PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2015/0875

BETWEEN

GARMAN GLYN ROBERTS

Applicant

and

FREDERICK JOHN SHORE
ELIZABETH DILYS SHORE

Respondents

Property address: Land to the South of the Ruthin to Mold Road, Gwerymynydd, Mold CH7 5LG
Title number: WA988488 and CYM226694

Before: Judge Gary Cowen

ORDER

1. The Chief Land Registrar is hereby directed to dismiss the Applicant's application dated 30 October 2014.

2. The parties shall be entitled to make written representations concerning the costs of this reference. Any such representations should be submitted by 4pm on 17 January 2018 following which further directions shall be given as necessary.

Gary Cowen

Judge Gary Cowen

Dated this 20th day of December 2017

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DECISION

1. The Applicant, Garman Glyn Roberts, is the owner of a property known as Rosemount, Ruthin Road, Gwerymynydd, Mold which is registered at the Land Registry under Title No. WA988488 ("Rosemount"). Rosemount comprises the land edged blue and the land edged green on the plan attached to the Statutory Declaration made by the Applicant on 29 October 2014.

2. The Respondents, Frederick John Shore and Elizabeth Dilys Shore, are the registered proprietors of land principally to the south of Rosemount which is registered at the Land

Registry under Title No. CYM226694 ("CYM226694"). There is also included within CYM226694 a strip of land to the north of the remainder of CYM226694 and which appears to abut Rosemount on its western boundary ("the disputed strip"). The disputed strip is edged red on the plan attached to the Statutory Declaration made by the Applicant on 29 October 2014.

3. The Applicant's application is to remove the disputed strip from CYM226694 and add it instead to the registered title to Rosemount on the grounds that the disputed strip forms part of the paper title to Rosemount and that the Register therefore contains an error which should be corrected pursuant to Paragraph 5 of Schedule 4 to the Land Registration Act 2002 ("the 2002 Act").

4. The Respondents' case is that they are the paper title owners of the disputed strip and that there is therefore no mistake in the register. In the alternative, they contend that even if they are not the paper title owners of the disputed strip, the disputed strip falls within their title as a result of a boundary agreement reached in correspondence in 1973. In the further alternative, the Respondents contend that they have been in adverse possession of the land from 1973 until at least 2011 and that, therefore, they are correctly registered as proprietors of the disputed strip

Background

5. On 23 July 1902, an auction of land took place at the Black Lion Hotel in Mold. Amongst the lots to be sold was Lot 1b, described as "*Four useful fields of pasture land and fir plantation*". This included OS Field No. 1608, said in the particulars to comprise 1.484 acres. The lot also included a roadway known as OS No. 1607, said to comprise 0.354 acres. In the later 1912 OS Map, the roadway appears to have been incorporated into Field No. 1608 which is given an area of 1.625 acres. Of course, adding the two earlier measurements gives a figure of 1.838 acres. It is not clear where that discrepancy arises. The plan attached to the auction particulars purports to be a scale plan.

6. It is the Applicant's contention that the western boundary of OS Field No. 1608 was the county boundary, shown on the 1912 OS Map by a dashed and dotted line.

Rosemount

7. Prior to 20 August 1930, all of the land which forms the subject matter of this reference was in the ownership of The Chester Northgate Brewery Company Limited ("CNBC"). On 20 August 1930, CNBC conveyed Rosemount to Robert Owen Jones ("the 1930 Conveyance"). The 1930 Conveyance conveyed "*All that piece of land situate at Gwernmynydd in the County of Flint containing six thousand six hundred and sixty square yards or thereabouts and fronting to the main road from Ruthin to Mold as the same with its boundaries and dimensions is more particularly delineated and described on the plan drawn on this deed and thereon surrounded with a verge line of blue colour*".

8. The plan drawn on the 1930 Conveyance appears to be a freehand drawing but is allegedly drawn to a scale of 1/2500. The jointly appointed expert, Kevin Hainsworth MRICS, says in his report that the drawing is traced from an earlier OS map, most likely the 1912 version, although there are significant differences between the two plans. The land to be conveyed is shown edged in blue and the words "Contents 6,660 sq yds" have been annotated on to the land. The plan contains three measurements for the property. On the western boundary, the measurement is 295 feet. Along the southern boundary, the measurement appears to be 200 feet and there is a measurement of 208 feet along the northern boundary where it adjoins the Ruthin to Mold road. On the plan, immediately to the west of the western boundary of the land conveyed is a strip of land on which has been written "Wayleave From Quarry". The annotation of the plan with those words stretches further south than the southern boundary of the land conveyed and a line has been drawn in a southerly direction from the south-west corner of the land conveyed which, on the face of it, appears to show that the "Wayleave" extended further south than the southern boundary of the land conveyed.

9. To the east of the eastern boundary of the land, there is an area of land shaped like an inverted "S" which is coloured brown on the plan. At its northern end, this runs between the north-eastern corner of the land conveyed and what appears on the plan to be a dwelling. The brown land ends at the southern boundary of the land conveyed.

10. The 1930 Conveyance granted a right to the purchaser "*in common with all other persons who have or who may have hereafter a like right at all times hereafter by day or by night for all purposes connected with the use and occupation of the said land or any messuages to be hereafter erected on the site thereof but not further or otherwise with or*

without horses or other animals carts carriages or waggons laden or unladen to go and return over and along the roadway coloured brown on the said plan (leading from the said Ruthin to Mold Road) so far as the same is co-extensive with the property now conveyed the purchaser his heirs and assigns from time to time paying over half of the expense of maintaining the said road in proper repair until the same shall be taken over by the local authority and also when called upon paying over half the cost of making up the said road fit for adoption by the local authority ...". This track to the east of Rosemount was referred to at the hearing as the eastern right of way. There is still an identifiable track at the location of the eastern right of way.

11. Robert Owen Jones did not hold the land for very long. He immediately conveyed the same land as had been transferred to him to Elford Harding Roberts by a Conveyance dated 23 December 1930.

12. Elford Harding Roberts died on 27 January 1937 and letters of administration were granted to his wife Mildred Aveling Roberts on 13 July 1937. She assented the property to herself on 19 June 1938. She then re-married in December 1938 and became Mildred Aveling Jones.

13. Rosemount was then conveyed by a Conveyance dated 18 June 1942 and made between Mildred Aveling Jones and Edward Lloyd Parry and Mary Davies. Once again, the whole of the land (described as being 6,660 square yards or thereabouts and more particularly delineated by reference to the plan to the 1930 Conveyance) was conveyed to Mr Parry and Miss Davies.

14. On 25 May 1950, Edward Lloyd Parry and Mary Parry (his, by now, wife) conveyed Rosemount to Thomas Hilditch Jones and Bessie Jones. Once again the land was said to comprise 6,660 square yards and was described by reference to the plan to the 1930 Conveyance. On the same date, Mrs Parry conveyed the dwelling to the east of Rosemount and known as Bryntirion Villa to Mr and Mrs Jones. That dwelling was subsequently known as Cloverdale.

15. On 2 September 1953, Mr and Mrs Jones conveyed both Cloverdale and Rosemount to Margaret Ellen Astbury. The Conveyance once again refers to Rosemount as 6,660 square

yards or thereabouts but shows the land on a new plan edged in blue. That plan, which also shows Cloverdale appears to show a significantly narrower right of way coloured brown to the east of Rosemount than that which was drawn on the 1930 Conveyance plan. It appears that at around this time, in 1953, the dwelling which was then referred to as Rosemount was constructed on that parcel of land.

16. Ms Astbury died on 29 November 1956 and Cloverdale and Rosemount passed to her executor, Trevor Johnson, who remained the owner of Cloverdale and Rosemount until his retirement in 1982.

17. In 1966, there was a widening of the Ruthin to Mold road on the northern boundary of Rosemount. For the purposes of the road widening, a part of Rosemount was compulsorily acquired by the highway authority. On the Conveyance dated 2 September 1953, it is recorded by Memorandum (added later) that by a Conveyance dated 17 November 1966 and made between Trevor Johnson and the Secretary of State for Wales, an area of OS Field 1608 measuring 785 square yards or thereabouts was transferred to the Secretary of State together with a right for the Secretary of State to create an embankment on adjoining land measuring 296 square yards or thereabouts. The removal of that land and the creation of the embankment had the effect of altering the dimension of 208 feet shown on the plan attached to the 1930 conveyance by effectively removing a triangular shaped parcel of land from the northern end of the land conveyed by the 1930 conveyance.

18. On 14 May 1982, Trevor Johnson appointed Robert Salisbury and Nelson Hughes as trustees of Ms Astbury's estate in his place. On 26 November 1984, Trevor Johnson in his capacity as personal representative of Ms Astbury's estate then assented to the vesting in Messrs. Salisbury and Hughes of Cloverdale.

19. Rosemount was then sold in two parts in 1985. On 23 January 1985, Cloverdale together with the land forming the southern part of Rosemount was conveyed to Owen Jones and Joy Rosemary Jones. The part of Rosemount which was sold was described in the Conveyance as *"all that parcel of land ... adjoining the said roadway coloured brown on the said plan all which property ... is for the purpose of identification only delineated with its boundaries and dimensions on the plan and thereon edged blue"*. The transfer also included *"ALL THAT the estate or interest of the Vendors in the land hatched black on the said plan"*.

On the plan, there is an area which is hatched black to the west of the western boundary of the southern part of Rosemount. The words "Wayleave to Quarry" are visible beneath the black hatching on that area.

20. On 16 May 1985, Messrs Salisbury and Hughes conveyed the northern part of Rosemount (nearest the road and including the dwelling constructed in around 1953) to Jane Myfanwy Butler and Jean Mary Butler. That transfer also included "*all that estate or interest of the Vendors in the land hatched black on the plan*". An area hatched black and equivalent to the one described above appears on the plan. Mrs Jane Butler had farmed the land as a tenant of Mr Johnson between 1973 and 1985 when she purchased the land.

21. On 7 June 2000, the southerly part of Rosemount and Cloverdale was first registered at the Land Registry under Title No. WA969381.

22. Later that year, on 25 September 2000, Jane and Jean Butler sold the northern part of Rosemount including the dwellinghouse to the Applicant and his then wife, Marie Therese Ginette Roberts. The land sold was stated to be "*All that parcel of land known as Rosemount ... which property is more particularly described and delineated on a plan annexed to a Conveyance made the 16th May 1985 ... together with the rights and subject to the rights contained or referred to in the Conveyance*". The northern part of Rosemount was registered for the first time under Title No. WA988488.

23. On 28 May 2008, the Applicant transferred a part of the northern part of Rosemount to Colin Evans. That land was given Title No. CYM401530.

24. On 8 February 2010, Jonathan and Gwen Evans transferred the southern part of Rosemount to the Applicant.

CYM226694

25. In February 1957, Frederick William Hughes Shore ("Frederick Shore"), the First Respondent's father, was interested in purchasing the land to the south of Rosemount. On 22 February 1957, Guy Williams & Co, solicitors, wrote to Frederick Shore. In that letter, Frederick Shore's solicitor, Mr Williams confirmed that he was "*satisfied that the Vendors will be in a position to sell to you two strips of land on the west and easterly sides of Field No.*

1608 coloured blue and pink on the plan subject to the strip of land on the easterly side of that field to a right of way in favour of the owners or occupiers of the bungalow now erected on the field No. 1608 ... The strip of land to the west of the field is not subject to any rights. Both these strips of land will give access to the main fields from the Ruthin – Mold Road". Later in the letter, the writer says that "*The Vendor's agent has inspected the land with Mrs Astbury's Executor and they have determined by measurement that the westerly boundary of her land runs along the line A-C on the attached plan*".

26. On 26 April 1957, CNBC conveyed CYM226694 to Frederick Shore. The land conveyed was said to be 14.975 acres "*or thereabouts situate at Gwernymynydd ... as the same are for the purposes of identification only more particularly delineated on the plan annexed hereto and thereon coloured or edged pink*". The plan which is attached to the 1957 Conveyance has been the subject of some controversy leading up to the hearing of this reference. However, at the hearing, I was provided with the original of the 1957 Conveyance with the plan attached and so was able to see it for myself. It accords with the plan at p.62 of Bundle 1 of the trial bundles. It shows the land conveyed to Frederick Shore edged in red and comprising OS Field Nos. (Part) 1503, 1505, 1507, 1508 and 1509. In addition, the land transferred included a strip of land at the western side of Field 1608 and a strip on the eastern side, being the eastern right of way which had been granted to Robert Owen Jones by the 1930 Conveyance.

27. Frederick Shore died on 23 May 1965 and on 18 October 1965, probate was granted to his wife, Louisa Shore, to whom the land was then assented. Mrs Shore died in the late 1980's and the land passed to the First Respondent.

28. On 5 May 2005, CYM226694 was registered at the Land Registry for the first time in the names of the Respondents.

1973 correspondence

29. On 28 December 1972, Guy Williams & Co, Solicitors, wrote to the First Respondent concerning the land. The First Respondent gave evidence that he dealt with correspondence regarding the land on behalf of his mother. The letter read

"On the question of the strip of land down the side of 'Rose Mount' in the northwesterly corner of the land, the deeds show quite clearly that this was included in the conveyance to your late father. In 1957, there was correspondence with the then Vendor's Solicitors with regard to the fencing of it and its identity was agreed but the Vendor declined to fence and was left for your father to fence or not as he thought fit. We have not been able to obtain the name of the present owner of 'Rose Villa' ... We would like to discuss with you the terms of a letter we should write to the relevant owner, giving him notice that you intend to fence the strip ..."

30. The First Respondent replied on 31 December 1972 and on 4 January 1973, his solicitors wrote again. That letter said that

"The tongue of land on the westerly side, giving access to the Mold-Ruthin Road is your property and was included in the Conveyance to your father and it is not subject to any rights of way in favour of anyone. This is unfenced and might possibly have been lost by adverse possession, taken by the owner of 'Rose Mount' or his occupier. ... I will write to 'Mrs Williams, Rose Mount' and give her notice that you intend, within the next week or so, to arrange for a post and wire fence to be affixed on her easterly boundary between the points 'A' and 'C' on the enclosed plan".

31. A letter in that form was sent to Mrs Williams on 8 January 1973. The letter records that Guy Williams & Co believed that Mrs Williams was the owner of "Rosemount" and that *"our client intends shortly to arrange for a simple fence to be erected along the line AC separating her land from yours".*

32. On 17 January 1973, Guy Williams & Co wrote once again to the First Respondent. In that letter, they said that they had received a reply to their letter of 8 January 1973 from a firm of solicitors known as Swayne, Johnson & Wight "whose partner, Mr Johnson, is the owner of the land in question". A copy of this letter is not available. The 17 January 1973 letter continues *"Mr Johnson confirms that he has no objection to you arranging for the erection of a fence between the points 'A' and 'C' on the plan. It would be wise for you to put this fence up as soon as possible and to break a way through the existing hedge which separates this strip from the rest of your land so that it comes positively into possession ..."*

33. On 29 January 1973, Swayne Johnson & Wight wrote to Guy Williams & Co. to say that "*Mrs C.M. Williams has this morning telephoned to us to state that your clients have erected a fence in the wrong position, but we have not been able to ascertain over the telephone where the fence has been erected and we are sending a copy of the plan to Mrs Williams and asking her to clarify the situation after which we will write to you*".

34. On 1 February 1973, Swayne Johnson & Wight wrote to Guy Williams & Co again. This letter includes the following:-

"*On the 29th ultimo we wrote to Mrs Williams explaining the position and sent her a copy of the plan on the Conveyance to Mrs Astbury which she has returned to us and she states that your client has erected a fence along the Westerly boundary of the land edged blue which includes a width of nine yards of the land edged blue. Apparently the fence has only one strand.*

...it is obvious that the fence has been erected in the wrong position and we are writing to let you know this so that any further work on the fence can be held up until the correct position has been established.

...

If you are unable to clear the matter up, we think we will have to get Mr Wynn O Rogers who prepared the plan on the Conveyance to Mrs Astbury to make a survey to establish the correct position of the fence.

We would mention that we have obtained a copy of the latest Ordnance Survey Sheet showing this area, but it does not seem to help a great deal as regards the position of the fence"

35. In a further letter dated 2 February 1973, Swayne Johnson & Wight wrote again to Guy Williams & Co. In that letter they stated that "*clearly the fence must be erected on what is the correct boundary between the late Mrs Astbury's property and your client's property and it may be necessary to attend on the site to make an inspection to establish the situation of the correct boundary*".

36. On the same date, Guy Williams & Co wrote to the First Respondent and informed him that they had received the letter of 29 January 1973 indicating that "*you have erected the fence in the wrong position*".

37. Guy Williams & Co wrote to the First Respondent on 6 March 1973 informing him that Mr Johnson "*feels it necessary to avoid any future question arising to have a survey made and he undertakes to let me know the result when he hears from the Surveyor*".

38. On 26 April 1973, Guy Williams & Co wrote once more to the First Respondent. The letter enclosed a plan dated April 1973 drawn up by Wynn O Rogers which it was said had been sent to them by Swayne Johnson & Wight under cover of a letter dated 24 April 1973. Although the First Respondent had the letter of 26 April 1973, the letter of 24 April 1973 was not disclosed and was not included in the bundles. The plan enclosed purports to be to the scale 1:500. That plan shows the original measurement of 208 feet along the northern boundary of Rosemount. This is marked "*Front boundary of Rose Mount prior to road widening*". The plan also shows a measurement of 222 feet along the revised northern boundary of Rosemount between points marked B and X on that plan and a measurement of 200 feet at the southern boundary of Rosemount between points C and I. An explanation for the First Respondent having erected his fence in January 1973 in the "wrong place" is offered in this letter; namely, that the First Respondent had taken the measurement of 208 feet from the eastern edge of the eastern right of way rather than taking that measurement from the western edge of that right of way which was, in fact, the boundary between Rosemount and the First Respondent's other land. The letter concludes by saying that "*I think and hope that Wynn Rogers' plan, which I have scaled off, is correct and corrects both errors. The reason for the frontage 'growing' from 208 feet to 222 feet is that the point B is fixed and unchanged by the road widening, therefore, the length of 208 feet is swinging southwards, not in an arc but along the straight line which is the extension of the westerly boundary of the plot across the part which has now been taken up by the highway*".

39. On 30 April 1973, Guy Williams & Co wrote to the First Respondent once more. In this letter, they thanked the First Respondent for his letter dated 27 April 1973, a copy of which we do not have, and stated that they would "*inform Swayne Johnson & Wight that you will move the fence to the line CX*". This is the line running approximately north/south on the westerly side of Rosemount. The letter then refers to the boundary on the easterly side of Rosemount but includes these words "*We have now written a non-committal letter stating that in view of the difficulty in fixing the boundary CX, you wish the easterly boundary of Rosemount to be fixed by a similar type of fence ...*"

40. On 18 July 1973, Guy Williams & Co wrote to the First Respondent stating that Swayne Johnson & Wight had written again "*asking if the fence has been re-positioned along the lines CX in the enclosed plan*". The enclosed plan was a further copy of the Wynn Rogers April 1973 plan which had been attached to the letter dated 26 April 1973.

The Boundary between Rosemount and the Disputed Strip

41. The parties approach the issue of the paper title ownership from (literally) opposite ends. The Applicant points to the fact that in the 1912 OS Map, Field 1608 is bounded to the west by the County Boundary which, the map shows, was marked by a wall. Mr Jackson of Counsel for the Applicant pointed out that wall to me on the site visit. It sits to the west of a deep cutting running in an approximately north/south direction. The cutting is clearly the product of significant erosion over a lengthy period but it is far from clear over what period that took place and whether it was natural or artificially created or whether it was entirely or even principally as a result of the transportation of materials from the quarry. To the east of the cutting lies a dilapidated wall, parts of which can be seen from the southern end of Rosemount. The Applicant relies principally on the joint expert report of Mr Hainsworth, a chartered surveyor who works exclusively on boundary matters. Mr Hainsworth has produced a joint report dated 18 January 2017. He additionally produced answers to questions asked by the parties on 27 February 2017 and 6 April 2017.

42. It is fair to say that Mr Hainsworth's conclusions concerning the plan attached to the 1930 Conveyance and his conclusions regarding the location of the western boundary of Rosemount in 1930 share the difficulties with which anyone attempting to precisely locate that boundary have been faced; primarily that there is no obvious means of interpreting the plan to the 1930 Conveyance in a manner which is internally consistent. As Mr Hainsworth notes in his report, "*it is not possible to obtain an area of 6,66 square yards or thereabouts if the dimensions of 200', 295' 208' and the shape of the easte ly side of the blue shaded area on the Plan Referred To are intended to be adhered to*". Th e difference between the quoted 6,660 square yards and the area which might be expected o have been adopted given the dimensions and shape of the land shown on the plan is sor e 9%. Mr Hainsworth expresses the view that the use of the word "thereabouts" might easonably be considered to be attributable to a difference of 3% and that, therefore, ther s an irreconcilable differenc in this plan between the stated dimensions and the stated area.

43. What is notable, however, is that Mr Hainsworth also notes that *"to obtain an area of 6,660 yards the shape would essentially need to be at or close to being a rectangle taking no account of the curve along the eastern boundary"*. Alternatively, he suggests, whilst the 295' dimension appears to be reliable because he was able to replicate the distance between the wall fronting the Mold to Ruthin Road in the mid-1960's to the wall which runs East-West on the southern boundary of Rosemount, the 6,660 square yards could only be achieved by "relaxing" the 200' and 208' dimensions. In my judgment, the first of those possibilities is a far more likely explanation for the discrepancy in the measurements in the plan. It appears extremely likely that measurements – or at the very least approximate measurements – were taken for the three boundaries for which measurements were included on the plan. If that was not the case, why would such measurements have been included? But given that it appears to have been the desire of the parties to the 1930 conveyance to include an approximate area for the land to be conveyed and that there appear to have been no other documents which might have assisted in trying to ascertain that area, it is quite possible in my view that the parties sought to approximate the area to be transferred by reference to the measurements which they had taken. Therefore, instead of carefully working out the area by reference to the somewhat difficult shape of the land especially at the eastern boundary, the parties simply calculated a value based on an assumption that the land was rectangular and made it clear that that was an approximate value. Using an average of 204' for the north and south boundaries and 295' for the west and east boundaries, the area would be 60,180 square feet or 6,686 square yards, a much closer approximation to the 6,660 square yards referred to in the document. In my view, that is the most likely reason for the discrepancy. It calls into question, however, whether much weight can be attached to the 6,660 square yard area.

44. The Applicant's case, based apparently on Mr Hainsworth's report, is that the line of boundary on the western side of Rosemount is represented by Line C on Mr Hainsworth's survey drawing No. INS461/001/1. On the key to that drawing, Mr Hainsworth has indeed noted Line C as representing the 1930 conveyance. Line C also corresponds with the dilapidated wall which I was shown on site. The Applicant's case is that Field No. 1608 stretched as far west as the County Line, that the "Wayleave for Quarry" marked on the plan to the 1930 conveyance had the County Line as its western boundary, that the 1930 conveyance plan shows that the boundary of Rosemount was intended to be to the east of the "Wayleave for Quarry" and denoted by some feature on the ground and that the dilapidated

wall at Line C is the obvious candidate to be that feature, especially as it leaves the cutting to the west which was, on the Applicant's case, the "Wayleave for Quarry".

45. Yet, in his conclusions, Mr Hainsworth says "*I do not know whether the dilapidated wall was intended to indicate the extent of the Wayleave and Boundary as evident on the 20 August 1930 Conveyance Plan*" and that "*At the southern end of the dilapidated wall I consider that the 200' annotated plan dimension (where Line E and Line D start) is a more likely indicator of the location of the Boundary of WA88488 Rosemount than the location of the dilapidated wall*". Furthermore, he notes that the 1930 conveyance plan "*does not have an annotated plan dimension for the width of the Wayleave to the West*".

46. This seems to call into question the Applicant's case in three respects. First, Mr Hainsworth undermines the contention that the dilapidated wall was intended to signify the boundary between Rosemount and the "Wayleave for Quarry". Indeed, nobody knows that that was the intention of the parties and we have no evidence as to when that wall was constructed though it appeared when I saw it to be many years old.

47. Second, although the dilapidated wall runs down to the south of Rosemount and Line C runs down that line for its entire length, Mr Hainsworth appears to be saying in the text of his report that the point at the southern boundary where Line D (said to represent the boundary as shown on the 1953 conveyance) and Line E (said to represent the boundary as shown on the 1973 plan) converge is a more likely starting point for the western boundary of Rosemount. I am not clear why that is not reflected in Mr Hainsworth's drawing. However, it calls into question whether it can be said that on a balance of probabilities, Line C represents the boundary line as shown on the 1930 conveyance plan.

48. Third, if the assumption is that the cutting represents the "Wayleave for Quarry" and that, therefore, the datum point for the 208' measurement on the northern boundary is the eastern side of the wayleave, we have no way of knowing where that datum point was because we do not know how wide the wayleave was in 1930.

49. The Respondents' case in relation to the paper title ownership of the disputed strip begins with the eastern side of the eastern right of way. That point, it is contended by Mr Strutt of Counsel for the Respondents, does not move throughout the chronological history of

the land. It marks the dividing point between the eastern right of way and the property which became known as Cloverdale. That point can be seen on the plan for the Sales Particulars for the 1902 auction as well as the 1912 Ordnance Survey plan. Given that the eastern right of way was, at that time, being retained by CNBC, it is alleged that the datum point as the eastern edge of the northern boundary would be likely to have been the western edge of that right of way. The Respondents then rely on the contention that it is extremely unlikely that the right of way was as wide as it appears on the plan to the 1930 Conveyance. In support of that proposition, Mr Strutt relies on the fact that both before and after 1930, the right of way is shown as being significantly narrower at its northern end than it is shown in the plan to the 1930 Conveyance. Whilst Mr Strutt recognised that it was, of course, possible that the right of way had been relatively narrow in 1912 at the time of the Ordnance Survey plan, had become much wider by 1930 but had then become narrower again by 1953 at the time of the conveyance of Cloverdale and Rosemount to Mrs Astbury, he contends that, on a balance of probabilities, that is unlikely. He contends that it would not have been necessary to widen the right of way in or before 1930 given that the land had frontage to the public highway and that the topography of the land as noted on the site visit does not lend itself to the idea that the right of way was very much wider than it was in the 1950's. On the site visit, the various potential lines of the western edge of the right of way had been staked out by Mr Hainsworth and the line which corresponded with the 1930 Conveyance had the western edge of the right of way passing over a bank of earth rising sharply from the level of the entrance to the right of way to what I would estimate was seven feet in height. Mr Strutt contended that that cannot have been the position on the ground in 1930 and that it was self-evident from the site inspection and the various documents which pre- and post-date 1930 that the right of way had always been narrower than it is shown on the 1930 Conveyance plan.

50. Having submitted that the right of way was narrower than it had been on the 1930 plan, he then measures 208 feet from the western edge of the eastern right of way though, as a result of the removal of a portion of the land in 1966 as a result of the road widening, that measurement becomes 222 feet. Mr Strutt relies on a number of the answers given by Mr Hainsworth on 6 April 2017 to the second set of questions put to him by the Respondents' solicitors. Mr Hainsworth agreed (in response to Q.9) that the methodology adopted in the Wynn Rogers 1973 plan "for taking into account the widening of the Ruthin Mold Road" was appropriate. Question 10 is also important. The Respondents' solicitors asked

"As regards the north western edge of the eastern right of way (which corresponds with the north eastern boundary of the plot conveyed by the 1930 Conveyance) is there any evidence to suggest that this point and in fact the current physical location of the eastern right of way (as shown on the 1973 plan) have ever changed over the years".

The answer given by Mr Hainsworth was *"Not that I am aware of"*. It may be that Mr Hainsworth had in mind that the reference to the 1973 plan in the question limited the scope of the question to the period since 1973. In his report, Mr Hainsworth notes that both at the north and at the south of the eastern right of way, the right of way is approximately 3m wide. He infers from this that *"the width of the easterly Right of Way was approximately 3.0 metres"*. That appears to be a reference to the position in 1973. Indeed, even if Mr Hainsworth's answer to Q.10 was intended to be dealing with a period before 1973, it is not obvious from his answer whether he considers that the position in 1930 was the same as appears on the 1973 plan and if he holds that view, his reasons for doing so.

51. That leaves the following problem. The Applicant relies upon a measurement from a datum point on the eastern side of the Wayleave to the west of Rosemount. But it is not possible to state with certainty where that datum point is because we have no information about how far the County Line was from the eastern side of the Wayleave. The Respondent relies upon a measurement from a datum point on the western side of the eastern right of way but because we do not know the width of the eastern right of way in 1930, that datum point is also uncertain.

52. Doing the best I can from the information which I have, I have concluded on a balance of probabilities and after taking into account all of the material contained within the expert's report that the boundary lay on Line E, being the line shown on the Wynn Rogers plan created in 1973 for the following reasons.

53. First. I do not think that the fact that the cutting lies to the west of the dilapidated wall and that the dilapidated wall is clearly very old is a sound basis for an inference that the dilapidated wall was intended to mark the boundary. I am supported in that view by Mr Hainsworth.

54. Second, the fact that Field No. 1608 took the County Line as its western boundary only assists the Applicant if he can show how wide the Wayleave was. In the absence of that information, we do not have a sensible datum point from which to measure the 208 feet on that boundary.

55. Third, I accept the submissions of Mr Strutt concerning the width of the eastern right of way. The Applicant is quite correct that we simply do not know about the topography of the land and the width of the land in 1930. But as Mr Strutt points out, it seems very strange that in the circumstances of this case where the right of way was used at all times very largely for agricultural purposes that it should be shown as relatively narrow in 1912 and 1953 but significantly wider – probably three times as wide – in 1930. If some event had taken place which might have explained why the right of way required to be very much wider in 1930 than it had formerly been, the position might be different. But no such suggestion was made in evidence. Again, one cannot take much from the current topography of the land which may have changed out of all recognition between 1930 and the present day but there would be little obvious reason for such a change and the width of the right of way in 1930, if accurately represented on the plan, would have taken it over land some seven feet or so above its current height.

56. Fourth, it is common ground that the 1930 plan is not accurate. It is either not accurate because the measurements shown on it were incorrect or it was not accurate because the land to be transferred was not approximately 6,660 square yards. If it was inaccurate in either respect, it suggests that the plan to the 1930 conveyance is not as accurate in every respect as it might be and that it should not necessarily be taken as representing accurately and to scale the width of the eastern right of way. If, as I have found, the most likely explanation for the discrepancy is that the area was effectively estimated by assuming a roughly rectangular parcel of land so as to avoid a difficult calculation having to be performed, it seems to me to be quite possible that the width of the eastern right of way was not drawn with any particular care, especially as it fell outwith the land to be conveyed and was included in the plan to show the location of the right of way which was granted.

57. I appreciate that on the face of it, I am not accepting Mr Hainsworth's view that the Line C represents the boundary line drawn on the 1930 Conveyance plan. However, it is open to me to differ from the view expressed to the Tribunal, even by a jointly instructed expert. I

do so for the reasons expressed above and because of the inconsistencies between Mr Hainsworth's identification of Line C as the relevant line and the sections of his text which I set out above at Paragraph 45.

58. In my opinion, therefore, the 1930 Conveyance did not convey the disputed strip. The disputed strip was conveyed to the First Respondent's father by the conveyance dated 26 April 1957 and the First Respondent has, at all material times, been the paper title owner of the disputed strip.

59. It follows that the disputed strip properly forms part of CYM226694 and that I do not accept that there is a mistake in the register which requires rectification. In my judgment, the Applicant's application must be dismissed for this reason. However, if I am wrong about my conclusions in this respect, I should go on to consider the Respondents' alternative cases.

Was there a Boundary Agreement ?

60. In Joyce v Rigolli [2004] EWCA Civ 79 the Court of Appeal was required to consider whether an agreement between the parties as to the location of the boundary between their respective properties was required to comply with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. Arden LJ referred to the judgment of Megarry J in Neilson v Poole (1969) 20 P & CR 909 as representing the law in relation to informal boundary agreements and in particular, Megarry J's distinction between a boundary agreement which is intended to transfer land from one party to the other and, on the other hand, an agreement which "does no more than identify on the ground what the documents describe in words or delineate on plans … the agreement is to identify and not to convey". Megarry J decided, s.10(1) of the Land Charges Act 1924 did not apply to the latter type of agreement because the agreement was not an agreement to convey.

61. Arden LJ decided that the same reasoning should apply in the case of s.2 of the 1989 Act. At [31], she said that

"As a matter of ordinary English usage, for a contract to be one 'for' selling or disposing of land, it must have been part of the parties' purposes, or the purposes to be attributed to them, in entering into such a contract that the contract should achieve a sale or other disposition of land".

62. At [32], she said that

"*to make the validity of a boundary agreement dependent on the preparation and execution of a written contract would be contrary to the important public policy in upholding boundary agreements so powerfully identified by Megarry J in Neilson v Poole ... I do not consider that Parliament ... could have intended section 2 to apply to transfers of land pursuant to boundary agreements of Megarry J's latter type ('demarcating' agreements) ...*"

63. The decision of the Court of Appeal was followed in Yeates v Line [2012] EWHC 3085 (Ch), a decision of Kevin Prosser QC. In Nata Lee Limited v Abid [2014] EWCA Civ 1652 Briggs LJ reiterated the distinction drawn in Neilson v Poole and Joyce v Rigolli where he said at [28] that "*Taking those two authorities together, there is to my mind a real difference between an agreement, the purpose of which is to move a boundary so as to transfer land from one neighbour to another, and an agreement the purpose of which is to define a previously unclear or uncertain boundary, even if that agreement may involve some conscious transfer of a trivial amount of land. The former agreement is subject to the formalities of the 1925 Act and the 1989 Act whereas the latter is not*".

64. In this case, the Applicant's contention was not that if there was a boundary agreement, it should be subject to s.2 of the 1989 Act but rather, that there was no boundary agreement at all. Mr Jackson of Counsel contended that whilst there was some correspondence between solicitors which suggested that an agreement had been reached, the correspondence was not complete and that, therefore, I could not be satisfied that a contractual accord had been reached between the parties. In particular, he pointed to the fact that the letter dated 24 April 1973 from Swayne Johnson & Wight by which the Wynn Rogers plan was set to the First Respondent's solicitors was missing notwithstanding that the First Respondent had kept almost all of the correspondence sent to him as was evidenced by the other correspondence in the bundles. Mr Jackson also contended that any agreement which can be gleaned from the correspondence must be taken to be subsequent to a discrete condition subsequent, namely the erection of the fence along the agreed boundary. We do not know from the correspondence whether the erection of the fence ever took place; the letter of 1 July 1973 merely asks whether the fence has yet been erected.

65. In my judgment, it is clear from the correspondence which exists that an agreement was reached between the parties as to the location of the boundary between the properties. In my view, that agreement had contractual force; each party gave consideration by promising to be governed by the agreement. The fact that certain letters in the chain are missing is neither suspicious at this length of time since the correspondence was written, nor fatal to the contention that an agreement was reached. There is no obvious reason why, in 1973, any of the parties would have an ulterior motive for misrepresenting the contents of correspondence, copies of which we do not have and in my judgment, it is perfectly proper for the Tribunal to have regard to the correspondence which we do have and to draw inferences about the contents of missing correspondence from references to that correspondence in other letters of which we do have copies.

66. In my judgment, the full run of correspondence to which I have referred above shows that having believed that an agreement as to the location of the boundary existed by reference to the plan attached to the Conveyance to Mrs Astbury in 1957, the First Respondent constructed a rudimentary fence along the line which he believed to be the agreed boundary line. Mr Johnson, the owner of Rosemount, believed that that line was incorrect and perhaps understandably, insisted that the boundary line be determined by his surveyor. Whilst we do not have the letter dated 9 February 1973 from Mr Johnson referred to in Guy Williams & Co's letter dated 6 March 1973 confirming that it was Mr Johnson's desire to have a survey carried out, there would be no reason for Guy Williams & Co not to report the contents of such a letter accurately to their own client, especially where the First Respondent was waiting to hear where he should re-erect the fence. The fact that it was Mr Johnson's suggestion that a survey be obtained is significant. It demonstrates, in my judgment, that there was some doubt as to the precise location of the boundary and that he was positively agreeing that he would be bound by the findings of his surveyor as to the whereabouts of the boundary line.

67. The plan prepared by the surveyor Wynn Rogers is then sent to the First Respondent on 26 April 1973 showing the line C-X as the boundary line between the two properties. Mr Jackson submits that without the letter dated 24 April 1973 referred to in that letter, we do not know what Mr Johnson was saying to Guy Williams & Co about the plan or the boundary. Whilst we do not have the letter, we know that some four days later, on 30 April 1973, Guy Williams & Co. wrote to the First Respondent that they had informed Mr Johnson that the First Respondent would construct a fence on the line C-X. There would be no reason for Guy

Williams & Co not to give their own client an accurate account of what they had written to the other party. Mr Johnson had stated that he wanted his surveyor to determine the whereabouts of the boundary. He then sends a plan on which the boundary is drawn as the line C-X. The First Respondent's solicitors then state that they have written back to Mr Johnson confirming that a fence will be constructed on that line C-X. If the missing letter of 24 April 1973 had put forward some other possibility for the boundary line, one might have expected to see further debate about the position in the correspondence. But, on the contrary, Swayne Johnson & Wight wrote at some point prior to 18 July 1973 to ask whether the fence had been erected on the line C-X. Again, if they had not done so, it is far from obvious why Guy Williams & Co would have told their own client an untruth.

68. Mr Jackson makes a number of further submissions with which I should deal. First he says that there is no evidence that there was ever a meeting or conversation between Mr Johnson and the First Respondent. Whilst true, it is clear that the agreement was reached between solicitors acting for each of the parties. In my judgment, there is nothing which would prevent a binding boundary agreement from being reached between properly appointed agents for the owners of the land. There is no suggestion here that either firm of solicitors did not have authority to bind their respective clients from whom, it appears, instructions were being taken.

69. Second, Mr Jackson says that it would have been quite remiss for Mr Johnson as a solicitor trustee simply to have agreed the purported line A-C (the line which the First Respondent previously believed to be the boundary line) without proper enquiry. Maybe so but first, there is no evidence that Mr Johnson did not make proper enquiries at the time that he agreed to the fence being constructed on that line and second, this agreement was in any event superseded by the Wynn Rogers plan and the agreement that the line C-X was the boundary line. In respect of that agreement, Mr Johnson had the advice of his own surveyor.

70. Third, Mr Jackson contends that it is astonishing that Guy Williams' letter to Mr Johnson of 30 April 1973 is missing and that the letter which we have seen, his letter to the First Respondent of that date, makes no reference to Mr Johnson having agreed the line. Again, this seems to me to be looking for inferences in the correspondence which cannot be justified. It is not terribly surprising that the First Respondent did not produce a copy of a letter sent by his solicitors to Mr Johnson as he would not necessarily have received a copy of

that letter. Further, it is not surprising that Guy Williams & Co's letter does not refer to an agreement from Mr Johnson. It was Mr Johnson, through his solicitor, who was proposing the line C-X as the boundary line. It was the First Respondent who was agreeing that line and Guy Williams & Co were in this letter reporting to their client that they had notified Mr Johnson that a fence would be constructed along that line in accordance with that agreement.

71. Mr Jackson next seeks to make something of the Swayne Johnson & Wight letter dated 6 March 1974 but there is nothing in that point. That is a letter concerned only with the possibility of fencing on the eastern boundary. To my mind, it is not relevant to the issues in this application.

72. In his oral submissions, Mr Jackson sought to characterise any agreement which the correspondence might reveal to be subject to a binding condition subsequent, namely the construction of the fence along the line C-X. Whilst I consider that it was clearly envisaged by the parties that the First Respondent would construct a fence along the line of the boundary – the correspondence began with the First Respondent seeking permission to construct a fence along the line of the boundary – I do not construe the correspondence as requiring the construction of the fence as a condition of the agreement. The agreement was intended to clarify the location of the boundary and if there was a binding agreement as to the location of the boundary, that would then be the boundary whether a fence was constructed along the boundary or not. In any event, even if that is wrong, I have no hesitation in accepting the evidence of the First Respondent that he constructed a fence along the line C-X following receipt of the plan in 1973. He said in evidence that he did not carry out the work immediately and that it would have been at some time after April 1973. He could not remember whether he had carried out the work by July 1973. The Applicant was asked in evidence whether he had seen the fence which the First Respondent says he erected in 1973 at the time of his purchase. He told the Tribunal that although he had walked the land at the time of his purchase, he had not seen the fence although he attributed that to the fact that the land was very overgrown at that time. I accept the Applicant's evidence that he may not have seen the fence at that time. Of course, that does not mean that the fence was not there and in that respect, the evidence of the Applicant and the First Respondent was not inconsistent. It should be noted that the Applicant confirms in his evidence that there was a fence on the westerly boundary of Rosemount although the Applicant characterises this as a stockproof fence. He says in evidence that in 2011, the First Respondent replaced this fence with a more substantial fence

and that it was this latter fence which the Applicant removed in 2011. From the foregoing, I am satisfied that the First Respondent did erect a fence along the line C-X in 1973.

73. Finally, Mr Jackson submitted that if there was a boundary agreement, it was unusual that it was not mentioned when the Respondents sought to register their Title to CYM226694 for the first time in 2005. Mr Strutt submitted that it was not terribly surprising that the boundary agreement was not mentioned because the rationale of the boundary agreement was not to fix a new boundary but rather to identify the location of the boundary as shown in the 1930 Conveyance plan. The mindset of the parties was that they were merely confirming on the ground the position set out in the documentation and there would be no particular reason, therefore, for that to have been mentioned in 2005. I accept Mr Strutt's submissions on this point which seem to me to reflect the correspondence passing between the parties in 1973.

74. Whilst Mr Jackson did not contend that any agreement which might have existed fell foul of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, I still have to be satisfied that any agreement is valid and binding. Because the agreement in this case does not comply with s.2 of the 1989 Act because it is not contained in a single document executed by all parties to the agreement, I must apply the guidance derived from the authorities referred to above.

75. In my judgment, this was clearly an agreement which fell into Megarry J's second category. In other words, this was an agreement whose purpose was solely to clarify the location of the boundary rather than an agreement whose purpose was to transfer property. My reasons for arriving at this conclusion are as follows. First, there was a genuine confusion as to the location of the boundary between Rosemount and the land belonging to the First Respondent caused not only by the 1930 Conveyance plan but also by reason of the intervening removal of land from the property for the purposes of the road widening scheme. The 1930 Conveyance had referred to a northern boundary measurement of 208 feet but the northern boundary had been completely altered in the 1960's and it was far from clear, therefore, where the boundary between Rosemount and the First Respondent's property lay. Second, the manner in which the agreement came about is consistent only with a desire to clarify the location of the boundary. The First Respondent wanted to construct a fence on the boundary and was asking for confirmation that that was acceptable to the owner of Rosemount. Ultimately, a surveyor was appointed to determine the boundary line and that line

was then agreed. There was never any suggestion in the correspondence that property would be transferred. Third, I reiterate the point made above in Paragraph 73. The reason that the agreement was not referred to in 2005 was that the parties believed that all they were doing in 1973 was to clarify on the ground what was in the 1930 Conveyance plan.

76. In my judgment, therefore, there was a binding boundary agreement created in 1973 which established the line C-X as the boundary. The disputed strip is therefore properly within the title of the Respondents and does not form part of Rosemount. If I am wrong in my primary conclusion that the disputed strip fell within the paper title of the Respondents, then, by virtue of this alternative case, in my judgment, this application must fail.

Adverse Possession

77. If I am wrong about both of the issues discussed above, it is necessary that I should go on to consider the Respondents' alternative case that they have been in adverse possession of the disputed land since 1973.

78. It was an unusual feature of the First Respondent's case that he said in evidence that *"very soon after his purchase of the land CYM226694 my Father pointed to the west boundary of Rosemount and told me that he owned a strip of land from the fields CYM226694 to the main Ruthin-Mold main road"*. This was unusual because the land was purchased in 1957 and the First Respondent was born in 1952 which means that this conversation must have happened when the First Respondent was around 5 years of age. However, when cross-examined about this evidence, the First Respondent was adamant that he had a clear recollection of walking the perimeter of the site with his mother and father and his father pointing through the hedge at the disputed land and telling the First Respondent that that was part of the land purchased. When it was put to him that he must have been mistaken in that recollection, he was clear that he was not and that he had that specific recollection.

79. The First Respondent also gave evidence that he constructed a fence along the line C-X on the 1973 plan at some time shortly after April 1973. I have already commented on this evidence above. His evidence was that his mother (until her death in the late 1980's) and subsequently he occupied and possessed the disputed land from 1973 until 2011 when the Applicant removed the fence which separated the disputed land from Rosemount. In his written evidence, the First Respondent described the disputed land as open pasture and the

First Respondent contends that he maintained the land throughout that period and used the land for grazing purposes.

80. The First Respondent relied on some photographs taken in around 1999. They show repairs being carried out to the fence on the disputed strip. The First Respondent said that he recalled that the fence had to be repaired because some sheep on the disputed strip had broken through the fence and strayed on to Rosemount.

81. So far as grazing the land is concerned, I heard evidence from Bobby Hughes, an electrician by trade, who, he told me, has held a grazing licence in respect of CYM22694 including the disputed land since 1997. Copies of two undated grazing licences in favour of Mr Hughes are in the bundle. Although the plans are at a very small scale, it is just about possible to see that the land included within the licences includes the disputed land. Mr Hughes also gave evidence that he was aware that Owen Jones had held a similar grazing licence over land including the disputed land from 1985 until his death in 1993 and that his wife, Rosemary Jones had also held a similar licence from 1993 until 1997. A copy of a grazing licence dated June 1993 in favour of Rosemary Jones is also in the trial bundles. The plan attached to that licence shows quite clearly the disputed land being included in the land over which a licence was granted. Mr Hughes stated that he had some land which he rented and that he would summer his sheep on the grazing land. He said that he had known Rosemary Jones for 3 or 4 years after the death of her husband and that he had helped her move her sheep off the grazing land. He said that he had grazed his own sheep alongside hers initially and that he had then taken over the grazing land from Rosemary Jones. He told me that Rosemary Jones had pointed out the disputed land to him and that she had told him that that land was part of the grazing land and that the grass on it needed to be kept low. Mr Hughes said that his sheep had grazed on the disputed land from 1997 until 2011 when the Applicant removed the fence between the disputed land and Rosemount. He said in cross-examination that he was concerned that sheep might stray on to Ruthin Road at the northern end of the disputed land but that during the period he had known the land, a sheep had never been lost. At the southern end of the disputed land, he told me that there were two pallets and a five bar gate which were used to control access for the sheep on to the disputed strip when they were shedding. In re-examination, Mr Hughes said that there were always sheep on the land until 2011. After that time, Mr Hughes did not allow his sheep on to the disputed land.

Mr Hughes came across as a straightforward witness who was trying his best to assist the Tribunal. I have no hesitation in accepting his evidence.

82. The Applicant purchased the northern part of Rosemount in September 2000 and the southern part in 2010 and therefore does not have any personal knowledge of the occupation of the disputed land before September 2000. He relied in evidence on a Statutory Declaration dated 16 August 2000 and sworn by Jane Myfanwy Butler who, together with her daughter, owned Rosemount between 16 May 1985 and September 2000. In that Statutory Declaration, Ms Butler refers to the disputed land by reference to a plan showing an area of cross-hatched land to the west of the boundary of Rosemount. Ms Butler states in the Statutory Declaration that "*I am able to confirm that I have enjoyed undisturbed possession of the said area of land cross hatched black on the plan without the consent of any other person and without payment to any other person*". No further particulars are given as to the manner in which Ms Butler is said to have enjoyed possession of the land.

83. Further, this Statutory Declaration is contradicted by an application made by Ms Butler's son, Andy Butler, for a Certificate of Lawful Use in relation to the garden of Rosemount. That application is dated 6 April 2000 and seeks certification that the whole of the land comprising Rosemount has been used as a garden ancillary to the dwellinghouse for a period of more than ten years. The application is accompanied by a document headed "Explanatory Statement". On the second page of the document, Mr Butler has written that "*The western boundary of the garden is again formed by a timber post and chain link fence. Beyond this fence is a 5.6-9.4m deep tranche of land (an easement) used for grazing*". On the same page, the claim is made that "the freehold [of Rosemount] includes the easement/way leave land for which a third party enjoys rights of access. As stated in the above, this area is fenced-off from the garden and is used for grazing".

84. This document appears to reveal a fundamental misconception on the part of Mr Butler concerning the disputed strip. On both parties' cases, there is no right of way or easement over the disputed land. It is either owned by the Applicant or by the Respondents but there are no rights over the land in relation to the other party or any third party. Mr Butler appears to be claiming that the disputed land forms part of Rosemount and that would be consistent with his mother's Statutory Declaration that she and her daughter have been in possession of the disputed land since 1985. However, the use of the land for grazing by third

parties is inconsistent with this position. Between 1985 and 2000, the land was indeed being used for grazing but the grazing was with the licence of Mrs Shore and subsequently, the First Respondent. There is no evidence at all that Ms Butler granted grazing licences over the disputed strip or that she used them herself for grazing livestock.

85. In my judgment, what this document does show is that, consistent with the First Respondent's case and the grazing licences which I have seen, the disputed land was indeed being used for grazing throughout the period 1985 to 2000.

86. The Applicant also drew my attention to a letter dated 13 March 2012 written by David Harrison who lives at a house called Greenbank on the opposite side of Ruthin Road from the disputed land. Mr Harrison writes that he has lived at that address for "just over 5 years now" and that "last July or August 2011 I noticed from my bedroom window a flock of sheep grazing on the small fenced off strip of land adjacent to the trees. This is certainly the first time in my time at 'Greenbank' that I have noticed any livestock on this land". I do not derive much assistance from this letter. The Respondents contend that their adverse possession of the land was between 1973 and October 2003, the time when the Land Registration Act 2002 came into force with its changes to the law in respect of adverse possession. Even if Mr Harrison's letter could be taken entirely at face value, therefore, it does not much assist as Mr Harrison's knowledge only extends back to 2006 or 2007. Further, merely because Mr Harrison had not noticed sheep on the disputed strip before July or August 2011 does not mean that they were never there even during his period of ownership. I bear in mind that it was clear on the site visit that there was quite a bit of tree cover between "Greenbank" and the disputed strip. I cannot attach much weight in any event to a letter written specifically for the purposes of this application where Mr Harrison has not been called to give evidence and is therefore not available to be cross-examined on the contents of the letter.

87. In Powell v MacFarlane (1977) 38 P & CR 452 Slade J said "*Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive 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".

88. In the present case, the land in question is a relatively narrow strip of pasture land, bordered on one side by shrubs and a steep drop into the gulley running to the west of the disputed strip.

89. Mr Strutt submits that the evidence of fencing of the land and the grant of grazing licences for the land is compelling evidence that if they did not already own it, the Respondents had acquired adverse possession of the disputed strip by no later than the end of 2001.

90. Mr Jackson submits that the evidence is far from compelling. He points to the fact that Rosemary Jones did not appear at the Tribunal to give first hand evidence concerning her use of the land for grazing her sheep. She is described in Mr Jackson's submissions as the key factual witness for the Respondents. I agree with Mr Jackson that it would have been more satisfactory to have heard evidence from Rosemary Jones. However, I did hear from Mr Hughes who described himself as a friend of Rosemary Jones and who was able to give evidence from his own knowledge that Owen and Rosemary Jones had used the disputed strip for grazing sheep since 1985. I add to this evidence the existence of grazing licences dating back to 1993 which I have seen and the concession by Mr Butler that the disputed strip was being used for grazing from at least 1985 and I can feel satisfied, in my judgment, that the land was used regularly for grazing from approximately 1985 onwards.

91. The fence which I have already decided was erected by the First Respondent in 1973 had the effect of enclosing the disputed strip. There was already a fence on the western edge of the disputed strip leading down the steep bank into the gully. There was also a steep slope at the northern end of the land leading down to the Mold to Ruthin Road which effectively cut off access from that direction. The fencing of the disputed strip in that manner, therefore, enclosed the disputed strip with the exception of the southern end which led directly to the First Respondents' other land. A fence erected to exclude people from entering on to the land

has long been recognised as the strongest possible evidence of factual possession coupled with the requisite intention to possess the land. In Powell, Slade J described the enclosure of the land by a newly constructed fence as an act "so drastic as to point unquestionably, in the absence of evidence to the contrary, to an intention on the part of the doer to appropriate the land concerned". I shall return to the issue of the fence in due course.

92. The other acts of possession relied upon are the grant of the grazing licences and the grazing of the land itself by the licensees. The former is good evidence in support of adverse possession. As Slade J noted in Powell adverse possession depends upon the person in possession showing that they are dealing with the land as an owner would deal with it. In the case of pasture land, one might expect the owner of land to grant grazing licenses over that land to maintain the land and to provide an income. In my judgment, although the licenses themselves do not grant exclusive possession of the land and thereby create a tenancy, the licensor is asserting its right to deal with the land by granting such licenses. The acts of the licensee will be taken to be on behalf of the licensor as against the paper title owner: see Sze v Kung [1997] 1 WLR 1232. As a result, it does not seem to me to matter much that the licensor retains the right to share occupation of the land with the licensee. Both would be occupying for the licensor and adverse to the paper title owner.

93. The grazing itself is somewhat more equivocal. The courts have traditionally viewed the grazing of animals as unsatisfactory evidence of the taking of possession of land because the conduct might be attributable to the acquisition of a profit of pasture and therefore cannot be evidence of the requisite animus. So, for instance, in Powell itself, the grazing of cows and goats was held not to amount to possession of the land and in Boosey v Davis (1987) 55 P & CR 83 the quantity and quality of the acts of possession where goats were grazed on the land was described as "minimal". In other cases, however, the courts have been prepared to consider the grazing of animals as one of a number of acts of possession. So, in Smith v Waterman [2004] EWHC 1266 (Ch) the court treated the grazing of horses and other animals as one factor to be taken into account when deciding whether the squatter had taken possession of the land. In Topplan Estates v Townley [2005] EWCA Civ 1369 the squatter had continued to use the land for the purposes of grazing after the termination of successive grazing licenses. The Judge had held that that conduct, taken together with the squatter's other acts of possession, amounted to the taking of possession of the land. The Court of Appeal did not interfere with that finding. Finally, in Beaulane Properties v Palmer [2005] EWHC 817

(Ch) the squatter had grazed cattle on the land and allowed others to graze horses on the land for which they paid a fee. The court was satisfied that, together with the maintenance of the fences, this was sufficient to demonstrate that the land was being adversely possessed.

94. In my judgment, therefore, I am able to consider the evidence of grazing along with the other evidence which I have already considered in relation to the fencing of the land. I have already mentioned that I have found as a fact that the land was being used for grazing (through their licensees) by the First Respondent and his mother from 1985 onwards.

95. I note here that the evidence of the First Respondent was that the fence which he erected and which I have found effectively enclosed the land was constructed in 1973 and only maintained by the First Respondent as necessary thereafter. I have also found that there is reliable evidence that the land was used for grazing but that that reliable evidence commences in approximately 1985 by which time the fence had been erected. If the period of possession upon which the First Respondent is relying is limited to a twelve year period from 1985, is it right that I should disregard the earlier enclosure by fencing in 1973 especially if each act of possession alone would be insufficient to form the basis of a claim to have taken possession? In my view, that would be an extremely artificial approach. If a squatter encloses land by erecting a fence in preparation to take possession of land but then does no further acts on the land for, say, five years before returning to the land and then occupying it exclusively for a further twelve years, it would be wholly wrong, in my view, to ignore the fact that the squatter had erected the fence which, during the twelve year period of possession, was responsible for keeping the world at large off the land. If, as here, the squatter carries out repairs on that fence to ensure that it continues to serve that purpose, it would be artificial to ignore the construction of the fence in the first place.

96. Mr Jackson made a submission in his Skeleton and in the course of oral submissions that in any event, if he was correct that the owner of Rosemount was the paper title owner of the disputed land, occupation of the land by Owen and Rosemary Jones who were the owners of the southern part of Rosemount from 1985 could not be adverse to the paper title owner because they were the paper title owners. Mr Strutt, in response to that submission, cited Bligh v Martin [1968] 1 WLR 804 as authority for the proposition that where the paper title owner is in possession of the land pursuant to a tenancy or licence granted by the squatter,

that possession remains the possession of the squatter and therefore can be adverse to the paper title owner.

97. Having given the parties some time to consider that authority, Counsel provided me with a joint submission on the point. In that document, Mr Jackson accepted the principle set out in Bligh v Martin subject to the caveat that it does not apply where the paper title owner refutes the licence. But that is not this case. Mr Jackson says once again that I should draw such an inference from the failure to call Rosemary Jones but I agree with Mr Strutt that there is no evidential basis whatsoever for drawing such an inference.

98. In my judgment, the Respondents have satisfied me on a balance of probabilities that the First Respondent's mother and, later, the Respondents have been in possession of the disputed strip to the exclusion of all others for the period between 1985 and 2011 and that during that period they held the requisite intention to possess the land. In my judgment, therefore, the Respondents would also succeed under their alternative case based on adverse possession.

Conclusion

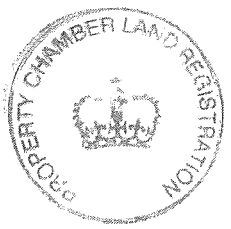
99. In my judgment, therefore, the Respondents have satisfied me that they are the correct paper title owners, there was a boundary agreement which fixed the boundary along the line of the fence which was erected in 1973 so that the disputed strip fell within CYM226694 and that they (and their predecessor in title) were in adverse possession for a period of twelve years prior to the coming into force of the 2002 Act. Accordingly, pursuant to Paragraph 18 of Schedule 12 to the 2002 Act, the Respondents were entitled to be registered as the proprietors of the disputed strip.

100. It follows that there is no mistake in the register by virtue of the Respondents being registered as proprietors of the disputed strip under Title No. CYM226694 and there is no justification for the removal of the disputed strip from that title and its addition within the Applicant's title.

101. I shall therefore direct the Chief Land Registrar that the Applicant's application should be dismissed.

102. I am minded to order that the Applicant should pay the Respondents' costs of this reference to be the subject of a detailed assessment if not agreed between the parties. If the parties would like to make submissions seeking to persuade me of any other course, they should lodge their submissions with the Tribunal within 28 days of the date of this decision. If I do not receive submissions from either party within that period, I shall proceed to make the proposed costs order without further reference to the parties.

Gary Cowen



Judge Gary Cowen

Dated this 20th day of December 2017.