[2018] UKFTT 325 (PC)

REF/2017/0562

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

GARY HUMM

APPLICANT

and

BRIGHTLINGSEA TOWN COUNCIL

RESPONDENT

Property Address: Land and Buildings at Brightlingsea

Title Number: EX745719

Before: Judge Owen Rhys

Sitting at: Ipswich Magistrates Court

On: 20th March 2018

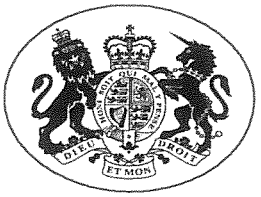
O R D E R

IT IS ORDERED that the Chief Land Registrar shall give effect to the Applicant's application in Form AP1 dated 14th September 2016 save insofar as it relates to the area covered by the floating jetty on the western boundary of the application land as shown on the title plan (which said area shall remain in the Respondent's title EX745719)
AND IT IS ORDERED that the parties have permission to apply to the Tribunal for the purpose only of implementing this Order at the Land Registry

Dated this 30th day of April 2018

Owen Rhys

BY ORDER OF THE TRIBUNAL



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Applicant representation:	In person
Respondent representation:	Mr Marsden of Counsel instructed by Fisher Jones Greenwood LLP

D E C I S I O N

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1. On 14th September 2016 the Applicant, who is a local commercial boatman, applied to HM Land Registry in Form AP1 to alter the above-named title, registered in the Respondent's name. I shall refer to the Respondent as "the Council", which also includes its previous iteration as the Urban District Council. The application was stated to be for "Change of Boundaries", and appears to be an application for the substitution of a new title plan. In

substance, the purpose of the application is to remove from the Council's title the area coloured blue on the Land Registry Illustrative Plan, comprising a roughly L-shaped piece of land on the western and southern edges of the title, including a floating jetty which forms the western boundary (to which I shall refer as "the Application Land"). The grounds of the application are that the Council's unregistered title did not include the Application Land, and that a mistake was made upon first registration in 2005. The Council objected to the application on 22nd November 2016, and the dispute was referred to the Tribunal on 9th June 2017. I heard this case at Ipswich Magistrates Court, having inspected the site in the company of the parties and their representatives on the previous day. At the hearing before me, the Applicant represented himself, and the Council was represented by Mr Andrew Marsden of Counsel.

2. The title in question, number EX745719, was first registered in April 2005 and is described in the Property Register as *"Land and Buildings at Brightlingsea"*. It includes several parcels of land. The parcel containing the Application Land is situated between Brightlingsea Creek and Waterside, with Waterside to the north and the Creek to the south. It is bounded on the east and west by jetties. It forms part of the foreshore, and consists primarily of sand, which is almost entirely covered by water at certain states of the tide. As I have indicated, the Application Land lies on the southern and western boundaries. To all intents and purposes, the Applicant does not pursue the application insofar as it relates to the southern portion of the Application Land, where the title abuts Brightlingsea Creek. He does however pursue the application with regard to the western section, being a strip of land some 30 feet wide and including the western jetty or slipway. I shall refer to this portion of the Application Land as "the Disputed Land".

3. The Land Registry Case Summary, which accompanied the reference to the Tribunal under section 73(7) of the Land Registration Act 2002 ("LRA 2002"), states that the application is to remove the area identified on the Illustrative Plan – namely the Application Land – and to *"reinstate a right of way"*. In paragraph 11 of his Skeleton Argument, Mr Marsden, who appeared for the Council, took issue with this statement. He pointed out that the Applicant was not claiming a private right of way, and insofar as he was asserting a public right of way, such rights constitute an overriding interest under section 11(4)(b) and Schedule 1 of the LRA 2002 so that the Council's title is subject to such rights in any event. Under rule 28 of the Land Registration Rules 2003, an applicant for registration is not

obliged to provide information about public rights, for this very reason. On this basis, he submits that it is not within scope of the reference to the Tribunal to determine whether public rights exist over the Application Land. It should be noted that the Case Summary is submitted to the parties in draft form before the reference is made, so the point (if valid) could have been taken at an earlier stage. There is no doubting, however, that the Land Registry has identified the main area of contention between the parties. The Applicant has always maintained that the Disputed Land did not form part of the land conveyed to the Council because it had always been considered as public highway. This is not accepted by the Council, which has sought to impose a charge on those wishing to obtain access to the sea over the Disputed Land, which seems to be incompatible with the existence of a public highway. Essex County Council, the Highways Authority, does not claim the Disputed Land as highway, and it is not shown on the Definitive Map or highways map as such. I shall consider in due course whether or not it would be right to address the highways issue in this case and, if so, to what extent. First, however, I shall consider the Council's title.

4. When the Council applied for first registration in 2005, the root of title was a Conveyance dated 22nd April 1898 and made between William Pannell (1) and Brightlingsea Urban District Council (2) ("the 1898 Conveyance"). Mr Pannell had acquired the land from Mr W. Bowker on 21st December 1897 and in effect made a gift of it to the Council. The conveyance related to "*the hereditaments described in the first schedule hereto*". The First Schedule describes the property thus: "*All That piece of land situate at and near the Hard in Brightlingsea aforesaid as the same with the several abuttals boundaries and other particulars thereof is more particularly delineated and described in the plan drawn hereon and thereon coloured pink.*" The plan does not include a scale. It identifies the land by reference to a number of physical features, namely "THE HARD" to the west, the Anchor Inn and Copperas Road to the north, "Stone Ground" and "creek" to the south, and the shipyard belonging to Mr R Aldous to the east. The land itself is a quadrilateral parcel, with the parallel eastern and western boundaries curving markedly towards the south-east. The north-western corner point of the boundary is very roughly in line with the south-western corner of the building marked as the Anchor Inn. The Applicant has attempted to transpose the 1898 Conveyance plan onto the current OS plan of the area, and seeks to demonstrate that the Disputed Land is clearly outside the depicted boundaries.
5. Mr Marsden, in his Skeleton Argument, does not accept that this is a valid exercise, and makes a number of criticisms of it (see paragraph 15). His conclusion is that the 1898

Conveyance plan "*is not sufficient to show the extent of the land conveyed and the court must admit extrinsic evidence to show what a reasonable person in the position of the Respondent would have thought when acquiring it in 1898.....*" He cites a number of well-known authorities in support of this proposition, namely Alan Wibberley Building Ltd v Insley [1999] 1 WLR 894, Toplis v Green [1992] EGCS 20, Pennock v Hodgson [2010] EWCA Civ 873, Strachey v Ramage [2008] EWCA Civ 384, and Ali v Lane [2007] 1 EGLR 71. In particular, he submits that regard can be had to the physical features on the ground in 1898. Subsequent conduct may also be considered, provided it is of sufficient probative value.

6. Broadly, I accept Mr Marsden's analysis of the facts and circumstances that may be taken into account when construing the parcels clause (together with a plan, if any) in a conveyance or transfer, where there is some ambiguity or uncertainty in the description. The most valuable aid is, of course, evidence of the appearance of the land and physical circumstances at the date of the conveyance. The more remote from the date of the conveyance the extrinsic evidence relied on, the less likely it is to be helpful or even admissible. The limitations on the use of extrinsic evidence were spelled out by Carnwath LJ in Ali v Lane as follows:

> *"36. The conclusion I would be inclined to draw from this review is that Watcham remains good law within the narrow limits of what it decided. In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended.*
> *37. The qualification is crucial. When one speaks of "probative value" it is important to be clear what needs to be proved. In this case the issue concerns the line of a boundary which was fixed not later than 1947. Evidence of physical features which were in existence in the 1970s is of no relevance to that unless there is some reason to think that they were in existence in 1947, or they are replacements of, or otherwise related, to physical features which were in existence in 1947. Similarly, evidence of Mr Attridge Senior's understanding of the position of the boundary, or actions by him apparently relating to that boundary, is of limited probative value, even if admissible. Such evidence begs the questions whether his understanding of the boundary was well-founded, and if so how strict he was in observing it, particularly having regard to the disused state of the disputed land during that period."*

7. In its Statement of Case, the Council has listed a number of facts, circumstances and specific documents, which, Mr Marsden submits, are all admissible as aids to the construction of the parcels clause in the 1898 Conveyance and demonstrate that the Disputed Land was intended to be included within the land conveyed. The specific matters relied upon in the Statement of Case are as follows.

(a) A Copyholder's Map of 1862, a copy extract of which was obtained from the Town Museum. This is what he says: *"This shows a parcel of land with the word "Hard" at its junction with [the Creek], narrowing as it proceeds northwards to a stricture marked "30 ft", and then widening again before dividing as it passes a triangular parcel on which a shelter was later built. To the east of this land are parcels marked "92, 91 and 90B" of which the last has to its south "Stone Ground 90a".... It is probably common ground between the parties that there was originally a naturally-occurring deposit of hard material providing a route from what was (at least in the past if not now) called Waterside Road, running approximately north-south and allowing access to the water on a firmer surface than elsewhere. This was called "the Hard". In 1882 a causeway was built on the western side of the Hard in a position where succeeding replacements have ever since been situated."* A comparison between this plan and the 1898 Conveyance plan is instructive. It is apparent that the western boundary of parcel 92 is in the same position as the western boundary of the land conveyed in 1898. This is demonstrated by its position *vis a vis* the position of the Anchor Inn, and by the curve of the western boundary which is common to both plans. Parcel 92 does not include the Hard, which does not have a number appended, just as the known roads such as Waterside do not.

(b) The following passage from Brightlingsea Parish Magazine of August 1882. *"One of the greatest improvements that Brightlingsea has seen for some time , has been recently effected by the construction of a raised causeway on the west side of the Hard, whereby passengers will now be able to embark or land comfortably at any stage of the tide, and without having to wade through an indefinite amount of mud, as was often formerly the case. The Hard has also been extended somewhat to the eastward, and made to assume an altogether neater appearance."* On the basis of this, the Respondent pleaded that *"Within*

living memory, people have now called "the Hard" all the land to the east of the causeway onto which boats could be hauled or beached....."

(c) Ordnance Survey map 1874 edition. This shows an area between the Anchor Inn and the Creek – more or less in the position of parcel 92 on the Copyholder's Map – formed of sand or mud. To the west there is a funnel-shaped area with a shingle base, wider at the southern (Creek) end than the northern (town) end. The western boundary of the sand or mud parcel is straight. If this map is compared to the Copyholder's map of 1862, it appears that the Hard now has straight, rather than curved, edges, but otherwise it is in the same position. A ferry crossing is shown as terminating on the southern end of the Hard.

(d) Indenture dated 7th August 1886 and made between Elizabeth Westwood Edward Westwood and George Bradley. This conveys to George Bradley *"all that parcel of land with the Ship Yard tenements storehouses and other buildings erected thereon situate at or near the place called the Hard in Brightlingsea....."* The plan shows a large section of the waterfront at Brightlingsea. Certain features stand out. First, an area named "The Hard" is shown as a distinct area leading from the town to the creek. Secondly, the area shown as parcel 92 on the Copyholders' Map is identified as "Late Ship Yard". Thirdly, the area to the east of "Late Ship Yard" is shown as "Ship Yard" tenanted by Mr Robert Aldous. Finally, there is indication of any causeway constructed to the west of The Hard.

(e) Parish Magazine November 1892. The proposed Brightlingsea Improvement Association was announced as being formed in order to *"assist in getting the Hard Bye Laws properly sanctioned so the Traffic of the Hard can be regulated"*.

(f) Mortgage dated 7th March 1893 ("the 1893 Mortgage"). There is no available copy of the mortgage itself, but it is referred to in an Abstract and a copy of the plan of the mortgaged property is attached. The mortgage plan is drawn to a scale of 100 feet to 1 inch, and shows the three mortgaged parcels. Again, certain features stand out. The relevant parcel lies to the south of the Anchor Inn, with an area marked "stone ground" to the south east adjacent to the Creek. To the east of the parcel is an area marked "R. Aldous Shipyard". The western boundary has a gentle dogleg, south to south-east. To the west of the parcel is

a funnel-shaped area marked "Hard or Landing". No jetties or causeways are marked on the plan.

(g) Auction Particulars dated 10th April 1896. These particulars related to an attempted sale of the mortgaged properties previously referred to, the mortgagee having previously foreclosed. The relevant parcel is "Lot Two" and is described as follows: "Excellent freehold Riverside Property with deep water frontage to BRIGHTLINGSEA CREEK, adjoining Mr Aldous's Shipyard, approached by a public right of way from Copperas Road, and close to "The Hard" or Causeway." The plan is drawn to scale and does not differ in any material respect from the plan attached to the 1893 mortgage.

(h) Conveyance dated 6th November 1897 ("the 1897 Conveyance"). By this deed, the mortgagee Mr Bowker conveyed *"All That piece of land situate at and near the Hard in Brightlingsea aforesaid as the same with the several abuttals boundaries and other particulars thereof is more particularly delineated and described in the plan drawn hereon and thereon coloured pink."* The plan does not mark a scale, but it is carefully drawn and is closely based on the plan attached to the 1896 Auction Particulars. The words "Hard or Landing" are written on the area lying to the west of the western boundary of the parcel.

(i) Minutes of Parish Meeting 19th January 1898. Mr Pannell, the Chairman, mentioned that he had purchased "the land at the Hard" and would transfer it to the council if it were prepared to make bye laws governing its use.

(j) Minutes of Byelaws committee meeting 31st January 1898. A "Collector of Hard Dues" was to be created.

(k) Minutes of Byelaws committee meeting on 1st February 1898. These read as follows: *"The members ..... met on Hard and agreed to recommend the Council to remove the posts to a distance from the Causeway and the said distance to be maintained as a Highway. That the posts running East & West should be put in a straight line and [illegible] required. That the stumps of boundary should be removed as they are dangerous to boats, as the boundary of Highway will be defined by the posts running by the Anchor Wall and the posts running parallel with the Causeway."*

8. The Council also relies on a number of other events and circumstances, said to demonstrate its control of "The Hard" over many years. These are pleaded at paragraphs 39 to 44 of the

Statement of Case. However, as I understood Mr Marsden's submissions, the principal matters relied upon were those itemised above. It is not disputed that in 2005 the Respondent re-built the causeway that lies on the western edge of the Disputed Land as a floating jetty. The cost was £140,000, some part of which was directly funded by it. Mr Marsden relies heavily on the expenditure on the original causeway in the late 19th Century and its subsequent replacements as demonstrating a belief that the Council owned the Disputed Land. He also relies on these acts in support of an argument that the Disputed Land is reputed to belong to the Council. Although there was an attempt – on both sides – to adduce evidence of Mr Pannell's own subjective understanding of the 1898 Conveyance, this is not evidence admissible in the construction of the document, as Mr Marsden accepted.

9. On the basis of the evidence referred to above, the Council submits that the 1898 Conveyance was intended to include the Disputed Land – see paragraph 46 of the Statement of Case. In a nutshell, the argument is that the 1893 Mortgage charged the entire waterfront, including the Disputed Land, and the subsequent conveyances in 1897 and 1898, were intended to include all the land as far west as the causeway. Furthermore, the Council has always been in control of the Disputed Land, as demonstrated by the construction of the original and replacement causeway, and the imposition of Bye-laws and a charging scheme relating to the Hard. This evidence is relied on, as I understand it, as being admissible evidence of subsequent conduct which passes the Ali v Lane threshold.

10. First and foremost, in construing the parcels clause in a conveyance, the tribunal must consider the words actually used, any plan referred to, and the terms of the document as a whole. These matters must be construed in the light of the physical circumstances existing at the date of the conveyance. No doubt, if the meaning is still unclear, it is permissible to consider other evidence, such as evidence of subsequent conduct, provided it is of probative value.

11. I shall now turn to the 1898 Conveyance itself. The first point to note is that the verbal description refers to land "*at and near the Hard in Brightlingsea....*" It does not purport to be a conveyance of the Hard itself. If that was the intention the obvious form of words would have been to convey "the land known as the Hard" or something similar. This conclusion is reinforced by reference to the plan drawn on the conveyance, which identifies

the area immediately to the west of the land coloured pink as "HARD". The land conveyed is "*more particularly delineated*" on the plan, which generally suggests that the plan controls the verbal description. However, Mr Marsden submits that the plan is a hand-drawn plan, not drawn to scale, and is therefore of limited value. He invites the tribunal to take into account the 1886 conveyances, the 1893 Mortgage and the 1897 Conveyance. Clearly, Mr Pannell could not in 1898 convey land which he did not own, and it is therefore permissible (indeed necessary) to look at the chain of title, which begins with the 1893 Mortgage. At the date of the 1893 Mortgage, Mr Bradley owned a long stretch of waterfront, which included both the Hard and the land on either side of it. This is apparent from the 1886 conveyances from the Westwoods that have been produced by the Council. However the mortgage documents, and the plans attached, are clear and unambiguous. They do not convey the Hard itself, but land "*at and near the Hard*" which is more particularly delineated on the conveyance plan. These plans are unequivocal. The plan attached to the 1893 Mortgage is drawn to scale and shows a funnel-shaped area marked "Hard or Landing" to the west of the parcel conveyed. There is less detail on the 1897 Conveyance plan, and no scale is marked, but the 1897 plan also clearly identifies the Hard or Landing as a distinct feature to the west of the parcel.

12. The Second Schedule to the 1898 Conveyance contains certain covenants made by the Council with the donor, Mr Pannell. These relate to the use of the "*hereditaments hereby conveyed*", and, for example, restrict the amount of time that boats may be laid up for the purpose of being re-fitted without a charge being levied. The potentially significant element is the fact that the "Hard Master" is charged with controlling the use of the Council's land. This might suggest that the "*hereditaments hereby conveyed*" were regarded as part of the Hard, which might feed into the true construction of the parcels clause in the 1898 Conveyance. I shall consider this point in more detail below.

13. Two other items of evidence may assist in construing the 1898 Conveyance, and have been relied on by the Council. First, the 1874 Ordnance Survey, being the edition which is closest in time to the 1898 Conveyance. The features shown on the map are consistent with the boundaries of the parcels shown on the 1893 Mortgage and subsequent documents. In particular, there is a funnel-shaped area of harder ground (identified by the conventional symbol for shingle) to the south-west of the Anchor Inn. I infer that this is (in the words of the Council's Statement of Case) the "*naturally-occurring deposit of hard material*

providing a route from what was (at least in the past if not now) called Waterside Road, running approximately north-south and allowing access to the water on a firmer surface than elsewhere. This was called "the Hard". There is a quadrilateral area to the east, with a western boundary that slopes in a south-easterly direction. The map shows a ship-building yard to the east. The funnel-shaped area is the Hard, and the land between it and the shipyard is the parcel conveyed in 1898. Although there may have been some subsequent reconfiguring of the ground (see the 1882 Parish Magazine), and the construction of a causeway to the west, the position of the Hard did not change. The second item is the Auction Particulars which were drafted by surveyors in 1896, and which included a description of the parcel of mortgaged land eventually sold to Mr Pannell. The parcel is described as *".... adjoining Mr Aldous's Shipyard, approached by a public right of way from Copperas Road, and close to "The Hard" or Causeway."* The plan, drawn to scale, clearly shows the parcel as lying between the Hard and the shipyard, but not including the Hard itself.

14. Subject to the reference to "Hard Master" in the Second Schedule to the 1898 Conveyance, I conclude that the Disputed Land was not included in the parcel conveyed. The verbal description, taken together with the plan, construed in the light of the physical features on the ground in 1898 and the post-1886 title deeds, is unambiguous. I do not consider that the reference to the "Hard Master" can affect this construction. There is no reason why the Council should not have used the Hard Master to control the area which it had acquired even though, strictly, it was not part of the Hard. It is probably no more than a matter of convenience that one person should be used to police the Hard itself, together with the land acquired under the 1898 Conveyance.

15. Mr Marsden submits that I should have regard to the Council's actions both before and after the date of the 1898 Conveyance, in constructing the causeway and its replacements, and appointing a Hard Master and imposing Bye-Laws to regulate the use of the Hard (as opposed to the land conveyed to it). This material will be looked at in another context, namely with reference to paragraph 6 of Schedule 4 to the LRA 2002. However, I do not think that it is either admissible or in any way helpful as an aid to the true construction of the 1898 Conveyance. It is evident from the construction of the first causeway in 1882 that the Council's activities on the Hard were not governed by any belief in that it owned the land in question. There are no minutes available of any meetings held at which the

construction of the causeway was discussed, but on any footing there was no prospect at that time of the Council obtaining ownership of the land on which the causeway was built. Equally, the proposal to introduce Hard bye-laws was made in 1892, long before the suggestion that the Council would acquire any land in the area. In my judgment, the Council never analysed the basis on which it dealt with the Hard – at least, there is no evidence of any such analysis. The Council relies on the minutes of 1st February 1898 as showing that it regarded itself as the owner of the Hard, and able to deal with it as it saw fit. At this stage, of course, the land had not been conveyed to it. Furthermore, the Bye-laws Committee recognised that a highway existed over the Disputed Land, and removed the obstructions. This action does not in my judgment demonstrate a belief that it owned the land, merely that steps had to be taken to remove obstructions from the acknowledged highway. At best, the Committee's decision is equivocal.

16. In my judgment, therefore, the Disputed Land did not pass to the Council under the 1898 Conveyance. Registration of the Council with an absolute title was therefore a mistake within the meaning of paragraph 5(a) of Schedule 4 to the LRA 2002. The application, if granted, would result in the removal of the Disputed Land from the Council's title. Under paragraph 6(3), the alteration to the register must be made unless there are "*exceptional circumstances*". However, since this type of extensive alteration amounts to "*rectification*" within the meaning of paragraph 1 of Schedule 4, certain additional protections are given to registered proprietors such as the Council. Specifically. paragraph 6(2) is in these terms: "*No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 without the proprietor's consent in relation to land in his possession unless—*

    (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or

    (b) it would for any other reason be unjust for the alteration not to be made."

17. Three further issues must therefore be considered. First, whether the Council is in possession of the Disputed Land. Secondly, and if so, whether it has by fraud or lack of proper care caused or substantially contributed to the mistake. Finally, if it is in possession but it has not caused or contributed to the mistake, whether it would for any other reason be unjust for the alteration not to be made. I shall consider these issues in turn.

18. Land is in the possession of the proprietor of a registered estate in land if it is "*physically in his possession*" – see section 131 of the LRA 2002. Mr Marsden submits that the test is essentially the same test as applies to a claim for adverse possession, and he cites paragraph 41 of JA Pye (Oxford) Ltd v Graham and anor [2002] UKHL 30 which in turn adopts the formulation of Slade J (as he then was) in Powell v McFarlane (1977) 38 P & CR 452 at page 470. Mr Marsden relies on the fact that the Council has built on part of the Disputed Land – the causeway and its replacements – and has imposed regulations on the use of the Hard and charged users in some circumstances.

19. In order to consider this submission, I must refer to the evidence that was adduced that related to the Council's possession. Unfortunately no live evidence as to the use and control of the Hard was given on either side, and all the evidence relied on by the Council is documentary or photographic. Mr Humm did refer to certain practices of the Hard Master – such as never imposing a charge on local users, but only on visitors – but none of this material was presented in the form of a witness statement and it cannot therefore be received as evidence.

20. It is not and cannot be disputed that the Council constructed a causeway at the western edge of the Disputed Land, and that this has been replaced over the years by other similar structures. I have already referred to the article in the 1882 Parish Magazine the relevant part of which reads as follows:

> *"One of the greatest improvements that Brightlingsea has seen for some time , has been recently effected by the construction of a raised causeway on the west side of the Hard, whereby passengers will now be able to embark or land comfortably at any stage of the tide, and without having to wade through an indefinite amount of mud, as was often formerly the case. The Hard has also been extended somewhat to the eastward, and made to assume an altogether neater appearance."*

21. The Council minutes dated 25th March 1897 record a decision to rebuild and extend the causeway by an additional 25 feet. A brochure prepared by the Council in 2005 purports to record a series of improvements and repairs to the causeway, and the construction of a solid jetty raised from the ground level in 1909. In 2005, a new floating jetty was

constructed by the Council at a cost of £140,000, of which, I am told, some part was contributed from outside sources but a substantial contribution was made by the Council.

22. Equally, the Council has regulated the use of the Causeway, and the Hard itself. Numerous documents have been produced which contain regulations and Byelaws relating to the Hard and causeway. One of the earliest documents relied on by the Council is a news article from the Essex Standard on 19th October 1895. This is a report on the proceedings at a local enquiry into the application by Brightlingsea Parish Council to become an Urban District Council – which it became in 1897. The grounds of the application are set out in some detail. The Parish Council considered that it needed additional powers in order to construct sewers and other drainage, to maintain the streets and to supervise the activities of the Gas and Water companies. In relation to the Hard and causeway, the following passage is relevant:

> *"The oyster fishing industry was a very important branch of the trade of the place, but was seriously handicapped owing to want of control over the landing place or Hardway which, under the existing system, was monopolised by worn-out vessels and hulks, which left insufficient room to carry on the business of the Port, which consisted of cargoes of coal, fish, bricks, manure, timber, hay, straw, chalk and more particularly oysters. A toll of 1s per mast was taken from all vessels not belonging to the Port for landing in cargo or taking in the same. A Hardway surveyor had always been appointed to attend to this, up to March 26 last, and since the Tendring Board took over the Parish roads the Parish Council had taken upon themselves the responsibility of retaining the same until further orders. Proper rules and regulations need to be conferred for the safety and convenience of those using the ferry and causeway, which was the only convenient place of embarkation for yachting people – now largely on the increase – as well as numerous excursionists crossing the river in unlicensed ferry boats. Powers were needed to control and maintain in perfect order the causeway, which was often overcrowded to the serious inconvenience of the more peaceable of Her Majesty's subjects."*

23. A number of matters are apparent from this material. First, prior to the construction of the raised causeway in 1882, passengers were using the area to embark and disembark from boats. In the words of the Council's Brochure, issued in 2005 to mark the construction of the new jetty: "*When Brightlingsea was just a fishing port, a long bank of rubble and oyster shells stretching over the natural outcrop of glacial gravel known as Roots Hard was all that was needed to go afloat at moist states of the tide. A good pair of well-oiled leather water boots made up for any deficiencies.*" The construction of the causeway meant that

"passengers will now be able to embark or land comfortably at any stage of the tide, and without having to wade through an indefinite amount of mud, as was often formerly the case." This is consistent with the 1874 Ordnance Survey, which shows a ferry landing at the south-western corner of the Hard. The Applicant submitted material that suggested that the ferry to St. Osyth had been operating since the 17th Century.

24. Secondly, the causeway was constructed at a time when the Council did not own the land on which it is situated. There is no suggestion that there was any agreement in place with the then owners. The Council constructed the causeway as a service to users of the port in its capacity as the local authority.

25. Thirdly, a "Hardway Surveyor" had been appointed prior to 1895, and a system of charging tolls had been instituted, although tolls were not levied on "home" vessels. The appointment of the Hardway Surveyor and the institution of a charging scheme pre-dated any ownership of land at or near the Hard by the Council. Part of the reason for applying to become an Urban District Council was to enlarge the powers of the Parish Council with regard to the regulation of the Hard, just as it sought enlarged powers to supervise the utility companies and to construct drainage. Responsibility for the parish roads was transferred to the Tendring Board at this time, but the Parish Council retained the services of the Hardway Surveyor.

26. After April 1898 the Council continued to control and supervise the use of the causeway and Hard in accordance with the previous practice and, as I have said, carried out works of replacement and renewal to the causeway. In addition, and as a matter of private law, the Council covenanted with Mr Pannell (the grantor) in the 1898 Conveyance to impose certain regulations on the land conveyed under that instrument, namely the land to the east of the Hard. The Hard Master ("Collector of Hard Dues") was appointed in January 1898.

27. As Mr Marsden submitted, possession for the purposes of Schedule 4 of the LRA 2002 has the same meaning as it does in cases of adverse possession. Mr Marsden cited the formulation given in Pye v Graham, namely *"(1) a sufficient degree of physical custody and control ("factual possession"); and 2. an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")."* This is taken from Lord Browne-Wilkinson's speech at Paragraph 40, which continues as follows:

"What is crucial is to understand that, without the requisite intention, in law there can be no possession..... But in any event there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary. Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend he does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession."

28. In the present case, in one sense the Council can be said to be in factual possession of the area covered by the floating jetty and, historically, by the artificial causeway first constructed in the late 19th Century. However, in my judgment it has always lacked the necessary intention to possess. The construction of the causeway was carried out for the general benefit of local inhabitants and other users of the port, and it was always intended that it should be open to and for the use of the public (subject to the imposition of any necessary regulations). There are numerous references in the documents to the "public" causeway. Although, of course, a squatter does not have to establish an intention to own, merely possess, in my judgment the Council's acts in relation to the public causeway do not amount to possession *"on one's own behalf and for one's own benefit"* in the sense that a squatter is in possession for his own benefit. It is true that the Council has (through the Hardway Surveyor or Hard Master) exercised control over the use of the Hard, and imposed Byelaws regarding its use. I bear in mind that the acts that constitute possession will vary according to the nature of the land in question. *"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."* (per Slade J. in Powell v McFarlane at

470-1). The actions of the Council do not, in my judgment, amount to factual possession. Even if they did, the intention to possess is lacking for the reasons just given. The fact that the causeway was built, and the regulations imposed, before the Council owned any part of the land at or near the Hard, reinforces the view that its activities were not activities *qua* landowner or squatter, but the activities which a responsible local authority was carrying out for the benefit of its inhabitants for the better enjoyment of land to which the public historically had a right of access.

29. If the Council is not in possession of the Disputed Land, the protection afforded by paragraph 6(2) of Schedule 4 does not apply, and I do not need to consider the terms of paragraph 6(2)(a) and (b). Instead, by virtue of paragraph 6(3), the register must be altered unless there are *"exceptional circumstances which justify not making the alteration."* I shall now consider whether there are any such circumstances present in this case, and if so, whether they justify not making the alteration. The most comprehensive guidance as to the meaning of these words was given by Morgan J in Paton v Todd [2012] EWHC 1248 at paragraphs 63-90. In paragraph 66 of his judgment, the Judge said this: *"Thus, in a case within para. 6(3), the court must ask itself two questions: (1) are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not making the alteration? The first of these questions requires one to know what is meant by "exceptional circumstances" and then to establish whether such circumstances exist as a matter of fact."* The following passages are particularly helpful.

> 67. *"Exceptional" is an ordinary, familiar English adjective. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered: see R v Kelly [2000] 1 QB 198 at 208 C-D (a decision from a very different context but nonetheless helpful as to the ordinary meaning of "exceptional circumstances"). Further, the search is not for exceptional circumstances in the abstract but those which have a bearing on the ultimate question whether such circumstances justify not rectifying the register.*
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> 79 *In my judgment, the first thing which ought to have been considered in this case, as to whether the exceptional circumstances justified a refusal to alter Mr Todd's registered title, was the effect on both parties of (1) an alteration of that title and (2) a refusal to alter that title. That was the choice which the Deputy Adjudicator had to make and, accordingly, the starting point should have been to consider the consequences of altering or not altering the title before considering whether a refusal to alter the title was justified.*
>
> 85. *The Deputy Adjudicator also thought that it was the policy of the LRA 2002 to provide a register from which one could identify the owner of any parcel of*

land. In a general sense, that is true but it does not seem to me to justify registering as the proprietor someone who was not the unregistered owner of the land and who is not otherwise entitled to the land, just to produce the result that there is an identified registered proprietor. Further, I do not see that the fact the owner of the blue land is and is likely to remain unknown is a justification for registering as the owner someone who has not been the owner of the land.

30. Are there any exceptional circumstances present in this case? Mr Marsden (see paragraph 33 of his Skeleton) has identified three specific circumstances which he says are exceptional, namely

    (a) The fact that the Disputed Land has been in the possession of the Council for over 120 years;

    (b) The Applicant has no alternative title to assert;

    (c) The title is contiguous with other registered titles belonging to the Council and no public benefit would accrue from the alteration sought.

    He also draws my attention to Derbyshire CC v Fallon [2007] 1 EGLR 44 and submits that the Council has built *"at very great expense"* a floating jetty which the Applicant says should be deleted from the title. No-one (least of all the Applicant, who has no competing title) could on these facts obtain an injunction requiring the Council to remove its jetty. So, as in Fallon, amendment would serve no useful purpose and refusal of the application would recognise the position on the ground. He also relies on Walker v Burton [2013] EWCA Civ. 1228.

31. The Applicant, who did not have the benefit of legal representation, did not address directly the issue of "exceptional circumstances", albeit that this point had been flagged up by Mr Marsden in his Skeleton Argument. However, his concerns were made very clear to the Tribunal and to the Council, and had been from the outset. Primarily, he has challenged the Council's title to the Disputed Land because he considers that it forms part of an historic highway connecting Waterside Road with the Creek. His concern is that the Council has purported to charge fees for the use of the Disputed Land on the basis that it is the owner, and is complying with the covenants contained in the Pannell conveyance. If, in fact, it is not the paper owner, it will have to cease charging the public for what is, he claims, the exercise of public rights of way.

32. In support of this argument, he relies on the following facts and matters:

(a) The Council and its officers have over many years accepted that the Disputed Land forms part of a highway. He relies on the express reference to the highway in the minutes of the Bye-Laws Committee in 1898 to which I have previously referred (see paragraph 8 (k) above). In his witness statement dated February 2008 Mr Pitt, former Clerk to the Council, stated that a strip of land 36 feet wide to the east of the causeway had been *"dedicated as a highway in 1898 but is not maintained by the Highway Authority and has not been since 1974."* This statement was made in the course of County Court proceedings to which the Council was party. In the Council's list of assets, under the heading "Town Hard and Public Pedestrian Causeway" it is stated that: *"It should be noted a distance of 38 feet running parallel with the public Causeway on the eastern boundary of the Causeway constitutes a public highway B1029 to O.M.L.W hence the reason for vessels not to lay against the scrubbing posts as they would impede the highway..."* For many years the Council's Regulations relating to the Hard include the following statement: *"Any person or persons obstructing the Causeway or the Highway (a distance of 36 feet from the Causeway) will be proceeded against under the Highways Act 1959, s.121 and be liable to a penalty not exceeding £50."*

(b) The Applicant refers to other long-standing indications that a highway existed. For example, the existence of the ferry route terminating at the Causeway and Hard, coupled with the historic use by the public confirmed in the documents already referred to above.

33. Essex County Council is the highway authority but it does not recognise this highway, and no public rights are shown on the Definitive Map. The Council's position is somewhat equivocal. For the purposes of this application, it does not concede the existence of a highway, but simply takes the point that if there are public rights over the Disputed Land then those rights are protected as an overriding interest. Mr Marsden submits that the issue is outside the scope of the Tribunal reference and there are other, more appropriate, means of resolving the point. Indeed, the Tribunal itself expressed that opinion in correspondence before the matter was heard. However, it is abundantly clear that the existence of the highway has been acknowledged over many years. Although there are references in the papers to the dedication of the highway in the 20th Century, there is no evidence of this. It seems clear to me that the highway came into

being no later than the late 19th Century as a consequence of long and undisturbed public user. It is also clear that the Council's charging structure is controversial, having given rise to County Court proceedings in 2008, and the current dispute with the Applicant and his supporters.

34. Bearing in mind the guidance provided by Paton v Todd, the following factors are in my judgment material, although not necessarily exceptional:
    (a) The Applicant does not himself claim to have paper title to the Disputed Land.
    (b) No third party has come forward to claim the Disputed Land.
    (c) The Council has, over the years, spent considerable sums of public money on the maintenance, repair and improvement of the original causeway.
    (d) The Council has purported to impose a charging regime over land that it has previously acknowledged to be subject to public rights of way, to which some local boatmen have objected.
    (e) The Council considers that imposing regulations for the use of the causeway and Hard is for the public benefit.
    (f) Over the years the Council has conflated its right to regulate and charge for the use of the land comprised within the 1898 conveyance with its position as the local authority, introducing an undesirable confusion into the situation.
    (g) The relevant Highways authority, Essex County Council, has declined to accept that all or part of the Disputed Land forms a public highway.

35. In my judgment, the only exceptional circumstance that exists is 34 (c) above, namely the Council's expenditure over the years on the causeway – now the floating jetty. In my judgment, the effect on the Council of losing title to the land on which the jetty was built would be seriously detrimental. That factor strongly outweighs, in my view, the presumption contained in paragraph 6(3) of Schedule 4 to the LRA 2002. However, that consideration does not apply to the remainder of the Disputed Land – the Hard itself. Accordingly, I do not see why the register should not be altered to remove the major part of the Disputed Land. I appreciate that this will be an unwelcome outcome to the Council. However, if it is currently entitled to charge for and regulate the use of the Hard I its capacity as local authority this will continue to be the case. However, it will not be able to justify such action on the basis of a registered title which it should not have obtained.

36. I shall therefore direct the Chief Land Registrar to give effect to the Applicant's application but only insofar as it relates to the Disputed Land excluding the floating jetty on the western boundary, which is clearly marked on the title plan and therefore this Order can be actioned without the necessity of a new illustrative plan being drawn. As to costs, my initial view is that I should make no order, since each party has won and lost in equal measure. If either party wishes to persuade me otherwise, they may make written submissions (to be served on the other party and lodged with the Tribunal) no later than Friday 11th May 2018.

Dated this 30th day of April 2018

Owen Rhys

BY ORDER OF THE TRIBUNAL