REF/2014/0689

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Stapleford Frog Island (Rainham) Limited
APPLICANT

and

Port of London Authority
RESPONDENT

Property Address: Land lying to South East of Creek Way Rainham
Title Number: BGL104878

Before: Judge Elizabeth Cooke

Sitting at: 10, Alfred Place, London WC1E 7LR
On: 8 – 11 February 2016 and 25-26 April 2016

Applicant Representation: Duncan Kynoch

Respondent Representation: Christopher Stonor QC

DECISION

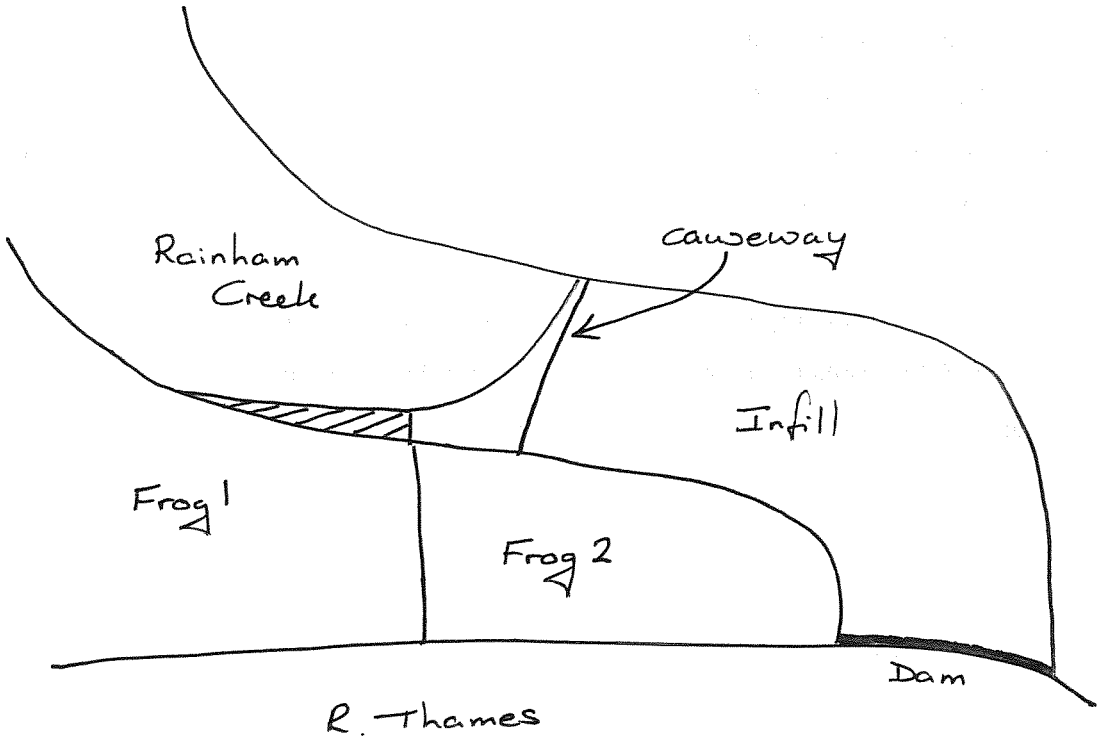
KEYWORDS – adverse possession – construction of a lease – topography and extrinsixc evidence - moveable title – estoppel between landlord and tenant.

Cases referred to

Acco Properties Ltd v Severn [2011] EWHC 1362.
Ali v Lane [2006] EWCA Civ 1532
Armstrong v Sheppard & Short [1959] 2 QB 384
Attorney-General v Chambers (1854) 4 De D M & G; 43 ER 486.
Attorney-General of Southern Nigeria v Holt [1915] AC 599.
Baxendale and others v Instow Parish Council [1982] Ch 14.
Cameron v Boggiano [2012] 1 P & CR DG21
Chief Land Registrar v Silkstone [2011] EWCA Civ 801.
Clarke v Adie No 2 (1876) 2 App Cas 423.
Essex County Council v Essex Incorporated Congregational Church Union [1963] AC 808, HL
Jayasinghe v Liyanage [2010] EWHC 265 (Ch).
Murdoch v Amesbury [2016] UKUT 3 (TCC).
Nielson v Poole (1969) 20 P & CR 909.
Norman v Sparling [2014] EWCA Civ 1152.
Powell v MacFarlane (1978) 38 P & CR 452.
Pye v Graham [2003] 1 AC 419.
Scarfe v Adams [1981] 1 All ER 843.
Watcham v AG of East Africa Protectorate [1999] AC 533

I. Introduction

1. Frog Island used to be a peninsula. It was a tongue of land in the angle between the River Thames and Rainham Creek, where the Ingrebourne River flowed into the Thames. In or around 1980 the creek was closed by the construction of a dam. Part of the river bed was filled in and a road was built across it. Frog Island is now almost surrounded by dry land, with only its name to recall its former topography.
2. The Applicant in this reference is the registered proprietor of freehold land on Frog Island, known as "Frog 1", registered at HM Land Registry under title number EGL252026; its holding company Stapleford Commercial Group Ltd ("Stapleford", formerly Stapleford Commercials Limited) is the registered proprietor of adjoining freehold land on Frog Island, known as "Frog 2", whose title number is EGL391125. Until 2008 Stapleford also held a lease of land reclaimed from the former river bed; I refer to that lease as "the infill lease". The lessor was the Respondent, the Port of London Authority.
3. Below is a sketch plan which gives an indication of the relationship between these areas of land.



4. This dispute is about the thin triangular strip of land ("the application land"), hatched on the plan above; it is part of a road that runs around the edge of Frog 1. Until the present dispute arose, the Applicant had regarded the application land as part of Frog 1 and within its freehold ownership, as did Stapleford which owned Frog 1 until 2009. In 2003 Stapleford granted a thirty year lease ("the Shanks lease") of Frog 1, including the application land, to Shanks Waste Services Limited ("Shanks"). Shanks operates on Frog 1 a waste disposal facility serving six London Boroughs. The road around its site is vital to its operations, and therefore so is the application land which is the width of the road at its widest part.
5. Both the Applicant and the Respondent claim to own the application land; the circumstances in which the dispute arose will be the subject of findings of fact later in this decision. On 15 May 2014 the Applicant applied to HM Land Registry for first registration as proprietor of the application land by virtue of adverse possession by itself and its predecessor Stapleford during the period 1998 to 2014.
6. The Respondent says that it is the owner of the application land. It does not now dispute that the Applicant and its predecessor have been in possession of the application land, for the requisite period and with the requisite intention, so as to satisfy the requirements for the acquisition of title by possession, save for one point. It says that part, or alternatively all, of the application land was within the infill lease and that, therefore, until 2008 (when the infill lease was surrendered) the Applicant's possession was not adverse because it was in possession as the Respondent's tenant. The legal effect of that would be that the application must fail.
7. The Applicant says that the application land did not form part of the land demised by the lease; alternatively it says that even if it did, the Respondent was not the freehold owner of the application land and that therefore the Applicant's status as tenant for that period does not stand in the way of its claim.
8. The Respondent objected to the Applicant's application and in due course the matter was referred to the First-tier Tribunal. There was a hearing before me on 8 February, listed for five days, following a very useful site visit on Friday 5 February; after four days the hearing was adjourned at the request of the parties so that they could first make written submissions about the Tribunal's jurisdiction and then make oral closing submissions, which they did on 25 and 26 April 2016.

9. I am more than grateful to Mr Kynoch for the Applicant and to Mr Stonor QC for the Respondent for their erudite and engaging argument at the hearing of this complex reference.

10. I heard evidence from five witnesses. Three were called as witnesses of fact: Mr Neil Searle, a director of the applicant and of Stapleford, Mr John Ball, a Chartered Surveyor employed by the Respondent since 2004 and the Respondent's Head of Property since 2005, and Mr Geoffrey Honey, a land surveyor employed by Evans and Langford LLP (Construction Consultants). Two were expert witnesses: Mr Nigel Atkinson MA, MSc, FRGS, FRICS, TD for the Applicant and Mr John Phillips FRICS FCIArb for the Respondent. Both are chartered surveyors of great experience. Although lengthy witness statements were made by all the witnesses, in the end a great deal of what they said was not in dispute, or related to matters that were not pursued at the hearing before me (as to which, see section III of this decision from paragraph [33] below). For the same reason, much of the material in the trial bundle (which comprised some 20 lever arch files at the start of the hearing, not to mention further bundles of authorities added as the hearing progressed) is not relevant. In this decision, where I have not mentioned any document or evidence, it is because it is not relevant to the matter I have to decide.

11. I have directed the Chief Land Registrar to give effect to the Applicant's application as if the Respondent's objection had not been made. I now give my reasons for that decision. My decision is structured as follows:

    I. Introduction
    II. Frog Island and the application land
    III. The application and the scope of the Tribunal's decision
    IV. Title to Rainham Creek and the application land
    V. Adverse possession: did the application land form part of the lease?
    VI. Conclusions.

II. Frog Island and the application land

12. Under this heading I explain the activities of the parties in the area of Frog Island over some decades, and I provide some more detail about the application land. Much of this material is taken from Mr Searle's evidence; I believe that the events and dates that I recount under this heading are not in dispute.

The parties and their activities in Rainham Creek

13. Frog Island is not a beautiful place, but it is busy, useful and interesting and I found the site visit most helpful. Before 1980 the area looked very different. The Ingrebourne River flowed, not through a culvert beneath Frog 1 as it does now, but into the Thames where the dam now is. Photographs in the trial bundle indicate that the River Ingrebourne was a substantial body of water, very unlike the insignificant outflow seen today because the water levels are now controlled by sluices up-stream. The water was tidal, and that is why the Port of London Authority is the Respondent in this reference.

14. The Port of London Authority is the statutory successor to the Thames Conservators, who derived their title from an indenture dated 24 February 1857 ("the 1857 Indenture") transferring land from the crown to the City of London, and then from a statutory conveyance in the Thames Conservancy Act 1857. The words of the1857 Indenture still define the Respondent's title:

> "all the estate right title and interest of Her Majesty in right of her Crown of in and to the bed soil and shores of the River Thames within the flux and reflux of the tides" to the east of an imaginary line drawn near Canvey Island.

15. Section 1 of the Thames Conservancy Act 1857 defined the word "shore" as

> "the Shores of the River so far as the Tide flows and reflows between High and Low Water Marks at ordinary Tides"

in line with the understanding that the crown's ownership of the foreshore is defined by the mean or median high water mark between the spring and neap tides (*Attorney-General v Chambers* (1854) 4 De D M & G; 43 ER 486). It is not in dispute that until the construction of the dam in or around 1980 the Respondent owned the river bed in Rainham Creek up to the mean high water mark from time to time; and it was made clear at the final hearing before me in April 2016 that it is no longer in dispute that the Respondent owned the application land before the dam closed the creek.

16. The story of the current reference begins with the construction of the Thames Flood Barrier. The closing of the barrier, in order to prevent flooding, would have given rise to a risk of flooding within Rainham Creek, and accordingly it was proposed in the early 1970s to close the creek (and, for the same reason, a number of other similar waterways flowing into the Thames). The problem posed by the Thames Flood Barrier, and the various possible solutions, are explained in the Statement of Case addressed by the Thames Water Authority ("the TWA") to a public inquiry into the proposed closure in December 1975. Following the public inquiry the Rainham Creek (Closure) Order (SI No 2043 1976) ("the Closure Order") made provision for the dam to be built across the mouth of the creek. There will be more to say later about the negotiations between the Respondent and the TWA at this time.
17. The dam was built in or around 1980, and a layer of infill (by which is meant hardcore and the like) ("the original infill") placed on its Rainham Creek side. The purpose of the original infill was to reinforce the dam and also to keep the water of the Ingrebourne River away from it so as to prevent a build-up of stagnant water, since the outflow culvert was a little way up-stream.
18. At this time the whole of Frog Island was owned by Phoenix Timber Ltd ("Phoenix"). The closure of the creek marked an opportunity for Phoenix to get access to Frog Island from the north, and in 1985 it commissioned Binnie and Partners, consulting engineers, to examine the feasibility of the construction of a causeway and the laying down of further infill. One of the plans produced in that exercise turns out to be crucial to this decision. It is first seen as an enclosure to a letter from Binnie and Partners to the Respondent, describing the proposed causeway and infill, dated 30 August 1985. I refer to this plan below as "the Binnie plan".
19. By 1988 the empty channel where the original infill had been placed had been filled with huge quantities of infill by Phoenix Timber Ltd and a road ("the causeway") constructed across it, supported by an embankment.
20. Two documents gave Phoenix authority to do this. One was a consent issued by the TWA under the Land Drainage Act 1976. The other was an agreement for lease dated 23 June 1988 between Phoenix and the Respondent ("the 1988 Agreement"). It is not in dispute that by the time the 1988 Agreement was entered into the causeway and the infill were already complete, even though the 1988 Agreement referred to an "accessway" (by which is meant the causeway) "to be constructed". On the same date

pursuant to that agreement the infill lease was granted to Phoenix by the Respondent for a term of 25 years with a break clause exercisable by either party in 1997 or 2007.

21. Accordingly by the end of 1988 Phoenix owned the freehold of the whole of Frog Island and also held the infill lease.
22. In 1989 Phoenix sold Frog Island and assigned the infill lease to Redland Cement Plc, which later (following an acquisition) changed its name to Lafarge Plasterboard Ltd ("Lafarge").
23. In 1998 Stapleford bought Frog 2 from Lafarge and also took an assignment of the infill lease. In 2001 Stapleford bought Frog 1 from Lafarge (there were commercial reasons why the two purchases were not made at the same time). Between 1998 and 2001 Lafarge allowed Stapleford to use and control Frog 1, pending the purchase (because the land would otherwise have stood vacant).
24. On 28 November 2003 Stapleford granted to Shanks a 30 year lease ("the Shanks lease") of Frog 1. Shanks subsequently applied for and obtained planning permission for the waste disposal plant. The application land is part of the road that runs around the plant and it is not in dispute that it has been occupied by Shanks since 2003.
25. Accordingly the land comprised in Frog 1, Frog 2 and the infill lease have been in the possession of Stapleford and its tenant Shanks since 1998; Mr Searle's evidence, which is not now in dispute, is that throughout that time Stapleford and Shanks controlled the application land and the access to it.
26. The infill lease was surrendered to the Respondent in 2008 by the exercise of a break clause.
27. Frog 1 was transferred to the Applicant in 2009 as part of a reorganisation of property within the group of companies and it is therefore now the landlord under the Shanks lease, while Stapleford still owns Frog 2.
28. In 2009 the Respondent granted to Select Plant Hire Company Limited a ten-year lease ("the Select Plant lease") of land broadly, but not entirely, coinciding with the area demised by the infill lease. It is not in dispute that the Select Plant lease does not include the application land.

More about the application land

29. The application land is a narrow triangle of land on the north-eastern edge of Frog 1. It is agreed that before closure the application land was under water, and that it consists of infill laid down by Phoenix (see paragraph [19] above) even though it is not part of

the embankment supporting the causeway. Accordingly the application land was in existence in its present form by 1988.

30. The application land is not within the red edging on the Land Registry title plan for Frog 1. The red edging on the north-eastern edge of Frog 1 is not a straight line. It is agreed – between the parties, as a result of the researches of their expert witnesses who have very helpfully prepared a joint report - that the application land lies within (that is, on the river side of) the mean high water mark in the creek at the latest date at which that line is recorded, namely 1973. That was a matter of fierce contention earlier in the proceedings, and even at the start of the hearing Mr Kynoch was insistent on the need for the Respondent to establish where the mean high water mark was at closure, but in the course of the final hearing before me in April it was confirmed both that the parties were no longer in disagreement as to the position of the mean high water mark and that it was agreed that before the closure of the creek the application land – then consisting of river bed and water - belonged to the Respondent.[1]
31. Title to Frog 1 was registered when Lafarge bought it from Shanks in 1989. The title plan depicts the dam, so must post-date 1980, but it does not show the causeway - yet the causeway and the associated infill were in place by early 1988. So the plan must date from before 1988, and probably before 1986 when the work of building the road and placing the infill was underway. Whether the title plan was the plan annexed to the conveyance from Shanks to Lafarge is not known. At any rate, it is problematic because at the date when it became the registered title plan for Frog 1 it was inaccurate, in that it did not show the application land as dry land.
32. By the time Stapleford bought Frog 1 from Lafarge the application land had been in existence in its present form for some ten years. Stapleford, and then Shanks, used it as part of their land; as already noted it became part of the road that now serves the waste disposal plant. Earlier in these proceedings there was some dispute about the date on which the current road was built and whether it was moved when it was re-surfaced in 2004 , but that is not now in issue.

[1] It is because of this agreement that so little of the expert evidence has had to be analysed in this decision. The experts' agreed report and agreed plans resolved a number of areas of deep disagreement.

III. The application and the scope of the Tribunal's decision

The relief sought by the Applicant

33. Once the matter had been referred to the First-tier Tribunal pleadings were produced which had the effect of elucidating or perhaps elaborating the dispute. In its Statement of Case, as amended, the Applicant claimed four different items of relief, namely
    i. a declaration that it owned the application land as part of Frog 1; failing that,
    ii. alteration of the register to extend the boundary to include the application land; failing that,
    iii. registration of title by virtue of adverse possession; finally, failing that,
    iv. entitlement to the land by virtue of a claim in proprietary estoppel.

The jurisdiction of the First-tier Tribunal in this reference: what is agreed

34. The Land Registration Division of the First-tier Tribunal ("the Tribunal") has a statutory jurisdiction pursuant to the Land Registration Act 2002 to decide matters referred to it by HM Land Registry under section 73:

> "If it is not possible to dispose by agreement of an objection [to an application, which is not groundless], the registrar must refer the matter to the First-tier Tribunal."

35. The form of the orders that the Tribunal can make following such a reference is determined by rule 40 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"): it may direct the registrar to give effect to the application, in whole or in part, as if the objection had not been made (rule 40(2)(a)), or to cancel the application in whole or in part (rule 40(2)(b)); and a direction under rule 40(2) may include a condition that a specified entry be made on the register of any title affected (rule 40(3)).
36. Thus in determining a reference the First-tier Tribunal can make quite a wide range of orders. However, it cannot give equitable relief: the statute has not given it jurisdiction to make declarations, nor to make orders to satisfy an equity arising by proprietary estoppel (save in the narrow circumstances envisaged in section 110(4) of the Land Registration Act 2002, which is not relevant here).

37. Accordingly it was acknowledged by both parties at the start of the hearing that the relief sought as items i and iv in paragraph [33] above could not be given.[2] There can be no suggestion that in not pursuing these items of relief at the hearing the Applicant is estopped from raising them in the future by not pursuing them here, because it cannot pursue them here.

The jurisdiction of the First-tier Tribunal in this reference: the argument about what is not agreed

38. Although there is therefore some agreement about the limits of the Tribunal's jurisdiction in this reference, jurisdiction remained an issue at the time of the final hearing before me in April 2016. Mr Kynoch in his written submissions on jurisdiction and at the April hearing argued (1) that the Tribunal has jurisdiction to decide whether or not the Applicant has title to the application land by virtue of its ownership of Frog 1; (2) that the Tribunal should now make a section 110 direction in relation to its claim in proprietary estoppel; and (3) that it is open to the Tribunal to make an order requiring alteration of the register.
39. I now set out the arguments on point (1) and my conclusions, and then explain the outcome of points (2) and (3).
40. As to point (1), Mr Kynoch argues that it is open to the Applicant, having applied for registration as proprietor of the application land on the basis of adverse possession, nevertheless to ask the Tribunal first to determine a prior question, namely whether it owns the application land without reference to adverse possession. Mr Kynoch accepts that the Tribunal has no jurisdiction to grant a declaration. The outcome of a finding that the Applicant was in fact the "true owner" of the application land would be a direction to the registrar to cancel the applicant's application (rule 40(2)(b), see paragraph [35] above, perhaps with a direction under rule 40(3) that the registrar make

[2] This difficulty may be eliminated in the future by flexible judicial deployment: see the Civil Justice Council report on the distribution of property cases between the courts and the Property Chamber of the First-tier Tribunal. This was included on the judicial intranet on Friday 3rd June, 2016 and can be found at www.judiciary.gov.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf There is now a pilot project on judicial deployment whereby concurrent proceedings in the Tribunal and the Central London County Court can be decided at a single hearing by a single judge. Had that project been under way by the time the case management conference was heard in this reference it might well have been possible for the reference to take a different course.

a specified entry on the Applicant's or any other title to clarify the extent of the Applicant's title.

41. That is the Applicant's preferred outcome, because its primary position remains that it (and Stapleford before it) owned the application land all along as part of Frog 1.

42. My Kynoch supports his argument by reference to the case of *Chief Land Registrar v Silkstone* [2011] EWCA Civ 801, approving *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch). He quotes a number of passages including the words of Rimer LJ in the Court of Appeal in *Silkstone*, who said at paragraph 48:

> "A reference to the adjudicator[3] of a "matter" under section 73(7) [of the Land Registration Act 2002] confers jurisdiction upon the adjudicator to determine whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application. If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself."

43. Mr Kynoch argues therefore that the Tribunal has jurisdiction to decide the whole dispute between the parties, without being limited by the terms of the application to Land Registry. He argues that the dispute is defined by the parties' Statements of Case, which determine what is properly before the Tribunal. Moreover, the Tribunal is to have regard to the overriding objective, in Rule 3 of the Tribunal procedure (First-tier Tribunal) (Property Chamber) Rules, to deal with cases fairly and justly, and (I paraphrase) in a manner proportionate to the importance of the case and the complexity of the issues, making effective use of the expertise of the Tribunal, avoiding unnecessary formality and seeking flexibility. Accordingly, he argues, it is appropriate for the Tribunal to determine the rival claims to ownership set out in the Statements of Case. He acknowledges, however, that a Statement of Case cannot confer jurisdiction where the Tribunal has none.

44. The Respondent disagrees and says that the Tribunal does not have jurisdiction to determine whether the application land is owned by the Applicant as part of the Frog 1. Mr Stonor points out that while "the matter" (see section 73(7), quoted at paragraph [34] above) is not defined in the Land Registration Act 2002, it is defined in the Adjudicator to HM Land Registry (Practice and Procedure) Rules 2003 in paragraph 2(1) as "the subject of either a reference or a rectification application." He submits that

[3] Now the Tribunal.

the Tribunal's jurisdiction is limited not only by statute, but also by Land Registry's case summary, and that it may not stray outside the boundary of the matter so defined.

45. The case summary is the document sent to the Tribunal when Land Registry makes a reference. It derives from Rule 3 of the Land Registration (Referral to the Adjudicator to HM Land Registry) Rules 2003, which says what it must contain, including the names and addresses of the parties and their representatives, and details both of the application and of the objection. In this reference, of course, it describes the application as being for title by virtue of adverse possession, and refers very briefly to the Respondent's objection.
46. Both Mr Kynoch and Mr Stonor make reference to the Upper Tribunal's decision, on appeal from the Land Registration Division, in *Murdoch v Amesbury* [2016] UKUT 3 (TCC), which was decided shortly before the hearing in February 2016. Mr Stonor referred to it in order to stress the restricted, statutory nature of the Tribunal's jurisdiction, and Mr Kynoch did so to point out how very different is this reference from the *Murdoch* reference.

The scope of my decision in this reference

47. At the heart of the parties' argument about jurisdiction is that notoriously undefined concept, the "matter" referred to the Tribunal pursuant to section 73(3). It is not only undefined but also undefinable, in the sense that it would probably not be possible to devise a definition that would make sense in every case. Certainly it is not limited to a summary consideration of the Applicant's entitlement to an entry on the register; *Jayasinghe* makes it clear that the Tribunal is to get to the bottom of the application and objection, to put it colloquially.
48. Nor can it be limited by the terms of Land Registry's case summary. The case summary is a useful practical tool. It tells the Tribunal what is the application and what is the objection; with it will be sent a copy of the application and the objection, so that the words used to describe them in the summary are not crucial. It is the starting point for the Tribunal's administrative and judicial procedures, and determines the form of the initial direction sent out to the parties (for example, who is to be the Applicant and who the Respondent; the applicant will be the party with the burden of proof). There is no authority for the proposition that the case summary limits jurisdiction in a particular case. It is unrealistic to regard it as defining jurisdiction

because when it is written the full basis of the application and objection are not known.

49. On the other hand it cannot be defined by the parties' Statements of Case, because it is well-established that jurisdiction cannot be conferred by consent (one of the crucial points in the decision in *Murdoch v Amesbury*: see *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808, HL), let alone by unilateral demand. Indeed, Mr Kynoch acknowledges that the Statement of Case cannot confer jurisdiction that the Tribunal does not have..

50. A more constructive approach is to start with the reference before me and to consider what the Tribunal *does* have jurisdiction to decide and must decide. Unquestionably it must determine what has been referred to it, namely the application for title on the basis of adverse possession and the Respondent's objection thereto. In doing so, the Tribunal's jurisdiction undoubtedly "includes the determination of the underlying merits of the claim that have provoked the making of the application", to quote again Rimer LJ's words in *Silkstone.* Accordingly the starting point is to consider that application and objection, and then to consider what must be decided in order to decide whether the objection is valid. Equally there may be questions or issues that are ruled out by the nature of that application and objection.

51. Mr Stonor has argued that it is inconsistent with a claim to title by possession for the applicant to argue that it is the "true owner" in any event, because "while a person claiming title by adverse possession has to prove factual possession, the paper title owner is deemed to be in possession" (*Powell v MacFarlane* (1978) 38 P & CR 452 at 470, Slade J, approved by the House of Lords in *Pye v Graham* [2003] 1 AC 419, paragraph 40).

52. Of course, where paper title is established then possession does not have to be proved. But there is no inconsistency in saying: "I think this land was mine all along as part my paper title but I am applying for title by possession". That is precisely what is said by those who apply for registration having lost their deeds, for example. They have tos to prove title by possession; and there is no requirement, in doing so, to show that they do not have a paper title. And it is agreed that the Applicant could have made an application to court and sought a declaration that it had a paper title or, in the alternative, a title by possession. There is nothing inconsistent in doing so.

53. However, the Applicant has chosen to make an application to Land Registry rather than commencing court proceedings, presumably choosing the claim by possession as its strongest suit.

54. This Tribunal hears many references arising from claims to adverse possession and they take many forms and many different evidential journeys. It is not unknown to find on hearing the evidence and on reading the documents of title that the applicant had a paper title to the land all along, whether or not it was aware of that fact. This is not a surprising scenario given the complexity of some titles. It results in a direction to cancel the application; it presents no difficulties in terms of jurisdiction. In other cases such a possibility does not arise; the paper title owner may be unknown and unfindable and the issues are possession and intention.

55. It is not necessary, in order to decide a claim to adverse possession, for the court or Tribunal first to determine who holds the paper title to the land in question. But in some, though not all, cases the only way to approach an adverse possession claim, or an objection thereto, is to decide who, if anyone, holds the paper title to the land in dispute.[4]

56. In this reference I have to take as my starting point the application that the Applicant has chosen to make, but I have to analyse the evidence in a way that makes clear the reason for my decision. In doing so, in the particular circumstances of this reference, I begin by assessing the evidence about the title to the application land, other than by adverse possession, for three reasons.

57. First, although the application land is a small area the determination of the reference necessarily involves the consideration of a number of different areas of land and the factual background is very difficult to understand without determining who owns what.

58. Second, and crucially, the central issue in this reference is whether the whole or a part of the application land was within the land demised by the infill lease; but that issue is only relevant if the Respondent was the owner of the application land before the Applicant and its predecessor Stapleford took possession if it. If the Respondent was not that owner, then the analysis of the extent of the infill lease is pointless.

---

[4] Similarly in some, but not all, determined boundary cases the only way to reach a decision about the Applicant's application will be to examine the title to the land and ascertain where the boundary lies (see the Upper Tribunal's decision in *Bean v Katz* [2016] UKUT 168 (TCC)) even though that is not the case where the application fails *in limine* (on the doorstep of the court) for a technical reason (*Murdoch v Amesbury* [2016] UKUT 3 (TCC)).

Accordingly a consideration of title is vital to explain the relevance of that analysis, which occupies some forty paragraphs below.

59. Third, part of the Applicant's case is that the Respondent has lost title to the application land to the Applicant. Unless the pre-adverse possession ownership of the application land is first examined and a finding made about it, the Applicant's case – in some of the alternative scenarios – amounts to saying that it is entitled by adverse possession because the Respondent is not the true owner because the applicant is the true owner – a position that is convoluted, not say contradictory.

60. To expand that a little: it would be possible for me to decide first whether the application land forms part of the lease. If it does not, then the Applicant's claim succeeds. But if it does, or in case I am wrong that it does not, I would then have to consider whether the Applicant is nevertheless no longer estopped from denying its landlord's title – on the tenuous authority of dicta in *Clarke v Adie No 2* (1876) 2 App Cas 423, a patents case – and then, if it is not estopped, or in case I am wrong that it is, to examine the Respondent's claim to be the owner of land in Rainham Creek including the application land. And one of the grounds on which the Applicant says that the Respondent does not own that land is its own claim to be the owner of the application land as part of its title to Frog 1. It is perfectly possible for an applicant to say that it can establish its title either by possession or as the holder of the paper title. But it is not possible for it to say that it has title by adverse possession *because* it holds the paper title. So to structure my decision in that way inevitably leads to confusion and contradiction.

61. Accordingly on the particular facts of this reference it is not possible to make sense of the claim to title by adverse possession without first establishing whether or not the Respondent owned the application land before that possession took place; and in these particular circumstances it is not possible to determine whether the Respondent has title without also analysing whether the Applicant has title (other than by adverse possession).

62. Accordingly I begin by analysing the pre-adverse possession title to the application land.

63. Turning to Mr Kynoch's point (2), what of the suggestion that the Tribunal should now make a section 110 direction in respect of the proprietary estoppel claim? This was the subject of discussion at the final hearing and it was accepted by Mr Kynoch that that is neither possible nor necessary. The purpose of a section 110 direction is to

transfer to the court the matter before the Tribunal so that the matter can be decided alongside other claims; as I am now deciding the matter before the Tribunal there is nothing left for section 110 to bite on. In any event, it has always been open to the Applicant to take court proceedings on the basis of its claim in proprietary estoppel, and it needed no direction from this Tribunal to enable it to do so.

64. Point (3), as it happens, does not arise. I find that the Applicant has not shown, on the balance of probabilities, that the application land belongs to it as part of Frog 1 and without adverse possession. Had I found otherwise then there would have been scope to consider what direction I should make to the registrar as a condition of the registrar's cancelling the Applicant's application (I reject the suggestion, made by Mr Stonor, that such a direction cannot be given when an application is to be cancelled. Rule 40(3) enables a condition to be attached to a direction under either rule 40(a) or rule 40(b)). But that does not arise.

IV. Title to Rainham Creek and the application land

65. As we have seen, the Respondent's root of title is the 1857 Indenture (see paragraph [14] above), which conveyed:

> "the bed soil and shores of the River Thames within the flux and reflux of the tides".

66. The Applicant agrees that the Respondent was the owner of the application land before the dam was built. But it says that the Respondent lost title to it either when the dam was built – in which case the river bed reverted to the riparian owners and the application land therefore belongs with Frog 1 – or when the infill, of which the application land consists, was laid down, for a number of alternative reasons. I look at those arguments in turn.

Did the Respondent lose title to the application land when the dam was built?

67. The Applicant argues that the Respondent's title is defined by the tides. And there are no tides now in Rainham Creek. Accordingly, the Applicant says that the mean high water mark, defining the limits of the Respondent's title, now lies along the Thames side of the Rainham Creek dam. There are no tides within the creek and therefore the Respondent has no title there.

68. Both parties agree that what was conveyed to the Respondent's predecessors was a moveable title. The boundary moves with the tide. The leading case on the nature of a

moveable fee simple, to which both parties have referred me, is *Baxendale and others v Instow Parish Council* [1982] Ch 14, where Megarry VC characterised a moveable fee as one where "The fee itself is a continuing estate, but it is an estate in land which from time to time changes its position." His discussion focused on lot meadows and on the foreshore where a grant of land may convey an estate that moves with the sea. As it happens, no moveable fee was found to exist in that case because there was in fact a plan defining the title concerned. But here there is no plan. There are only the words of the 1857 indenture.

69. My Kynoch in his closing note quoted extensively from *Loose v Lynn Shellfish Limited* [2015] Ch 547 in support of the proposition that whether there is a moveable fee is always a question of construction. His closing note was submitted before the Supreme Court handed down its decision in that case on 13 April 2016: see now [2016] UKSC 14. Much of the argument in Mr Kynoch's closing note was addressed to the Respondent's argument that its title to Rainham Creek was fixed; but it was made clear at the closing hearing that the Respondent accepts that the 1857 Indenture created a moveable fee simple insofar as the title included foreshore (which I understand to mean land over which the tide flows).

70. There remains a difference, therefore, in the way the two parties describe the title, because while the Applicant says that the whole of the Respondent's fee simple in the bed of the tidal river is moveable, the Respondent says that its title is fixed save insofar as it is foreshore – and therefore fixed save for the area between low and high tide. Which of those two ways of characterising the Respondent's title is correct may be a complex and perhaps an academic question, because the essence of the disagreement here – and the question I have to decide - is about the effect of the damming of the creek upon what is agreed to be, or to have been, a moveable title (even if the extent to which it was moveable is not agreed). The Applicant says that the dam brought to an end the Respondent's title to Rainham Creek, and the Respondent of course disagrees.

71. The Applicant is saying that the Respondent's title is not only moveable with the tides but also conditional upon the tides. When the tides cease, so does the title. The river bed then reverts to its common law position and is owned thenceforth by the adjoining landowners *ad medium filum* – up to the middle of the river.

72. The Respondent, however, says that the consequence of the moveable nature of its fee simple in Rainham Creek is that its title became fixed when the dam was built, so that its boundary is now the last high water mark before closure.
73. That is certainly what everyone expected in the years before the dam was built and it is the basis upon which land management has taken place in Rainham Creek and elsewhere ever since.
74. I referred above to the public inquiry at which the closure was authorised. On the day before the public inquiry the Respondent reached an agreement with the TWA on the basis of which it withdrew its opposition to closure. The agreement was that the TWA would not exercise against the Respondent its powers of compulsory purchase of land within the creek, and would instead co-operate with the Respondent in the management of the creek thereafter. That agreement was formalised in a document dated 14 January 1976 (a similar agreement had been made with Phoenix dated 26 August 1975, likewise in consideration of Phoenix withdrawing its objection to the Closure Order). Ever since, the Respondent has managed and leased land in the creek – hence the infill lease, and now the Select Plant lease. But that is immaterial if the Applicant is correct.
75. Moreover, on 29th May 1984 the Respondent conveyed to the TWA the land on which the dam was built. There were no tides on that land, but clearly both parties believed that the Respondent owned that land after closure. It was pointed out, for the Applicant, that the conveyance does not contain a recital of the Respondent's title to the land; but I see no significance in that. The TWA would not have paid the Respondent for land that it did not believe the Respondent owned.
76. Mr Kynoch argued that it was important that Phoenix sought consent from the TWA to construct the causeway and infill (see paragraph [20] above); but I find that there is no significance in that. The TWA's consent was sought under the Land Drainage Act 1976 and not as owner of the land. The consent of the Respondent as the supposed owner of the land was given in the 1988 Agreement, following extensive correspondence with the Respondent.
77. The Closure Order in 1976 contained a number of provisions setting out the Respondent's position. In particular, Article 13 provided that the jurisdiction of the Respondent as navigation authority would cease to the north of the dam; and Article 17(11) says this:

"nothing in this Order shall prejudice or derogate from the estates, rights, interests, privileges, liberties or franchises of the Port of London Authority or alter or diminish any power, authority or jurisdiction vested in the Port of London Authority at the Commencement of this Order."

78. The natural meaning of those words is that the Respondent's ownership of land in the creek would not be disturbed by closure.
79. The Applicant is undismayed by the wording of Article 17(11). It agrees that the order is saying "this order makes no difference to the nature of the Port of London Authority's title." But, it maintains, that title was not only moveable but conditional before closure, and the closure makes no difference to that; by its very nature the Respondent's title within the creek will ebb away with the very last tide. Accordingly, said Mr Kynoch, the Respondent's title is unaffected but not improved by the Closure Order.
80. As a matter of common sense that is perfectly obviously not what the words meant, nor what anyone involved in the negotiation or implementation of the Closure Order thought they meant.
81. If it was actually intended that the Respondent's ownership would come to an end, then the draftsman of the Closure Order would certainly not have chosen those words to say so – and indeed a great many of the other provisions in the Closure Order would have been unnecessary or, at any rate, drafted very differently.
82. Rainham Creek was not, of course, the only creek to be closed around this time and for the same reason. I asked about this at the hearing; Mr Stonor told me, on instructions, that other creeks too were closed and that the Port of London Authority continues to manage land within them as the owner. Title to a couple of these areas has been registered. No evidence was given about this and Mr Kynoch did not formally accept the truth of what was said on the Respondent's behalf, but I see no reason to doubt its truth. Again, that is immaterial if the Applicant is correct.
83. Mr Stonor points out that if, as the Applicant says, its moveable title is actually conditional on the existence of tidal water, then the Respondent would lose title to any area of the river where an embankment was constructed. And there would then be considerable uncertainty as to who would then take the title; perhaps the City of London, perhaps the Crown as the original grantor?
84. The Respondent points to the case law on moveable titles to show that that is not the effect of an embankment, nor of a dam. The most relevant authority would appear to

be *Attorney-General of Southern Nigeria v Holt* [1915] AC 599 at p. 615 where Lord Shaw, giving the judgment of the Privy Council, said:

> "Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible … becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work on it remains as before, i.e. in cases like the present, with the Crown."

85. Clearly these words are relevant where an artificial embankment is placed in a river, moving the edge of the water in towards the centre of the river and thus reclaiming the bank. In *Holt* it was the Crown that owned the foreshore; when it reclaimed some of the bank it continued to own it even though it was no longer covered by water.
86. Does the same principle operate where there is no more tide because the river has been dammed?
87. The Applicant says not. Mr Kynoch in his closing written submissions seeks to distinguish *Holt* by arguing that this was a closure by Parliament rather than a sudden artificial reclamation, It was an assertion of the Crown's rights, the Crown having granted a moveable and conditional title in the first place, and the grant was always subject to reclamation in this way.
88. I am not convinced by the Applicant's efforts to distinguish *Holt*. The fact that the dam was authorised by Parliament is irrelevant (and indeed it is not unknown for embankments to be built by Act of Parliament, yet *Holt* does not suggest that they are any different from any other man-made reclamation). The dam is a man-made obstacle, an "artificial reclamation", and it seems to me that the same principle must apply.
89. I find that the title conferred by the 1857 Indenture was moveable in the sense that its edges were defined by the mean high water mark from time to time – as long understood – but that there is nothing in the Indenture to displace the further rules that the common law applies to moveable titles when their edges stop moving as a result of a man-made structure. Accordingly the building of the dam did not cause the Respondent's title to drain away with the water as it flowed out for the last time. The Respondent continued to own the land that had formerly been covered by the tidal river and was now for the most part dry save where the Ingrebourne River, much reduced, continued to flow.

90. That would appear to be confirmed by the plain and obvious meaning of Article 17(11) of the Closure Order, namely that the Respondent's ownership of land would be unaffected by closure.
91. So by virtue of the common law, and in any event as the Closure Order provides, the Respondent's title to the creek remained defined by the last high tide, or at least the last mean high water mark, before the dam was built.
92. I noted above (in paragraph [30]) that it was agreed, by the end of the hearing in April 2016, that the Respondent owned the application land immediately before closure. The result of the finding I have now made about the moveable title is that I can now proceed on the basis that the Respondent owned it immediately after closure too. As noted above (paragraph [36]) the Tribunal cannot make a declaration, but the finding I have made creates an issue estoppel between the parties.

Did the Respondent lose title to the application land when the infill was laid down?

93. Accordingly when the dam was built the Respondent owned the application land. Before closure the application land was covered by water; afterwards it is likely to have become an area of unstable river bed once the Ingrebourne River was changed by the use of sluices upstream. The Applicant says that if, as I have done, I find against it on the moveable title point then not long after closure the Respondent lost title to the application land, and the Applicant acquired it. It says this on a number of alternative bases all arising directly or indirectly from the reclamation of the application land by the laying down of infill (by Phoenix, as described in paragraph [19] above).
94. I can go through these alternative bases relatively briefly because I do not find any of them at all convincing – even though I do not doubt that the officers of the applicant, and of its predecessor Stapleford, have regarded the application land as part of the freehold of Frog 1 since they took possession of it in 1998. As Mr Searle put it in paragraph 12 of his witness statement, they have been unable to understand how the Respondent could own land that Phoenix created. Difficult as it is for the Applicant to accept, I do not find any legal basis for the argument that ownership passed to Phoenix, and thence went with the title to Frog 1, as a result of the laying down of infill. Phoenix did not create the land. It put infill on top of it.
95. I turn therefore to the Applicant's arguments.
96. One is that the Respondent's title is cut off horizontally at the level of the mean high water mark, agreed to be 3 metres ODN (which stands for Ordnance Datum Newlyn),

and does not extend to the infill above. As Mr Stonor put it the Applicant says that 3 metres ODN is a glass ceiling on the title. This flies in the face of the principle that title extends to the sky above and the earth beneath (*ad caelos et ad inferos* as the old Latin maxim has it), including any buildings or other structures on land. There is no authority for the claim that the presence of stone, concrete and other infilling materials on top of land excludes its freehold owner from the airspace, and now infilled space, above it.

97. A more developed version of that argument is that in allowing Phoenix to place infill, as it did by the 1988 Agreement, the Respondent granted to Phoenix an irrevocable licence, or perhaps a licence coupled with an interest, with the result that it lost title to it. The Applicant refers to comments made by Lord Evershed in *Armstrong v Sheppard & Short* [1959] 2 QB 384, to the effect that where licence is given to obstruct an easement, the easement may be extinguished.

98. That argument, or those arguments, evaporate in the presence of the infill lease itself. If permission to infill was intended to be an irrevocable licence to occupy, or to confer an interest, there would have been no need for the infill lease to regularise Phoenix's possession, and no right for the Respondent to take a rent from Phoenix. The licence arguments fly in the face of the reality of Phoenix's position, which is that it laid down infill in return for a lease. As it happens, as I shall go on to explain, it laid down infill that was outside the area of the lease, but that is another matter. Infilling by itself did not transfer the land, and that is why the authorised infill was the subject of the infill lease.

99. The applicant's final arguments relate to Frog 1 and its registered title. One is that the application land falls within its general boundaries. It is certainly possible for land that falls outside the red edging on a title plan nevertheless to be within its general boundaries *(Wotner's Guide to Land Registry Practice 2009* , at 3-003). But the application land at its widest point is the width of the road, which is outside the tolerance usually associated with general boundaries. Be that as it may, to succeed in this argument the Applicant would have to establish *why* the boundary was so far outside the line on the title plan, and must therefore rely either on the arguments discussed and dismissed above or on its final argument – referred to by the parties as the "bank to bank" argument. It is the idea that what Stapleford bought from Lafarge was Frog Island, from bank to bank, and that that must have been the intention on first registration. Mr Kynoch in his opening note at paragraph 25 said "...what was clearly

intended on first registration was to convey the whole of Frog 1 from the Thames bank to the Rainham Creek bank, and that included the application land, which had been placed there some 2-4 years prior to 1990".

100. I am unconvinced by the Respondent' argument on this point, which was that the purchaser at first registration could have had no views about the boundary, because it was at the same time taking an assignment of the infill lease and the boundary between the infill lease and the freehold of Frog 1 was unknown. That is speculation, and it is unlikely that the officers of Lafarge would deliberately have left the boundary of their freehold unknown. More importantly it assumes that the infill that comprises the application land was part of the infill lease, and I find (for reasons that appear later) that it was not.

101. However, again I am unconvinced by the Applicant's claim. Stapleford in 1998 bought whatever Lafarge had bought from Phoenix, and Phoenix could not convey what it did not own, whatever its own intentions and those of its purchaser. It is problematic enough to imagine the intentions of the vendor and purchaser on, or before, first registration, looking at land in a state different from its present condition, and looking at a plan that I cannot now see (because it is not known whether the plan, if any, attached to the conveyance that led to first registration was the same as the registered title plan). But even if I could do that, it is irrelevant, because Phoenix conveyed only its own land. If the preceding arguments arising from the infill itself do not succeed, and they do not, then the "bank to bank" argument is of no assistance. Equally, by the time Stapleford took over the extent of the title to Frog 1 was already determined, and the impressions of the officers of Stapleford and of the Applicant are not relevant to the extent of the land.

102. With that, then, I dismiss the Applicant's arguments that it owns the application land as part of its freehold land known as Frog 1 and within the already registered title to Frog 1. I find that if the Applicant's claim to title by adverse possession were to fail the land would remain in the ownership of the Respondent. Again, that is not a declaration and does not bind anyone other than the parties to this reference; and its practical effect is scant in the light of my findings below and my direction to the registrar to give effect to the Applicant's application for title by adverse possession.

V. Adverse possession: did the application land form part of the lease?

103. I now turn to the Applicant's claim to have acquired title to the application land by virtue adverse possession.

104. The Respondent holds a caution against first registration of the land within the 1973 mean high water mark (caution title number EGL569757), registered under the provisions of section 53 of the Land Registration Act 1925[5] on the basis that it is entitled to the freehold ownership of the land, but the caution simply records its claim; there is no registered title to the application land or any part of the river-bed north-east of Frog 1. Accordingly the Applicant's claim to have acquired title to the application land by adverse possession proceeds under the pre-2002 law; the provisions of Schedule 6 to the Land Registration Act 2002 are not relevant.

105. There is no need for me to set out in detail the legal requirements for the acquisition of title by adverse possession because it is not now in dispute that those requirements have been met save in one crucial respect. That became clear in the course of the hearing, after Mr Searle had given his evidence, which led the Respondent to abandon its one point of opposition in relation to factual possession.[6]

106. Accordingly the Respondent does not contest the Applicant's claim to have been in possession of the application land, by itself and its predecessor in title Stapleford, with the requisite intention, for the requisite period of at least twelve years before its application was made in 2014.

107. But the Respondent raises a different challenge with respect to part, or alternatively the whole, of the application land. The Respondent says that as to one part of the application land, Stapleford was in possession up until 2008 as its tenant, because the land formed part of the premises demised under the infill lease. For the Applicant, the consequences of partial success are the same as those of total failure, because if the Respondent is able to resist the Applicant's claim in respect of that part of the application land it will, perfectly properly, seek either to recover possession of it or to require payment for not doing so. As Mr Ball pointed out, it is a self-funding,

---

[5] The significance of this is that under the Land Registration Act 1925 a caution against first registration could be entered by a person claiming to be freehold owner of land, whereas under the Land Registration Act 2002 that is not possible, see section 15(3).

[6] The Respondent sought to argue that because the section 106 agreement relating to the construction of the Shanks building required the construction of a walkway around Frog 1 and the application land, which was to have been open to the public, the Applicant and its tenant could not have been in adverse possession because they had not enclosed the application land so as to keep people out of it. Mr Searle explained why the walkway had not been constructed – because of concerns from the police – and the point was dropped by the Respondent.

not-for-profit organisation, required by statute to get the best possible consideration for the disposal of land in its ownership.

108. The Respondent also argues, in case I find against it on the construction of the lease as to that part, that the lease should, alternatively, be construed so as to include the whole of the application land.

109. To explain those two arguments I have to make reference to a further plan.

Frog Island and the tadpoles: the area demised by the infill lease

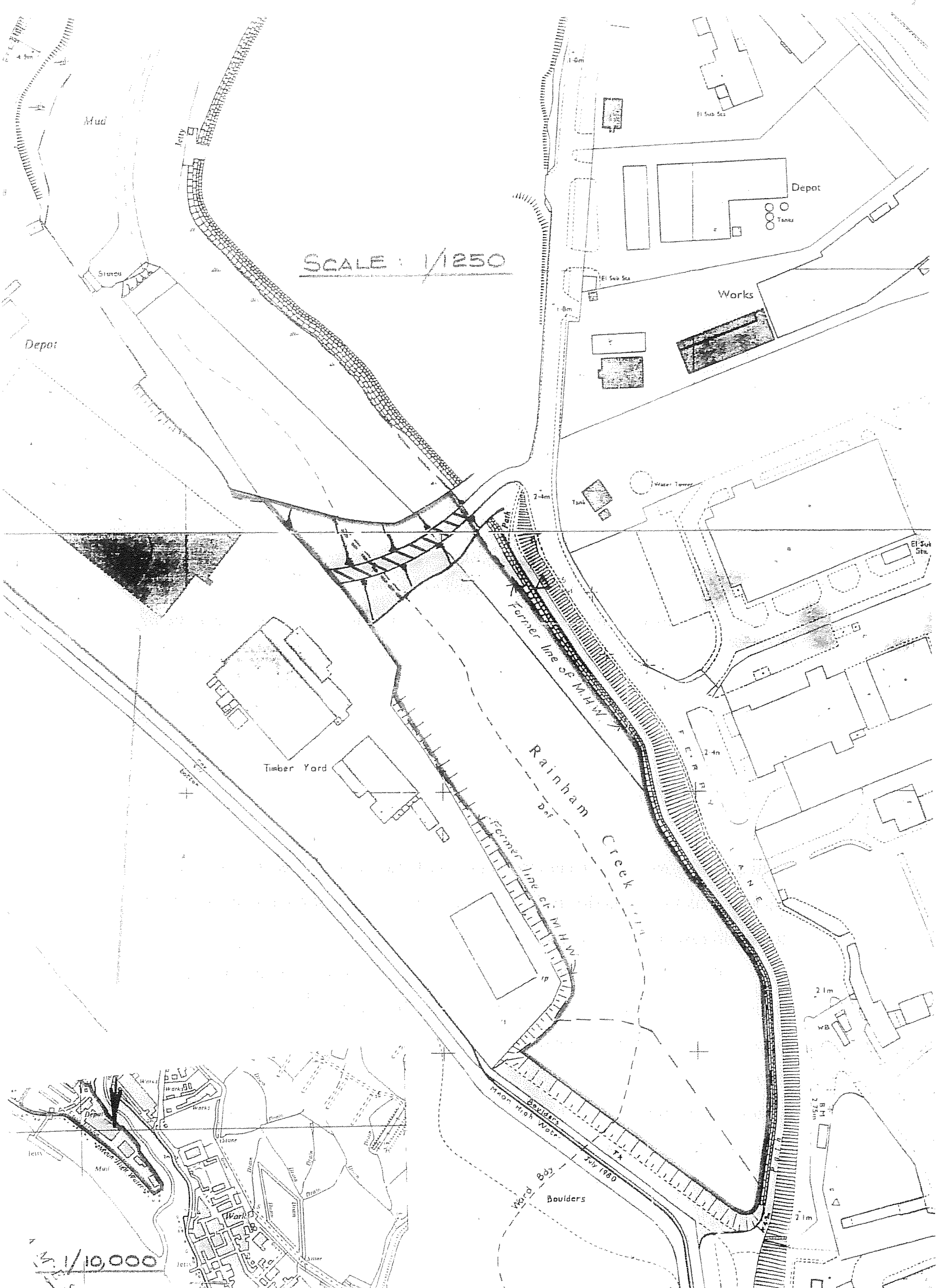
110. The infill lease was a consequence of the damming of Rainham Creek. The construction of the dam created a potentially useful area, former river bed, filled in with a small amount of infill originally and therefore dry, but at a lower level than the banks on either side. The infill laid down by Phoenix made it useful and valuable.

111. On the next page is a black and white photocopy of the plan annexed to the infill lease, with the red edging showing as a thick black line. There was produced at the hearing an original colour copy, I believe from the counterpart lease still held by the Respondent; previously the parties had been working from photocopies, on which red edging had been added to the black reproduction of the original red edging. I kept a colour photocopy of it, and the plan below is a black and white copy of that colour copy. Accordingly the thick edging is red in the original.

112. This plan was not drawn specially for the lease. Instead the parties re-used the Binnie plan, produced three years earlier for Phoenix (see paragraph [18] above).

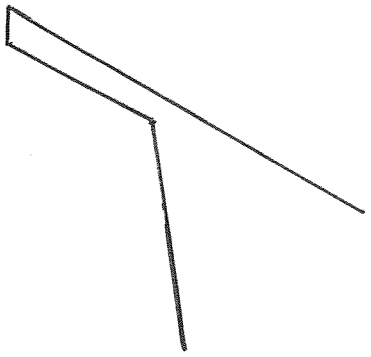
113. It will be seen that the demised premises, according to the lease plan, extend from the inner face of the dam in the south of the infill area to the foot of the embankment to the north of the causeway; the sloping embankment is indicated by marks known to surveyors as tadpoles. The riverside edge of the demised premises is marked as the 1973 mean high water mark (1973 being the last time there is a record of the position of the mean high water mark; Mr Atkinson explained in his evidence that even that measurement was probably based on Ordnance Survey data from before 1973).

114. The building to the west of the causeway, on Frog Island, is not the Shanks building. Mr Searle's evidence was that the buildings on the title plan to Frog 1 were not there when Stapleford bought Frog 1, and accordingly I deduce that the buildings depicted on the Binnie plan are not there today.



SCALE : 1/1250
Mud
Jetty
Sluice
Depot
El Sub Sta
Depot
Tanks
Works
Water Tower
Tank
Path
Former line of M.H.W.
Timber Yard
Rainham Creek
Former line of M.H.W.
FERRY LANE
Boulders
Mean High Water
July 1980
Ward Bdy
Boulders
1:10,000
Depot
Works
Drain
Jetty
Mud

115. At the north-west corner of the demised land is an area which was described at the hearing as "the nib", since it looks like the nib of a fountain pen seen sideways on. Its area is about 34 square metres, and it comprises about 30% of the area of the application land. It is difficult to see it on the lease plan because of the thickness of the red edging: here is a very rough sketch of it:



116. The question I have to decide is whether the nib (by which I mean the nib-shaped area on the plan to the infill lease) falls within the application land. The Respondent says that it does because if the plan is scaled up and overlaid upon a modern plan of the area, the thicker part of the nib lies within the application land.

117. This is known because of the research carried out by the parties' expert witnesses. They produced a joint report and, most useful of all, a number of joint plans, which show the positions of the application land, Frog 1's registered title boundary, the pre-1973 mean high water mark, the causeway as it is now, the causeway as shown on the infill lease plan, and the edge of the premises demised by the infill lease as seen when the plan is scaled up.

118. Those plans also show that the narrow tip of the nib is within the registered title to Frog 1 and actually beneath the Shanks building. The Respondent does not pursue any claim to that narrow tip, accepting that if it did own any land within the registered title to Frog 1 it has long since lost it through adverse possession. So although for simplicity I continue to refer to the nib, that narrow tip of the nib is in fact not relevant to this reference.

119. However, the plan is ambiguous, for reasons which I shall explore below. The Respondent also says that if I find that the nib did not fall within the application land

then, alternatively, the whole of the application land was demised by the lease even though none of it was within the land edged red on the plan.

The Respondent's first argument: the nib was part of the application land

120. The plan shows the demised area extending from the dam in the south-east of the creek to the foot of the embankment at the north side of the causeway.

121. I pause to note that the demise is not said to be "more particularly delineated and shown" on the plan; nor is the plan said to be "for the purposes of identification only". The causeway itself *is* said to be "for the purposes of identification hatched blue and coloured brown" on page 1 of the lease, but that description is not used of the plan itself. Accordingly, in the words of *Sara on Boundaries and Easements* para 1—12, it must be given equal weight with the words of the lease. That takes us no further.

122. The law relating to the construction of the lease can be summed up in two propositions. First, if the plan in unambiguous then I must go no further. Second, if it is ambiguous then extrinsic evidence can be admitted as an aid to construction (*Scarfe v Adams* [1981] 1 All ER 843).

123. That extrinsic evidence is, first, the topography (*Cameron v Boggiano* [2012] 1 P & CR DG21); and can include evidence of the conduct of individuals only insofar as it shed light upon the intention of the original parties (*Watcham v AG of East Africa Protectorate* [1999] AC 533; *Nielson v Poole* (1969) 20 P & CR 909; *Ali v Lane* [2006] EWCA Civ 1532; *Acco Properties Ltd v Severn* [2011] EWHC 1362; *Norman v Sparling* [2014] EWCA Civ 1152). The law is not in doubt and so I have referred only briefly to the principal cases that are agreed by the parties to be the authorities on this point, rather than burdening this already-long decision with quotations.

124. Whether a plan is unambiguous depends, of course, upon what one seeks to find out from it. This plan unambiguously shows that the land leased was in Rainham Creek. It is not unambiguous as to whether the nib was part of the application land. It is not possible from a perusal of the infill lease with its plan to ascertain whether the nib is part of the application land, although if I had to make a decision without any other evidence I would have to say that it is not, simply because there is nothing in the plan that might lead one to suppose that is.

125. Accordingly on this question the lease plan is ambiguous, and I have to turn to extrinsic evidence.

126. I begin with the topography of the area, and it takes the reader of the lease in two different directions, On the one hand the application land is flat and the nib on the plan is marked with a tadpole to indicate that it is sloping. So that lends support to the argument that the nib was not part of the application land, although not very strong support because it is well-known that the land has changed over the years.

127. But there is also expert evidence about topography. As I noted above, the expert witnesses for the Respondent and the Applicant agree that if the lease plan is scaled up and overlaid upon a modern plan, then the nib overlaps the application land, to such an extent that the straight tip of the nib – or "pan handle" as it was also called – extends beneath the Shanks building.

128. I pause to note that on that basis the Respondent says that the lease plan is unambiguous. But it is not. The overlap is not discernible from a perusal of the plan itself; expert evidence is required to demonstrate the overlap. And the evidence about overlap contradicts the evidence discerned by looking at the plan itself, because the experts also agree about a further point. They agree that when the lease plan is scaled up, what it says about the position of the causeway is wrong. Hence there being two positions for the causeway on the experts' agreed plans (paragraph [117] above): where it is now, and where the infill lease plan says it is.

129. It will be recalled that the lease plan is the Binnie plan, drawn up in 1985 before the causeway and embankment were built. The eventual construction did not match the proposal on the Binnie plan; yet that plan was used for the infill lease. The causeway was built further south than is shown on the lease plan, according to the dimensions derived from the scale of the plan. So although scaling up the plan has the effect of demonstrating an overlap with the application land when overlaid upon the modern layout of the area, it also has the effect of showing the north-eastern boundary of the demise some 25m further north-east then the foot of the embankment on the inland side of the causeway.

130. So topography and expert evidence have only revealed, rather than resolved, ambiguity. Does the lease plan tell us that the demise ends at the north-east edge of the causeway embankment, as the drawing of the plan would appear to say? If so, then the

demise ends south of Frog 1 and does not overlap with the application land. Or is its scale to prevail, with the effect that the demise ends approximately 25m further north, at least in the centre of the embankment? If the latter, then indeed the nib is part of the application land, but also the demise includes a part of the post-closure Ingrebourne River; the experts agree that that is what the scaled-up plan shows.

131. That cannot have been what the original parties intended. There was no purpose in leasing to Phoenix the river bed extending north of the embankment to an arbitrary line, and no purpose in leasing to Phoenix the south-western end of the Ingrebourne River. I am confident that that was not the intention of the parties, and that their intention is shown clearly by what is depicted on the plan rather than its scale: the objective was to lease the causeway and the embankment, and nothing to the north of that.

132. Other extrinsic evidence points in the same direction. I am keenly aware that I can consider conduct only insofar as it casts light on the intentions of the parties to the infill lease in 1988, and no-one who negotiated that lease is now available to give evidence. As Mr Stonor rightly points out, therefore, the available evidence of the original parties' intentions falls a long way short of what was available in, for example, *Norman v Sparling* [2014] EWCA Civ 1152 where the parties had marked out on the ground the boundary about which they were later in dispute.

133. Mr Kynoch said at the hearing in February that conduct is crucial in this case. I do not regard it as crucial because I have concluded that the land demised by the infill lease did not include the application land on the basis of the topography and the expert evidence, by the reasoning set out above. However, because some, although not all, of the evidence about conduct in the years from 2003 onwards supports my conclusion I discuss it briefly and explain my findings about it.

134. My conclusion is supported by some of the evidence about conduct because I find that neither Mr Ball nor anyone else in the employ of the Respondent was aware of any possibility that the Respondent owned and had leased the application land until the summer of 2012. Everyone who, like Mr Ball, was involved in the management of Rainham Creek knew that the application land existed, because it would be impossible to be unaware of the existence of a road around Frog 1. But there was no awareness of it as a distinct parcel of land that might not be part of the title to Frog 1. I find this

because if the Respondent, through its employees, had intended in 1988 to demise the application land to Phoenix, it is likely that its employees at the time would have continued to be aware of that fact and that knowledge would have been passed on. But that clearly did not happen; there is no evidence of any corporate memory, in the years for which evidence is available – roughly from 2003 – that the application land might not be part of the Frog 1. Had there been any, Mr Ball would have known.

135. The following sub-paragraphs set out my findings on the evidence about the conduct of the Respondent in the decade or so before the application. My findings depend to some extent on the evidence of Mr Ball. He was cross-examined at considerable length. Some of his answers were evasive. He was anxious not to lie, and he did not; but I find that he was trying to create an impression that the Respondent was aware of and made decisions about the application land before 2012. I do not believe that it was aware or that it made any such decisions. I also heard evidence from Mr Honey about some of the events described below, and his evidence was uncontroversial.

136. Here are my findings about conduct:

i. The application land was leased to Shanks in 2003. Shanks applied for planning permission for its waste processing plant in 2003, and the Respondent was sent plans and informed of the proposed development. At no point did anyone say on behalf of the Respondent: that is our land. The infill lease contains the usual covenant against sub-letting or alienation without the landlord's consent, yet no-one on behalf of the Respondent tried to say that there had been an unauthorised sub-letting. Mr Ball did not join the Respondent until 2004, and he said that he did not know about the Shanks lease at that stage; but he got to know about it later and yet took no action. I accept his evidence that when he first saw a copy of the lease plan he was not made aware of the application land from that plan, because like so many other plans of this area it was not clear. But he knew of the road, and if there had been any awareness in the Respondent's offices that part of that road was within the infill lease, Mr Ball would have realised sooner or later that it had been sub-leased to Shanks. It is therefore clear that there was no awareness within the Respondent organisation that the infill lease, for which it was taking rent, might extend to land north of Frog 2.

ii. In 2008 when the infill lease was surrendered the Respondent did not take possession of the application land. Mr Ball had no explanation for this save to say that it was fenced and gated. If there had been any suspicion on the part of the Respondent's employees, including Mr Ball, that the land now surrendered might extend to part of the Shanks plant, I have no doubt at all that the Respondent would have (perfectly properly) insisted either on taking possession or on taking a consideration for not doing so, regardless of fence and gates.

iii. I was asked to attach significance to the absence of the application land on a number of plans produced by or for the Respondent during this period. Two were produced for purposes to which the application land had no relevance. One was attached to Mr Ball's statutory declaration made on 6 August 2009 relating to the Respondent's title to the land comprised in the Select Plant lease. The application land is not included within the line said to be the Respondent's boundary on the plan. But nor is the river bed north of the embankment. This plan does not purport to show everything that the Respondent owned in Rainham Creek, and I attach no significance at all to the absence of the application land within the red edging marked "PLA boundary". The same goes for a plan relating to the position of sewage pipes beneath the infill area, referred to in paragraph 7 of Mr Ball's witness statement. Neither plan showed any of the land within the PLA's caution title north of the causeway either, yet that does not mean that the Respondent was unaware that it claimed to own that land. Neither the caution title land nor the application land had any relevance to the purpose of either plan.

iv. Mr Ball said that in 2008 after the surrender of the infill lease he surveyed the fence between Frog 2 and the infill area, and discovered a problem with the boundary between those two areas. As a result, in 2008 the Respondent commissioned a survey by Mr Honey of Evans and Langford prior to the grant of the Select Plant lease. Mr Honey's plan shows the registered titles of Frog 1 and Frog 2 and it is possible to work out from that plan that the application land is outside the red edging of both titles. Mr Ball said that he put the matter on hold and that it was on his "to do list". But the plan does not indicate that

the application land had been part of the infill lease and I find that no-one at that stage regarded it as having been part of the infill lease.

v. The application land was not part of the Select Plant lease. This is irrelevant. There could have been no reason for it to be included. But I find as a fact that there was no deliberate decision to exclude it, as there might have been if the Respondent (through Mr Ball or any other officer) had been aware that it had been part of the infill lease. Mr Ball was pressed hard on this point in cross-examination and refused to give a clear answer to the question whether that was a deliberate decision. He said "That [the land on the lease plan] was the area we decided to include". He did not lie but he was evasive, and it is clear to me that there was no deliberate decision to exclude the application land.

vi. In 2011 Shanks made another planning application, to install a bio-facility at the plant so as to increase the percentage of recyclable waste. Mr Ball again became aware of boundary problems and contacted Shanks to try to sort this out (Mr Searle thought that he should have approached the Applicant instead; I see no relevance in that point to the issues I have to decide). Mr Ball drew a plan showing in pink and blue the land that appeared to him to be on the wrong side of the Frog 2 boundary. The application land was not included, and I conclude that when Mr Ball produced this plan he did not have the application land in mind.

vii. In May 2012 the Applicant and the Respondent held a meeting; Mr Searle, Mr Ball, Mr Honey and others were present. The aim of the meeting was to sort out boundary problems between the parties. The meeting was "chaotic", as Mr Honey put it. A number of plans were looked at, and the window was used as a light box so that the plans could be overlaid and compared. I find that it was at that meeting that the application land first became an issue; Mr Ball said that the application land "became a problem at that meeting". I find that that was the first time at which the Respondent became aware of any uncertainty about its ownership. Even then, there is no evidence that the Respondent thought that the application land had been part of the infill lease. The purpose of the meeting, as Mr Ball said, was to sort out issues arising from the planning application; even then, therefore, I find that the Respondent did not expressly challenge the Applicant's use of the application land.

viii. Mr Searle's understanding was that as a result of that meeting there would be a land swap to sort out the boundary between Frog 2 and the infill area (but not involving the application land); he takes the view that Mr Ball went back on a deal that was done, or nearly done, at the meeting. Mr Ball says that he did not commit himself at that meeting. Despite the time expended on that point in cross-examination I do not regard it as relevant to my decision.

ix. As a result of that meeting a further survey was undertaken by Mr Honey for the Respondent and a Mr Andrew Moulsdale of BSinitiative for the Applicant. A number of plans were drawn up, exchanged and compared and it was as a result of that exercise that the extent of the uncertainty about the application land was revealed to both parties.

137. Accordingly Mr Ball's evidence, and the behaviour of the Respondent in the years before 2012, lead me to conclude that neither Mr Ball nor, therefore, any other employee of the Respondent had any idea that the application land might have belonged to it and been part of the infill lease until after the joint survey was done in the summer of 2012. And that lends some support to my construction of the lease, because if the Respondent had in 1988 intended to demise the application land one would have expected its then employees to have passed on their awareness to their successors. That is not conclusive, and I would not make a finding on the basis of the evidence of conduct alone. Indeed I have reached my conclusion without it. But it is worth saying that it is consistent with my construction of the lease and lends it some support.

138. The strongest evidence is from the lease itself and its plan, the topography, and the plans produced by the experts to show the relationship of the scaled-up lease plan to the features on the ground today. I find that the land demised by the infill lease extended to the foot of the embankment to the north of the causeway and therefore did not include any part of the application land.

The Respondent's alternative argument: the whole of the application land was demised by the lease

139. The Respondent then puts forward an alternative argument. If its preferred construction is not accepted – and it is not – the Respondent says that the lease

actually demised the whole of the infill laid down by Lafarge, whether within the red edging on the lease or outside it.

140. It refers to the definition, on page 2 of the infill lease, of the premises as follows:

> "the land at Rainham Creek, Essex shown edged red on the Plan which has been filled in and reclaimed from the Creek bed by the Tenant in accordance with the agreement dated [23 June 1988]"

141. The copy of the lease in the trial bundle leaves blank the date of the agreement, but it is not in dispute that it refers to the agreement dated 23 June 1988 ("the 1988 Agreement").

142. The Respondent, in this alternative argument, takes that definition (on page 2 of the infill lease) to refer to the whole of the infill laid down by Phoenix in Rainham Creek. And as it is agreed that the application land is infill, that must, the Respondent argues, mean that the whole of the application land formed part of the demised premises under the lease.

143. The Respondent's construction requires me to read the words "shown edged red on the Plan" as if they did not qualify or limit the term "the land". Yet it seems to me that the grammar of the clause requires that "the land" is qualified in two respects: it is shown edged red on the plan, and it has been filled in and reclaimed pursuant to the agreement of the same date. The Respondent is asking me to ignore the red edging and bring into the lease all the infill laid down by the tenant.

144. The 1988 Agreement has a slightly different plan. It is again the Binnie plan with red edging added, but the edging that stops south-east of the causeway. It is not suggested by either party that that was the true limit of the demised premises; the lease plan itself prevails because it is beyond doubt that the causeway and its northern embankment were within the demise.[7] The 1988 Agreement requires the prospective tenant to lay down infill in accordance with the annexed approved plans. It is common ground that the infill had been laid down, and the causeway built, before the date when the 1988 Agreement and the infill lease were executed, but that makes no difference to this particular point of construction. It is common ground that the approved plans do not authorise the infilling of what became the application land. Yet the Respondent

[7] It appears from a memorandum of the Respondent's solicitor dated 2 May 1986, copied in the hearing bundle, that at one stage there may have been an idea of having a separate lease of the causeway, which may explain the discrepancy in the eventual plans.

seeks to construe the lease itself as including within the demise any infill laid down by Phoenix, whether or not authorised by the 1988 Agreement.

145. That is not a plausible construction of the lease. To accept this argument would be not only to ignore the grammar of the definition of the premises in the lease, but also to render the lease hopelessly uncertain, being a lease of whatever infill the tenant chose or had chosen to construct, with or without authority, anywhere at all in Rainham Creek. That cannot have been what the parties intended, even if that were an available construction of the words of the lease.

146. So far as this alternative construction is concerned I do not think the lease is ambiguous: it plainly did not include whatever infill the tenant might have laid down, anywhere in the creek. Accordingly I regard the infill lease as unambiguous in respect of the question whether the whole of the application land was within the demised premises. Unambiguously the whole was not. If I am wrong about that, then I can turn to extrinsic evidence, and the Respondent's construction then fails on the same basis as the first argument once the Respondent's own conduct is examined. As discussed above it is clear that it never occurred to any of the Respondent's management or employees that its land included the application land, and in my judgement that sheds some light on the intentions of those who drafted the infill lease. I find that the Respondent's alternative construction also fails.

Conclusion

147. Accordingly, no part of the application land was within the premises demised by the infill lease; specifically, the nib on the lease plan did not extend beyond the gates at the south-east corner of Frog 1. Nor do I see any merit in the respondent's alternative argument that the whole of the application land was demised by the lease.

148. Because I began by finding that the Respondent was the owner of the application land until title was lost by adverse possession, I do not now have to go through the alternative submissions made by the Applicant in case I were to find that the nib was part of the infill lease. In that event its arguments are directed to showing that the Respondent had no title to the land in Rainham Creek, or to the application land, and so could not object to adverse possession. But I have already found that the Applicant's submissions on that point – even if it were not estopped from making them, as the Respondent's former tenant – must fail. Accordingly there is no further analysis needed or possible.

VI. Conclusion

149. I have found that no part of the application land was within the land demised by the infill lease. In the light of the Respondent's concession that the other elements of adverse possession are made out, the Applicant is entitled to succeed and I have directed the Chief Land Registrar to give effect to the Applicant's application as if the Respondent's objection had not been made.

150. In this Tribunal costs normally follow the event. If either party seeks an order for costs it is to make an application within 28 days; the other party will have a further 28 days to respond, following which I will make a decision on liability for costs. If I make an order for costs then the assessment of costs will be referred to a costs judge unless it can be agreed.

Dated this 30 June 2016

Elizabeth Cooke

By order of the Tribunal

REF/2014/0689

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Stapleford Frog Island (Rainham) Limited

APPLICANTS

and

Port of London Authority

RESPONDENTS

Property Address: Land lying to South East of Creek Way Rainham
Title Number: BGL104878

Made By: Judge Elizabeth Cooke

ORDER

IT IS ORDERED as follows:

On 18 July 2016 the Chief Land Registrar is to give effect to the Applicant's application, dated 8 May 2014, as if the Respondent's objection had not been made, unless by 5 p.m. on 15 July 2016 either party has made an application to the First-tier Tribunal, and provided a copy of that application to the Chief Land Registrar, for a stay of this order.

Dated this 30 June 2016

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL

Elizabeth Cook