to the drain under the Common was sufficiently open to found the acquisition of an easement of drainage for the Coach House from 1978 at the latest. In my judgment, therefore, an easement of drainage arose in favour of the Coach House, at the latest 20 years after its construction.

144. The question whether the drain may lawfully be used by the proposed new houses depends on application of the principles discussed in paragraphs 85 to 92 above. I have already decided that there is to be no radical change in the character of the Coach House and Mr Wilmshurst did not challenge Mr Hambly's conclusion that the existing sewers have sufficient capacity to service the additional dwellings now proposed. It follows that the easement of drainage will accommodate use of the dominant tenement as it is proposed to be developed.