Neutral Citation Number: [2013] EWHC 1635 (Ch)

Case No: 1BM 30168

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**BIRMINGHAM DISTRICT REGISTRY**

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 13/06/2013

**Before** :

**HHJ DAVID COOKE**

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**Between :**

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| **Avon Estates Ltd** | **Claimant** |
| **- and -** | |
| **Richard Evans (1) and Susan Evans (2)** | **Defendants** |

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**Kevin Leigh** (instructed by **Emms Gilmore Liberson Ltd**) for the **Claimant**
**Julian Greenhill** (instructed by **Rickerbys LLP**) for the **Defendants**

Hearing dates: 2- 5 April 2013

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# Judgment

**HHJ David Cooke:**

1. This case arises from a boundary dispute between the owners of two commercial properties in a rural area near Stratford-upon-Avon. The claimant company is the owner of Avon Park, on which there are approximately 225 large mobile homes. The defendants are the owners of Oxtalls Farm, which is operated as a stud farm for thoroughbred horses. The length of the boundary remaining in dispute runs between points D and H on a plan prepared by the defendant's surveyor Mr Gibbons (bundle reference 3/7/135, referred to as the "Key plan"). In general terms, the disputed boundary runs from West to East, with Oxtalls Farm to the north. On the Avon Park side there are plots for a number of mobile homes starting at the eastern end of the disputed boundary, while at the western end there are a small car park, some permanent buildings providing toilet and other facilities for the plot holders, and a building in which the site manager lives.

2. Both parties have relied on expert surveying evidence, from Mr Powell on behalf of claimant and Mr Gibbons on behalf of the defendants. The experts have produced two joint statements and an agreed plan setting out the location of various features on the ground that are referred to in the conveyancing documents and evidence of the lay witnesses. I had the benefit of a site visit on the first day of the trial, in the presence of counsel and solicitors for both parties and the principal lay witnesses, who also gave oral evidence. The experts were called and cross-examined.

3. There is one other remaining issue, relating to alleged nuisance by the claimant having modified a road along the western boundary of Oxtalls Farm so that it is raised above the surrounding ground level and, it is said, interferes with the natural drainage from fields forming part of Oxtalls Farm. Depending on my findings on these two issues, there will be matters arising as to damages or other remedies. A claim by the claimant for aggravated damages arising from Mr Evans' alleged conduct was withdrawn by Mr Leigh on instructions before the evidence commenced. All the other issues raised in the pleadings have been resolved between the parties prior to the commencement of the trial.

4. The two properties were in common ownership until 3 October 1955. On that date the then owner, EH Youell & Co Ltd, divided the site by conveying Oxtalls Farm to Mr Evans' parents, from whom it has subsequently been transferred to the defendants. What is now Avon Park was retained and conveyed a few months later, by deed dated 26 April 1956, to Mr Ernest Higgins. Mr Higgins sold Avon Park in 1963 to Allens Caravans Ltd, which in turn transferred it in 1984 to the claimant company.

5. Most of the disputed boundary was established by the 1955 conveyance. That document appears in bundle 4 at tab 4, and has a plan attached to it which is based on the 1914 ordnance survey map. This shows the boundary running between fields numbered 75, 67A and 67 on the north side and therefore within Oxtalls Farm, and field number 74 to the south, being Avon Park. A short length of the disputed boundary, between points D and E on the Key plan is affected by a transfer made in 1963 from Mr Evans senior to Allens Caravans Ltd of an irregularly shaped strip of approximately 1 acre out of field 75.

6. The location of the boundary is therefore in the first instance a question of the true construction of the 1955 and 1963 conveyances. This is a matter which the court is required to approach on an objective basis, construing the documents as a whole to ascertain the meaning they would convey to a reasonable person in the light of the

background circumstances known to the parties at that time there were entered into, in accordance with the principles set out by the House of Lords in *ICS v West Bromwich BS* [1998]1 WLR 896. Both parties referred me to authority on the question when and to what extent the court can take account of the actual features on the ground in the exercise of construction of a conveyance; in general such evidence is admissible and the court must assess its weight as part of the construction process; see *Neilson v Poole* [1969] 20 P&CR 909 at 915.

7. The land conveyed by the 1955 conveyance is described as follows in the parcels clause:

> " All those pieces or parcels of land together with the farm, bailiff's house cottages and farm buildings and premises being part of Oxtalls Farm situated in the parish of Old Stratford in the County of Warwick and containing an area of 131.282 acres or thereabouts. All which said premises are for the purposes of identification only more particularly delineated on the plan attached hereto and thereon edged red and more particularly described in the first schedule hereto… "

8. The plan attached is as I have said based on the 1914 ordnance survey map and shows the various field numbers referred to above. Within each field, there is not only the field number, but a figure given (by the Ordnance Survey) for the acreage of that field. The red edging follows a solid black line at the boundary between the fields that are sold and field 74 which is retained. Along that section of the boundary there are "T" marks drawn on the side of the retained land, i.e. that which became Avon Park. There is however no reference to these "T" marks anywhere else in the document.

9. The first schedule to the conveyance consists of a table setting out the various ordnance survey field numbers of land sold, a description of each field such as "pasture" or "arable" and a figure for the acreage of that field, which corresponds to the ordnance survey map.

10. It is common ground that the solid black line on the ordnance survey map represents the line of an ancient hedge, and that the practice of the ordnance survey when plotting such a feature is to draw the line, within the limits of accuracy available given the scale of the map, along the centre line of such hedge. The map itself of course does not purport to show boundaries between land in different ownership, but only the physical features of the terrain mapped. Both expert witnesses were in agreement that the map was prepared in this way. I was also referred to *Harsten Developments Ltd v Bleaken* [2012] EWHC 2704 (Ch) in which Morgan J noted at paragraph 25 the statement of the Court of Appeal in *Davey v Harrow Corporation* [1958] 1 QB 60 that courts could in future take notice of the practice of the ordnance survey in this respect. The evidence of the experts in this case went slightly further however, since they were both agreed that at least where the hedge consisted of a single line of trunks or "growers" the line taken as the centre of the hedge was a line through the centre of the growers.

11. There are photographs in the bundle taken some years ago which show the hedge in question as quite a flourishing feature. It is now in a much reduced state. It was apparent on inspection that a number of the former growers have been cut off at ground level, for the most part apparently some time ago. There are counter

allegations as to who was responsible for this. It consists mainly of hawthorn trees, although there are also a number of alder trees. In places, new hawthorn whips have been planted by the defendants in an attempt to restore some of the lost material.

12. The remnants can be seen of an old chestnut paling fence, which on the evidence must have been in place in 1955. A fence of this type consists of a number of roughly split strips of wood about 4 feet high bound together with twisted wire along the top and bottom. Mr Powell's evidence was that it is supplied on a roll and so must be unrolled on site in order to be fixed to whatever is to support it. In this case, the remains of the fence can be seen to be mostly supported by the growers of the hedge. For the most part the fencing lies on the south side of the growers, and is attached to them by nailing the wire to the trunks. There are however places where it is attached to the north side of the trunks. In other places, particularly at the eastern end of the disputed boundary, it can be seen that the chestnut paling fence is supported on posts in the ground, many of which have rotted off at ground level so that it is not possible to say without further investigation whether they are all in the places in which they were originally.

13. The dispute arose because Mr Evans alleged that there were encroachments across the boundary in some cases by caravans placed on plots on Avon Park and in others by things such as sheds or gas bottles placed behind those caravans by the various plot holders. He also alleged that there were numerous incidents of trespass by rubbish and other items being thrown over or pushed through the hedge by the plot holders, including soil and grass clippings. He was particularly concerned about grass clippings which, it is accepted, can be poisonous to horses. It is accepted that there have been incidents in which rubbish, soil and grass clippings have been thrown over and the claimant maintains that it has done what it can to prevent the plot holders from repeating these incidents. It is not accepted that the matters complained of as encroachments are in fact such, until the exact line of the boundary is established. The claimants say that Mr Evans has exaggerated these incidents and there have been a number of occasions on which he has been abusive or offensive to their staff and residents. There were also allegations of behaviour intended to interfere with the enjoyment of their caravans by the plot holders, such as the placing of a large mound of earth and rubble close to the boundary, unnecessary burning of material during the holiday season and noisy behaviour such as shooting very close to the boundary.

14. In early 2004, Mr Evans erected a tall close boarded fence about 1 m to the north of the hedge, and so (he would say) clearly on his land. This no doubt served as a stock proof barrier, replacing the chestnut paling fence which by then must have been too dilapidated to be effective, and would have made it virtually impossible for anything to be thrown by the caravan plot holders over it so that any harm could come to his horses. However this fence was dismantled in late 2006. The reason given by Mr Evans was that while the fence was up the claimants and their plot holders had accelerated the extent to which they were encroaching on the hedge line and throwing items through the hedge, which he could not monitor while the close boarded fence was in place.

15. In February 2011 Mr Evans began erecting a metal palisade fence. This was at the very least much closer to the line of the hedge, although Mr Evans maintains that it was still on his land. His evidence is that it was constructed 20 cm to the north of the line of the old chestnut paling fence, which he had previously had plotted by a firm called Interlock and which he says he regards as the true boundary because it forms

the original stock proof barrier between the two fields. In order to do this, he had to cut down a considerable amount of the hedge material so that the new metal fence runs in some places hard up against the trunks of the ancient hedge. In some places it runs south of the line of those trunks that are remaining, Mr Evans would say because the chestnut paling fence was also south of that line. The claimants say that the new fence encroaches across the true boundary, and obtained an interim injunction on 25 March 2011 at a hearing before HHJ Purle QC to prevent its completion. They do not accept that the metal fence is in fact at all points north of the line of the old chestnut paling fence, or that that fence represents the boundary. They also complain that the new fence is out of character with a rural location, being more akin to the sort of security fencing used in an industrial park, although they accept that if the fence is in fact located on the defendants' land, its appearance is not something they have any legal right to object to.

16. The respective positions of the parties as to the location of the boundary, ignoring for a moment the section affected by the 1963 conveyance, can be summarised as follows. For the claimant, Mr Leigh argued that the T marks on the plan indicated that the boundary feature, in this case the hedge, was intended to be owned by the owners of the land on the site on which the T marks appeared, that is to say the retained land which is now Avon Park. Further, since the hedge was a growing hedge and so a feature with an appreciable width to it, this indicated that the owner of the hedge was intended to be also the owner of a strip of land on the far side of the centre line of the growers sufficient to accommodate a reasonable growth of the hedge. He relied on the evidence of Mr Powell as to the practice when the ordnance survey was first completed and the "public" boundaries between parishes for instance were plotted with the intention that they would follow the boundaries of land in different private ownership. An assumption was applied in the determination of such boundaries that the owner of a hedge also owned a strip of land either 3 or 4 feet wide on the opposite side of it.

17. For the defendants, Mr Greenhill argued that there was no rule of law that T marks on the plan invariably indicated ownership of the feature referred to; they might be used to indicate other things such as responsibility for maintenance. If the T marks were not referred to in the text of the conveyance itself, I should either find that no meaning could be attributed to them or that they meant something other than ownership. If the T marks did not indicate ownership of the hedge itself, the boundary line was along the centre line of the hedge and on the evidence I should find that the centre line of the hedge was represented by the line of the chestnut paling fence and that the metal fence was on the defendants' side of that line. Alternatively, the centre line of the hedge was represented by the line between the centres of the growers. If the T marks did indicate ownership, so that the hedge belonged to the claimants, I should find that the legal boundary lay no further north than a line along the north faces of the growers, pointing to the decision of the House of Lords in *Collis v Amphlett* [1920] AC 271.

18. Both parties agreed that any issue as to which of the various acts complained of might constitute a trespass, and the appropriate remedy if they did, should await the determination of the line of the boundary.

19. I begin with the language of the 1955 conveyance, and the relationship between the wording of the parcels clause and the plan and schedule attached to the conveyance. It is often said that where a plan is referred to as being "for identification only" the

controlling wording is the language of the parcels clause and the plan can only assist in identifying the general location of the land described in that clause. If however the land is described as being "more particularly delineated in" the plan, the plan will be the controlling document. If both forms of words are used, as they have been in the present case, the draughtsman has achieved neither one thing nor the other, and the two expressions may be said to be "mutually stultifying"; see the judgement of Megarry J in *Neilson v Poole* (1969) 20 P&CR 909. The issue of which is to be given priority is of importance where there is some apparent inconsistency between the parcels clause and the plan, as there was in *Druce v Druce* [2003] EWCA Civ 535, to which Mr Greenhill referred me. In that case the parcels clause referred to a plot having a frontage of 90 feet, but the plan indicated an area with a frontage closer to 190 feet.

20. In the present case however it does not seem to me that there is any inconsistency between the parcels clause and the plan. The former refers to "pieces or parcels" of land "forming part of Oxtalls farm". It would be quite impossible to identify from this description which parts of Oxtalls farm were being referred to without reference to something else. The matters that are referred to which assist in this process are firstly the specified approximate acreage, secondly the plan and thirdly the schedule.

21. The plan performs its stated function of identification by reference to the ordnance survey map and the physical boundary features that are marked on the map. The schedule is entirely consistent with this in that it refers to the fields that are shown on the ordnance survey map and the plan, identifying them by reference to the field numbers and the acreages shown (which add up to the figure in the parcels clause). I do not consider that "identification" is in all cases limited to identifying the location of a piece of land in a general or approximate way; as a matter of ordinary language if a parcels clause gives a non- specific description of land referred to as "more particularly delineated for the purposes of identification" on a plan, the more particular delineation on the plan assists in identifying the location extent and boundaries of the land, as long as it is not inconsistent with the parcels clause. This it seems to me remains the same whether the word "only" is present or not; that word might have the effect of subordinating a plan to the body of a conveyance where the two were inconsistent, but where they are not and the plan adds to and clarifies the meaning of the words used its relevance to construction is not removed by the addition of the word "only", see per Buckley LJ in *Wigginton and Milner Ltd v Winster Engineering Ltd* [1978] 1WLR 1463 at 1473.

22. The parcels clause and plan construed together show in my judgment that the boundary of the parcels described is prima facie the feature drawn on the ordnance survey map, ie the centre line of the hedge since that is accepted to be what is represented by the line on the map and plan. This is supported by the schedule, listing the individual fields and acreages taken from the map. There were evidence and submissions as to the accuracy of these acreages and the way they are derived by tracing round the map once the field boundaries have been plotted, but Mr Greenhill was in my view right to submit that the importance is not in the values themselves, but in the fact that by using figures taken from the ordnance survey map where a field is described, the schedule is referring to that field as plotted on that map and in a way consistent with the boundaries of the land conveyed being the features shown on the map that were used, with whatever degree of accuracy, in calculating the acreages shown.

23. In these respects, the facts of this case are very similar to those in *Fisher v Winch* [1939] 1KB 666. Part of an estate had been sold out of common ownership by a conveyance which described the parcels of land sold in general terms and went on to say "all which said premises are more particularly described in the first schedule… and delineated on the plan drawn hereon". The plan was taken from the ordnance survey map. There was a hedge along the boundary in dispute with a ditch on one side of it. The Court of Appeal held that the boundary was to be determined by construing the conveyance and not by applying the old "hedge and ditch" presumption and that the boundary ran along the centre line of the hedge, that being what was represented on the plan. Greene MR (with whom the rest of the Court agreed) said this at page 672:

> "Of course, the fact that the boundary is shown in a particular place on an ordnance map is in itself no evidence of what the true boundary is as between the parties, but where the party's title is derived from a document which refers to the ordnance map, it is necessary to look at the ordnance map and ascertain where the boundary shown on that map is truly positioned. The evidence of Mr. Emery in this case is, to my mind, quite conclusive, that in the present case the boundary of the land conveyed to the defendant's predecessor in title is positioned along the middle line of the old hedge which runs along one of the disputed boundaries, and along the fence which runs along the other disputed boundary. Those have been there for many years, and there can be no question on Mr. Emery's evidence and the other evidence in the case as to those fences and hedges, that the boundary referred to on the ordnance survey map is the centre line of the hedge and the fence. That being so, when the conveyance is looked at, the boundaries on which are traced by reference to the ordnance survey, and the acreage of which is fixed by reference to the ordnance survey, it is established beyond possibility of question what the boundary is."

24. Morgan J reached a similar conclusion in *Harsten Developments v Bleaken*, in holding that the boundary established by a conveyance by reference to an ordnance survey map marking the middle line of a hedge was the middle line so marked.

25. Is this prima facie position affected by the presence on the plan of the T marks, notwithstanding they are not referred to in the body of the conveyance itself? Mr Leigh submitted that there has clearly been put on the plan for some purpose, since they are not of course shown on the original ordnance survey map. The claimant's expert Mr Powell said that T marks are generally used to indicate a responsibility for maintenance of some existing feature. It was often the case that they were referred to in the body of the document, but not invariably so. Responsibility for maintenance, in his view, should be equated with ownership. He gave the example of a fencing obligation between domestic gardens; if one plot owner was required to erect or maintain a fence along a specified boundary this could only really make sense if he was the owner of the fence.

26. Mr Gibbons for the defendant gave slightly different evidence. In his view, T marks indicated a boundary feature to which a right, obligation or ownership attached as set

out elsewhere in the document to which the plan was attached. The nature of the right or obligation would have to be spelt out in the document. In the absence of any other reference in the document, the marks themselves could not be taken to indicate anything specific. Mr Greenhill referred me to 2 other sources which are consistent with Mr Gibbons' evidence, though strictly neither of them constitutes either evidence or authority. Firstly, in his book "Boundaries Walls and Fences" (tenth edition) Mr Trevor M Aldridge QC says this at paragraph 1-07:

> " It is the practice to define the ownership of boundary features, or the responsibility for the maintenance, by inserting T marks... If, as sometimes happens, T marks appear on the plan without any reference to them in the deed, they can be no more than persuasive evidence of the ownership of the boundary features. "

27. Secondly, guidance on the website of HM Land Registry under the heading "How do I find out who has responsibility for a boundary fence, wall or hedge?" says this:

> " The most common marking on deed plans indicating boundary ownership, or the liability to maintain and repair it, is a T mark. T marks on a plan to a deed would normally indicate that the proprietor of the property with the red edging is responsible for the maintenance/repair of any boundary with the inward facing T marks. However the wording in the deed must also be read to obtain the necessary interpretation of the T marks in the particular deed... T marks on a deed plan that are not referred to in the deed have no special force or meaning in law. "

28. Neither counsel was able to cite any authority which attributed a particular meaning to T marks as a matter of law. Mr Leigh relied on *Seekts v Derwent* [2004] EWCA Civ 393. In that case, the plan attached to a conveyance showed T marks along all the boundaries (on the claimant's side) but there was no specific reference to them in the wording of the conveyance itself. In determining that the claimant was the owner of a hedge along a disputed section of boundary and that reliance should be placed on the T marks in preference to various dimensions marked on the plans that indicated a different boundary position, Carnwath LJ (with whom Waller LJ agreed) said (para 28) "In my view it is not possible to disregard the ordinary understanding of the T marks. The natural implication is that they were intended to represent existing boundary features, and that those features were to belong to [the claimant]".

29. But in that case, there was agreement in the evidence of experts for both sides that the convention was that inward facing T marks indicated ownership of the feature to which they were attached, see the judgment at para 15. Further, reliance was also placed on a pre contract enquiry as to whom boundary features belonged and the answer "see plan on contract", which clearly implied that the T marks were intended to indicate ownership in that case.

30. There is no similar agreement between the experts, and no such corroborative evidence, here. Mr Gibbons draws a distinction between ownership and "some other right or obligation". Mr Powell said that the implication was of responsibility for maintenance of the relevant feature, and although he expressed the view that this responsibility necessarily implied ownership, it seems to me that is not necessarily so.

It will no doubt commonly be the case that the appropriate person to maintain a feature is the owner of it, but the attribution of such responsibility is a matter for agreement between parties to a conveyance and there is nothing to stop them agreeing any terms they choose. One could envisage a range of rights or obligations that parties might agree in relation to a boundary feature depending on the circumstances; "maintenance" is an obvious one but even if that is intended, the exact content of the obligation is not necessarily self explanatory. In the present case for instance, it might be speculated that parties would have considered defining which of them should be responsible for replacing the stockproof fence running along the boundary, whether or not the existing fence was precisely on the boundary.

31. In my judgment, there is no single meaning or default meaning established by the evidence or authority that can be attached to T marks where a meaning cannot be ascertained by reference to the body of the conveyance or other admissible material. It may well be that the parties to the 1955 conveyance subjectively intended some meaning to be attached, but if they did, given the range of possibilities as to what it might be and the absence of any evidence to enable the court to identify what their intention might have been, that intention has not been carried into effect.

32. The prima facie position set out above, that the boundary established by the 1955 conveyance lies along the centre line of the ancient hedge, is not therefore affected by the T marks on the plan. There remains the issue as to where that centre line is located, and Mr Greenhill's submission that it should be taken to be the line of the chestnut paling fence. Before considering that, however, in case I am wrong on the relevance of T marks and they do indicate ownership of the hedge, I deal briefly with Mr Leigh's case that such ownership implies the ownership of a strip of land on the far (North) side of the line between the growers of the hedge sufficient to allow for reasonable growth of the canopy. Mr Powell's evidence was that an assumption was made that the owner of a hedge owned a strip 3 or 4 feet wide on the far side of it when marking out public boundaries during the original Ordnance Survey in the 19th century, a process called "mering". The process was described by Hazel Williamson QC in *Well Barn Farming Ltd v Backhouse* [2005] EWHC 3397 (Ch), where the evidence seems to have been that it was based on local custom at the time the public boundaries were established. Mr Powell was not able to say why the meresman allowed 3 feet in some cases and 4 feet in others, but this could be accounted for by variation in local custom. There is no evidence of any such local custom in this case, whether in 1955 or at any earlier date.

33. No authority has been cited for any general presumption or rule of law to similar effect. On the contrary, such authority as was cited in my judgment indicates firmly that there is no such general presumption or rule. In *Collis v Amphlett* the conservators of Clent Hill Common sued the owners of properties bordering the common. The defendants' properties were bounded by old established hedges, and it was accepted that the hedges themselves belonged to the defendants. It was alleged they had trespassed on the common by erecting fences on the common side of their hedges. The defendants argued that as owners of the hedges they were entitled also to the ownership of a 'ditch width' of four feet on the outer side of the growers of the hedge as a matter of (a) general presumption of law (b) local custom or (c) inference from the evidence in the particular case. There was not in fact any evidence that an actual ditch had ever existed outside the hedges in question.

34. Where there is an artificial ditch alongside a hedge the well known 'hedge and ditch presumption' is that the owner who made them did so by digging the ditch at the edge of his land, throwing the excavated earth back on his own land and planting a hedge on the bank so formed. But both the judge at first instance and the Court of Appeal ([1918] 1 Ch 232) rejected the argument that there was any general rule or presumption of law entitling the hedge owner to a ditch width of land where there was no evidence of an actual ditch. The majority of the Court of Appeal (Swinfen Eady and Warrington LJJ) held that a boundary four feet outside the line of the growers of the hedge could be inferred on the facts of the particular case (see per Swinfen Eady LJ at p247 and per Warrington LJ at p 252). Scrutton LJ dissented on the inference of fact, and said this as to the alleged general presumption, beginning at p 259:

> "There is undoubtedly a popular belief in some parts of the country which has found its way into books that the owner of a hedge is also the owner of a space outside it; sometimes said to be four feet from the base of the bank on which the hedge stands. I am not aware of any legal authority for this broad proposition…
>
> [he then referred to cases dealing with the hedge and ditch presumption, and continued] These are, I believe, all the reported cases on the subject, and they appear to be limited to artificial ditches, and to establish a presumption that in the case of land bounded by a hedge and artificial ditch the boundary of that land extends to the further edge of the ditch. The presumption is not rested on the necessity of protecting the hedge, and any four feet or eight feet rule is only mentioned once to be rejected…
>
> Mr. Amphlett claimed a ditch-width of about four feet as protection for a hedge, whether there was a ditch or not, or whether there was a fence at the edge of the four-feet width or not. It existed, he said, though the hedge was on a sloping bank where there was no presumption of a ditch. He thought on this common all traces of the original ditches for ancient inclosures had been lost except that there were depressions in some places. He thought the ditch width was recognized on Clent Hill Common, but could not say it appeared anywhere else. One of his witnesses thought that every owner of an agricultural fence had a ditch-width the other side of it, varying in width with the locality. In Birmingham he said it was three feet, except on commons and parish boundaries, where it was four feet, and he put its justification in the protection of the hedge. Mr. Fowler thought it made no difference whether there was a ditch or not - the owner of a grower fence always had some land outside it. This evidence does not suggest any right of the owner of a hedge over the soil of another, but apparently means that the Court must presume that where a man has erected a hedge he has erected it four feet back from the edge of his land, and therefore that the boundary of his land is that distance back from some line either the middle of the hedge or the bottom of the bank. I can only say that I know of no

> authority in law for such a rule, that I do not think any judge can decide accordingly without evidence, and that the evidence in this case fails, in my opinion, to establish such a rule."

35. The House of Lords reversed the decision of the majority on the inference to be drawn from the evidence in the case. The report is very brief ([1920] AC 271). The headnote states:

> "The appeal does not call for a detailed report. In the opinion of the House it raised no question of general importance in point of law, but turned entirely on the facts as to the position of the line of growers in the particular case; in the words of Lord Sumner, the case was "really one of evidence, neither complex nor novel." "

and the report:

> "Their Lordships were of opinion that the plaintiff had proved his case, and that there was not sufficient evidence to establish the existence of the local custom asserted by the defendant. They came to the conclusion upon the evidence that the boundary of the common must be taken to be a line drawn along the growers of the hedge on their side next to the common and that neither the defendant nor his successor could claim the right to erect or maintain a fence outside that line."

36. It must be the case, then, that the House of Lords also considered that there was no general rule or presumption of law as to ownership of a strip of land outside the growers of a hedge. Had I concluded that the T marks indicated that the owner of Avon Park owned the hedge, I would accordingly have held that the boundary ran along the northern face of the growers of that hedge, as they existed in 1955 when the ownership was divided.

37. There is in my judgment no justification for the contention that the centre line of the hedge in 1955 ran along the line of the chestnut paling fence. First, the experts were agreed that the line on the Ordnance Survey map did not represent the chestnut paling fence per se, but the centre line of the hedge as surveyed at the time. Second, although I accept the submission that in the past the hedge was much more substantial than it is now, as can be seen from such photographs as were produced, that seems to have been principally because the canopy has been cut back. It is apparent on the ground that some growers have been cut off at ground level, but there is nothing in the expert evidence, nor anything that was apparent on inspection, to suggest that there was ever more than one line of growers making up the hedge, albeit that the line between the trunks was not perfectly straight. The experts are agreed that that line is what is represented on the Ordnance Survey map, and so in turn on the plan attached to the 1955 conveyance.

38. The fence can be seen for most of its length to run on the south side of the growers that remain, and there is no evidence that there was ever any additional line of growers to the south of the fence, such that the fence could be said to be in the centre of the hedge. Mr Evans was of the view that since the chestnut paling fence was the original stockproof barrier, it must have been intended to form the boundary, but that does not accord with the conveyance or the plan, and there is no other evidence to

suggest that was the intention in 1955. His view in that regard was also, it seemed to me, inconsistent with his oral evidence in which he said he had never claimed to own the hedge, but only to have the right to maintain half of it on his side.

39. I hold then that the boundary established by the 1955 conveyance was a line between the centres of the growers of the hedge, as they existed at that date. Subject to the effect of the 1964 conveyance and the argument as to adverse possession, which I address below, that is where it remains. The experts' agreed plan plots the line between the growers that remain, but it may be that this plan can be further refined by plotting also the centres of any of those that have been cut off but are still visible, on the assumption that they would have been present in 1955. Otherwise, the best evidence of where the boundary was in 1955 will be the plan as it currently exists.

40. The 1964 conveyance transferred a strip of about 1 acre from the south- eastern side of field 75 from the Oxstalls title to Avon Park. It is shown on the plan attached to the conveyance (3/7/79). The strip is generally rectangular in shape, the purpose of the transfer being to make a new access road into the caravan park. At the eastern end however there is an extension to the rectangle that was described as a "spur" or "beak". The new boundary at that point runs between points C,D and E on the Key Plan, rejoining the old boundary at point E. Between points D and E is the extremity of the "beak", and the general effect of the conveyance at that point is that a small triangular patch of land becomes part of Avon Park.

41. The parcels clause describes the land conveyed as:

> "...the south eastern portion of field Ordnance Survey no 75...forming part of Oxstalls Farm which piece of land contains an area of one acre or thereabouts and is more particularly delineated and edged red on the plan attached hereto for the purposes of identification only..."

42. There were again T marks on the plan along the new boundary, but this time their meaning was explained in the conveyance:

> "2. The Purchaser hereby covenants with the Vendor that it the Purchaser for itself and its successors in title will erect and for ever after maintain a stockproof fence of a type and design to be approved by the Vendors along the boundaries marked with a T inwards on the said plan."

43. Again, it would only be possible to identify which part of the field was to be conveyed with any certainty by reference to the plan. The experts have plotted the line shown on that plan as best they can on their jointly agreed plan. For most of its length (between B and C on the Key plan) it is not controversial. Between C and E it is, however.

44. Mr Evans explained that the area of the "beak" was at a point where the ancient hedge was at its thickest. He produced some photographs from 1992 and 1999 (2/4/71 and 79) and described this region as a "thicket" about 3 to 4 m deep that had originally been stockproof. He denied that he had done anything to cut it down or reduce its width until 2004, when he had cut what he described as his side of the hedge in order to erect the close boarded fence. From the photographs it appears that the northern or north-western edge of the "thicket" follows a line of the same general shape as the

new boundary shown on the 1964 plan, so the conveyance would appear to be consistent with a general intention that the area of the thicket would become part of the Avon Park title, whereupon the owners of the Park would be able to take it out and make use of that corner of the site, having put up a new stockproof fence along what had been the north side of the thicket.

45. Whatever was the intention, no new fence was ever put up at this point, and on Mr Evans' evidence nothing was done to cut down the thicket, at least from his side, until at least 2004.

46. Subject to any point on adverse possession then, since 1964 the boundary between points C-E on the Key Plan is that shown on the plan attached to the 1964 conveyance, the location of which on the ground is as marked by the experts on their agreed plan. Although Mr Greenhill made submissions based on the evidence as to the location in this area of the old chestnut paling fence and the centre line of the hedge or thicket, those matters could only have affected the location of the boundary prior to 1964, and they are now superseded, again subject to the point on adverse possession.

47. Mr Greenhill submitted that to the extent I should find that the boundary of the paper title lay to the north of the chestnut paling fence at any point, the defendants have title by adverse possession to any land between that boundary and the line of the chestnut paling fence. This applies particularly to the area of the "beak", but also at or around point G on the Key Plan, where it was said that the hedge was originally also thicker and had been denuded. It was accepted that the defendants must establish not less than 12 years adverse possession prior to 2003 when the Land Registration Act 2002 came in to force, since that Act restricted the extent to which a registered title may be overcome by a squatter whose possessory title had not already been established at that date. All these areas, he submitted, had however been used or treated as part of Oxstalls Farm since 1955 (and since 1964 where relevant). That use consisted of allowing horses to graze the field as far as they could reach, ie up to the stockproof barrier which was the chestnut paling fence, and maintaining the Oxstalls side of the hedge, including planting new whips where it had become thinned out. The defendants had also walked the fields themselves and used them for a nature trail open to the public (though it appeared on the evidence that the public using that trail were kept away from the hedge line by a fence). They had buried stallions from the stud farm in the area adjacent to the hedge and erected headstones to them, though the evidence did not show exactly where the burials had taken place and it appeared from the photographs that some of the headstones had been recently moved so that they were further into the hedge. The claimant, he said, had been excluded from all such areas by the hedge and/or the chestnut paling fence.

48. Mr Greenhill relied on *J Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 in which the House of Lords upheld the claim to a possessory title of an occupier who originally held a grazing licence over a field but continued to use it for over 12 years after the licence expired. The leading opinion was given by Lord Browne- Wilkinson, with whom all the other Law Lords agreed. He reviewed the authorities dealing with the legal concept of possession of land, as distinct from mere occupation, and the requirement to establish not just physical possession of the land but also an intention to possess. He found the law to be in most respects as set out on the judgment of Slade J in *Powell v Macfarlane* (1977) 38 P&CR 452.

49. As to the two elements required and the degree of control necessary to establish possession in fact he said this:

"Possession

40 In Powell's case 38 P & CR 470 Slade J said, at p 470:

> "(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')."

Counsel for both parties criticised this definition as being unhelpful since it used the word being defined—possession—in the definition itself. This is true: but Slade J was only adopting a definition used by Roman law and by all judges and writers in the past. To be pedantic the problem could be avoided by saying 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"). What is crucial is to understand that, without the requisite intention, in law there can be no possession. ... Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary. Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend he does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession.

Factual possession

41 In Powell's case Slade J said, at pp 470-471:

> "(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time.

> The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

> I agree with this statement of the law which is all that is necessary in the present case. The Grahams were in occupation of the land which was within their exclusive physical control. The paper owner, Pye, was physically excluded from the land by the hedges and the lack of any key to the road gate. The Grahams farmed it in conjunction with Manor Farm and in exactly the same way. They were plainly in factual possession before 30 April 1986."

50. As to intention to possess and the extent to which a squatter must be shown to intend to own the land or exclude the paper owner:

> "43 ... Slade J reformulated the requirement (to my mind correctly) as requiring an "intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow"."

51. In *Pye v Graham*, the squatter had possession of a whole field that was in the paper ownership of the claimant. It was bounded by hedges and accessible only on foot or through locked gates controlled by the squatter. There was no doubt that whatever the squatter did, and whatever his intentions were, they applied to the whole of the land up to the actual boundaries of the paper owner's title. There is, it seems to me, a significant difference between such a case and one such as this which involves a boundary that is fairly ill defined on the ground, the areas of land in dispute are very small and necessarily at the margins of the alleged possessor's land, and the use made by the possessor of his own land is such that in truth the extent to which it affects the disputed margins is minor and intermittent. Such usage is likely by its nature to be inconclusive as to both whether it can in truth be said to be a sufficient exercise of physical control, and also whether it demonstrates the necessary intention to exclude others from the small areas concerned.

52. Lord Hutton in *Pye v Graham* drew attention to the existence of such inconclusive situations, again quoting from the judgment of Slade J in *Powell*:

> "76 I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion. ... It is in cases where the acts in relation to the land of a person claiming title by adverse

possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded.

77 The conclusion to be drawn from such acts by an occupier is recognised by Slade J in *Powell v McFarlane*, at p 472:

> "If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."

And, at p 476:

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

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

> "What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow." "

53. Mr Leigh also drew my attention to some remarks of Megarry J in *Neilson v Poole* (at p923) which were in the context of a claim to an estoppel but it seems to me equally relevant to circumstances in which a paper owner stands by without explicitly objecting to inconsequential acts that might conceivably in future be relied on as evidence of adverse possession:

> " Life would indeed be unendurable if people always enforced their rights to the ultimate: and I should be slow to regard a man who fails to dispute every possible point with his neighbour as thereby admitting or representing that what his neighbour does he does as of right. The law ought not to encourage people to be aggressive about their rights by the fear that in granting any indulgence they will be treated as having

> yielded up their rights. A man who puts in garden canes short of the point that he considers to be the true though unmarked boundary, in order to serve as a warning to himself and others against any arguable trespass onto his neighbour's land, ought not to be treated as having thereby represented that the canes show the true boundary. "

54. No doubt in general terms putting horses to graze in a field is evidence of an intention to make use of the whole field, to the extent that it can be reached by the horses. If the field consists of grassland up to a clearly defined boundary such as a fence or wall without any obstruction to access by the horses, such use would no doubt be capable of being relied on as amounting to possession of the land up to that boundary feature. But here the disputed boundary consists of a hedge which is accepted to have been quite a thick feature largely composed of hawthorn, and for most of its length the area of land in dispute amounts to a few inches between the midline of the growers of the hedge and the chestnut paling fence attached to the South side of those growers, or to posts very close to the line of the growers. There would not have been any grass or other grazing material underneath the canopy of the hedge. It must be doubtful whether the horses could have got their noses into the disputed area other than on a very occasional basis at the point at which the hedge was for whatever reason rather thin. There is no evidence before me that they ever did so at all. I accept that, as Mr Greenhill submitted, it would have been difficult for anyone to access the disputed area of land from the Avon Park side because of the presence of the chestnut paling fence, but all that means is that neither party has made any active use of that area at all.

55. The other respects in which it was said that use was made of this part of the disputed area were in my judgement even less substantial. Members of the public and Mr and Mrs Evans' friends and family were allowed to walk in the fields, but there is no evidence that they made use of this facility in order to go on to, or do anything in, the small disputed area in the middle of the hedge. There is no clear evidence as to where stallions were buried, and the headstones erected do not appear to be firmly fixed since some at least have been recently moved, so that even if they are at present located in the disputed area I do not regard that as sufficient evidence that they have always been.

56. So far as the "beak" is concerned, on Mr Evans' own evidence this area was covered by a thicket that was stock proof, and he took no steps to cut it down or cut it back until he put up the close boarded fence in 2004. There is thus no evidence that Mr Evans or his animals went on to that area or made any use of it prior to 2004. No doubt the owners of Avon Park had failed to put up a stock proof fence along the northern edge of the thicket as they were required to do by the 1964 conveyance, but in circumstances in which the thicket was left in place so that there was no active use of the land by anyone, it cannot be said that (even if it were relevant) the area on which the thicket stood had been abandoned by them.

57. For these reasons, I am not satisfied that the evidence shows the necessary degree of physical control of the disputed areas to found a claim for adverse possession. Furthermore, since such use does not show a clear intention to possess and exclude others from the disputed areas, it is not such as to give rise to any presumption of the necessary intention to possess those areas, so that the onus would be on the defendants to establish that intention which, in my judgement they have not done.

58. Accordingly, I reject the claim for adverse possession and find that the boundary line remains as I have set out above.

59. The remaining issue concerns the counterclaim in respect of flooding to the defendants' land allegedly caused by work to the claimant's access road. The road in question runs along the western boundary of field 75. The pleaded allegation is that in or about 1998 the claimant caused this road to be widened and raised. Prior to that, it is pleaded, water collected on field 75 either by rainfall or as a result of flooding of the River Avon "drained and percolated naturally from field 75 on Oxtalls Farm over the access road on to the land beyond and thence into the River Avon". The defendants' evidence is that since alteration of the road they have suffered from floodwater in field 75 being unable to drain away after various flooding events, the first in 1998 itself and others in later years. The defendants gave no specific evidence of the extent of the works allegedly carried out to the road.

60. The claimant's witnesses denied that the work that has been done involved raising the height of the road surface at all. Mr Nicholas Allen said that the road had originally been made of concrete and installed in order to service a wartime glider base situated on what is now Avon Park. The level of the road, he said, had always been somewhat above the level of the surrounding ground so that although the work involved making of a bank by the side of the road adjacent to the defendants' field, that was only because the road was now wider and not because it was higher. By 1998 roots from the trees planted by the defendants along the boundary next to the road had caused the concrete to lift and crack. The work done involved removing the concrete and widening the road, but not raising the level of the surface. Under the tarmac a layer of crushed stone was placed as a base, which would be permeable to water and so assist, rather than reduce, the extent to which groundwater could percolate away under the road. Mr Michael Butler, the site manager who had been employed since 1988, said that he had been involved in the work done at that time, and that the kerbs laid for the rebuilt road had been at the same height as the previous kerbs, but the road surface itself was in fact laid slightly lower, so that the tarmac could in future be "topped up" without having to relocate the kerbstones.

61. It was accepted by the claimant that after flooding events areas of field 75 remained wet, and indeed it could be seen on the site visit that a small area in the south-west corner of field 75, and a larger area a little further along the western boundary, were much softer than the surrounding land and populated by marsh plants indicating permanent wetness.

62. Mr Allen's evidence was that no complaint had been made about any drainage problems until the present claim had been initiated. This would seem to be borne out by correspondence in 2010 which was produced during the trial, in which such a claim was threatened by way of counterclaim if the claimant should be "unwise enough" to issue any proceedings in respect of boundary issues. Prior to that, when floodwater was retained in field 75 Mr Evans had placed a pump in the field so as to pump water away, discharging over the claimant's road on to the neighbour's land. No objection had been made to this, nor had any permission been asked for.

63. In these circumstances, I am not satisfied that the evidence of the defendants' witnesses as to what was done to the road at least 12 years before they made any complaint about flooding can be relied on to establish that any such works have actually been the cause of any reduction in drainage from the defendants' land. They were not able to explain how any such works could have affected the percolation of

water through the ground, or to contradict Mr Allen's evidence involved laying of a stone base which would if anything have improved the extent to which water could percolate away. Although it was suggested by the defendants' witnesses that the new road surface was approximately 50 cm higher than the old, it seems to me that they had no firm basis for this assertion, which was effectively refuted by the evidence of Mr Allen and Mr Butler. I am not satisfied, therefore, that the surface of the road had been raised in such a way as would increase the extent to which water lying on the surface was retained by the road acting as a sort of dam. It was accepted that the road was widened, but that in itself would make no difference to its ability to hold back surface water.

64. That conclusion would be sufficient for me to dismiss the counterclaim. For completeness, however, I should say that had I been satisfied with the defendants' evidence as to the facts, I would nevertheless have upheld Mr Leigh's second submission that the claimant owed no duty in law to the defendant to receive naturally draining water onto its land, and could not be liable for any work that had the effect of preventing or restricting such drainage, short of unreasonable user of its own land. Mr Leigh further submitted that if there was any claim in principle, it was statute barred, or prevented by laches or estoppel.

65. As to the first of these points, the proposition of law was upheld by Mr Piers Ashworth QC, sitting as a Deputy High Court Judge in *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd* [1987] 1QB 339, in which after reviewing English and Commonwealth authority he said (p349):

> "I hold that the common law rule is that the lower occupier has no ground of complaint and no cause of action against the higher occupier for permitting the natural, unconcentrated flow of water, whether on or under the surface, to pass from the higher to the lower land, but that at the same time the lower occupier is under no obligation to receive it. He may put up barriers, or otherwise pen it back, even though this may cause damage to a higher occupier. However, the lower occupier's right to pen back the water is not absolute, as I shall demonstrate below…
>
> [I]n my opinion, although the plaintiffs had no right to require the defendants to accept the percolating water from their land, the defendants' right to reject it was not absolute, but was subject to qualification that such rejection must be reasonable and in particular in the reasonable user of their land. It follows that if a lower occupier erects barriers maliciously and not for the purpose of the reasonable user of his land, he is or may be guilty of the tort of nuisance…
>
> Again, I gratefully adopt the words of Windeyer J. in *Gartner v. Kidman*, 108 C.L.R. 12, 49:
>
> > "Although he has no action against the higher proprietor because of the natural unconcentrated flow of water from his land, he is not bound to receive it. He may put up barriers and pen it back, notwithstanding that doing so damages the upper proprietor's land, at all events if he uses reasonable

> care and skill and does no more than is reasonably necessary to protect his enjoyment of his own land. But he must not act for the purpose of injuring his neighbour. It is not possible to define what is reasonable or unreasonable in the abstract. Each case depends upon its own circumstances."
>
> I emphasise the last words: "Each case depends upon its own circumstances." Neighbourhood, duration, time of day may all be relevant."

66. Mr Greenhill accepted that it could not be said that the construction or rebuilding of an access road on this part of the claimant's land was in itself unreasonable use of the land. That is clearly correct; the access road existed before 1955 when the original title was divided and the strip of land on which the access road is situated was retained for the specific purpose of providing access into what is now Avon Park. His submission however was that it was unreasonable to construct an access road that did not provide for drainage under it. That submission may have been prompted by Mr Allen's evidence that he thought there had originally been a pipe under the road, although he had been unable to locate it. There was no evidence from the defendants that they had in fact ever been such a pipe under the road; Mr Richard Evans' evidence was that before 1998 water had flowed away across the surface of the road as it then existed, rather than underneath it.

67. There is no suggestion in this case that any alteration to the road was made maliciously or with the intention of causing or exacerbating drainage problems on the defendants' land. If the construction of an access road is accepted to be reasonable use, it seems to me that it follows that it cannot be said to unreasonable to construct such a road raised, at least to make modest degree as this one was, above the level of surrounding land if that land is liable to flooding, since that evidently will increase the extent to which the road can serve its purpose. Nor can it be unreasonable to construct such a road without special provision for water to pass underneath it; an obligation to do so would in effect amount to the obligation to receive natural draining water onto the claimant's land that was held in the *Home Brewery* case not to exist. Further, as Mr Leigh pointed out, if a culvert were created, that would potentially raise issues with the owner of the land on the far side of the road, since water flowing from the culvert would not be water draining naturally and in an unconcentrated way and so would or might require an easement from the neighbouring owner. In my judgment, therefore, even if the road had been altered in such a way as to impede the flow of floodwater or rainwater, that would not have been actionable.

68. In the circumstances, it is not strictly necessary to deal with the arguments on limitation, laches and estoppel, but had there been a cause of action shown I would not have upheld the defences based on laches or estoppel, since it does not seem to me that the extent to which the defendants stood by and coped with the consequences of any increased retention of water was such as to make it inequitable for them to enforce any rights in relation thereto, still less did they amount to any representation that they would not do so upon which the claimant could have relied.

69. As to the point on limitation, I prefer not to express a concluded opinion since it seems to me a potentially difficult point is raised which was not fully argued. Mr Greenhill accepted that the relevant limitation period is six years from the date on which the cause of action accrued, which in the case of the tort of nuisance is when damage was suffered, and further that if the works done to the road were capable of

amounting to a nuisance, damage was suffered on the first occasion when Field 75 flooded thereafter, which was in 1998. He submitted however that a fresh cause of action arose on every occasion when flooding subsequently occurred, because that amounted to further damage caused by a continuing nuisance, and accordingly an action could be maintained in respect of any damage suffered in the six years prior to issue of the claim.

70. The distinction between damage which is suffered on one occasion, but manifests itself over a period of time, and successive occurrences of separate incidents of damage can be a fine one. In this case the land near the road, if it be assumed that it was made more liable to retain water by the work done in 1998, remained in the same state throughout, though at times it was under water and at times merely wetter than other areas in the field. It may well be that such a situation is to be distinguished from, for instance, successive instances of subsidence of land caused by mining (see eg *Darley Main Colliery Ltd v Mitchell* (1886) 11 App Cas 127).

71. This part of the counterclaim then is dismissed. I invite submissions as to the form of order required to reflect this judgment in relation to the location of the boundary, and matters arising.