Case No: A3/2005/2925

Neutral Citation Number: [2006] EWCA Civ 1532
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HH Judge McCahill QC
Chancery Division, Birmingham District Registry
Lower Court Ref. No: BM330154

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 21st November 2006

Before :

LORD JUSTICE WALLER (Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE CARNWATH
and
LORD JUSTICE MAURICE KAY

- -

Between :

	LIAQUAT ALI	**Respondent**
	- and -	
	ROBERT LANE & ANR	**Appellants**

- -

(Transcript of the Handed Down Judgment of
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- -

Jeremy Cousins QC & Simon Clegg (instructed by **Messrs. Moran & Co**) for the **Respondent**
Jonathan Gaunt QC & Stephen Jourdan (instructed by **The Wilkes Partnership**) for the **Appellants**

- -

Judgment

Lord Justice Carnwath :

Background

1. This is the latest stage in a long running dispute between two adjoining land-owners over an area of land ("the disputed land") amounting to a little less than an acre in area, to which the claimant, Mr Ali, holds the paper title. The defendants, Mr and Mrs Lane, own the property known as "Greenacres", immediately to the south. The judge was concerned with an adverse possession claim by the Lanes over the disputed land. This claim failed and permission to appeal was refused. There remains an issue about the precise boundary of the disputed land where it abuts Greenacres ("the disputed boundary").

2. There are three contenders (identified by colours on plan C attached to the defence, which was prepared by the Lanes' surveyor witness, Mr Rock):

   i) The "claimed boundary" (blue);

   ii) The "1985 conveyance boundary" (red); and

   iii) The "extrinsic evidence boundary" (magenta).

   Mr Ali argues for the blue boundary. The Lanes' primary case is for the magenta boundary. The red boundary is their fall-back position. This follows the boundary shown on the plan attached to the conveyance to them in 1985, which was in turn based on the 1979 Ordinance Survey map. As I understood the submissions of Mr Gaunt QC (for the Lanes) this was relied on, less as an alternative line in its own right, than as evidence undermining the blue boundary. The principal contest therefore is between the blue and magenta boundaries.

3. The difference between the two is only a few metres at the widest. The major issue before the judge was undoubtedly the adverse possession claim, which related to a larger area, and which clearly had commercial significance for both parties. That issue having been finally resolved, it is less easy to understand why the parties are still continuing to litigate over the boundary. It was disturbing that neither of the experienced leading counsel before us was able to give a clear indication of the practical significance of the strip to their respective clients, nor to inform the court what if any attempts have been made at mediation. It is sadly a commonplace that boundary disputes can be fought with a passion which seems out of all proportion to the importance of what is involved in practical terms. In such cases, professional advisors should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind and of the possibilities of alternative dispute procedures.

4. However, we now have to deal with the case as it has come before us.

<u>The disputed land and its surroundings</u>

5. The disputed land adjoins the A435, Alcester Road, Portway in Worcestershire. It lies a few hundred yards south of the roundabout above junction 3 of the M42. The Alcester Road runs roughly north-west to south-east. The judge described the surroundings as follows:

> "Immediately to the north of the disputed land are the house and land known as The Croft. To the east, the disputed land is bordered by the Birmingham bound carriageway of the Alcester Road, the A435. To its west, lie some old ponds. Immediately to the south of the disputed land is "Greenacres", the Defendants' bungalow and outbuildings from which they run their cattery and dog kennel business. Greenacres is currently undergoing extensive development. The Defendants' new home is in the course of construction on Greenacres and, when it is ready for habitation, the existing bungalow will be demolished and three new houses built on the site of the former bungalow.
>
> The Claimant has paper title to the disputed land and, in addition, to just over 10 acres of land adjoining the western boundary of the disputed land."

Further to the north on the A435 is a property known as Pretoria Cottage.

6. An important physical feature immediately to the south of the disputed boundary, within Greenacres, is a long single-storey building, running parallel to the boundary, referred to by the judge as the "kennel block". This was built in the mid 1970's by the Lanes' predecessor, Mr William Attridge, who was himself a builder. His son, John Attridge, gave evidence, which the judge accepted, that his father had built the kennel block "as close as he could to the boundary and not more that six inches away from it". The reliability of that evidence was a major issue in the trial and before us.

<u>The judge's reasoning</u>

7. The judge's conclusion in favour of Mr Ali relied strongly on the report of his expert Mr Worley, which in turn depended on an analysis of the evidence obtained from a series of transactions in 1947 relating to the disputed land and the land immediately to the north. To understand that analysis, it is necessary to summarise the relevant conveyancing history.

8. We do not know when or by whom the disputed boundary was first established. The earliest conveyance we have relating to the disputed land was dated 25th March, 1947. A Mr Skelcher conveyed 10.5 acres, including the disputed land and an area to the west, to Messrs. Wedgbury, Thomas and Potts, as tenants in common in equal shares.

9. On the previous day, the same Mr Skelcher had conveyed to Mr Wedgbury (who lived at "The New House", now "The Croft") a T-shaped area of land bordering the A435 to the north of the disputed land, bounded by the grounds of The New House to the south and Pretoria Cottage to the north. The plan attached to this conveyance (1/500) showed the area divided into three plots each with a frontage to the A435. It contained detailed measurements both of the frontage to the A435 and of the western boundary of the T shaped area. It also showed an area hatched in red extending along the whole frontage of the A435, including the frontage of the disputed land and of The New House; and a "drain" marked A-B-C and coloured green, extending from point A in the rear garden of The New House through the disputed land and emerging onto the A435 at point C very close to the southern boundary of the disputed land. The conveyance included rights to "connect to or extend" the drain, and to pass over the hatched area in the event of it "being formed into a service road".

10. The plan attached to the conveyance of the disputed land was to a smaller scale (1/2,500), and with less detail. The disputed boundary was shown as a straight line running south west from the A435. The boundary to the road was shown as 13 yards, which the judge accepted was a mistaken transposition for the figure of 31 yards shown on other plans (see below). The only other dimension shown on this plan was on the south-western boundary of the T-shaped area, which was shown as 76 yards 2 feet, the same figure as shown on the plan attached to the conveyance of the previous day. The conveyance itself described the plan as being "…..for the purpose of identification…"

11. The conveyance of the disputed land also transferred rights of access over "the land hatched red on the plan" if formed into a service road, and reserved the right of the adjoining owners to connect to -

> "the sewer or drain laid in or under the land hereby conveyed and the adjoining land formerly of the Vendor in the position indicated on the said plan hereto annexed by green lines and marked ABC…"

The small-scale plan attached to this conveyance did not contain any such hatched area or line marked ABC. The judge accepted that this was a "simple omission", and that the reference was intended to be to the same indications as in the conveyance of 24th March (para 50-1).

12. On the 26th March, Mr Wedgbury conveyed the central of the three plots within the T-shaped area to Mr Potts. That conveyance had attached to it a 1/500 plan, similar to that attached to the conveyance of 24th March, and showing the same hatched area on the road frontage and the same drain line. It gave additional measurements, including one of the road frontage of the disputed land (not shown in either of the previous plans), as 31 yards. Finally, on 27th March, Mr Wedgbury conveyed to Mr Thomas the northern of

the three plots, with a plan attached similar to that of the conveyance of the previous day.

13. The judge commented on the 1947 conveyances:

> "I am perfectly satisfied that great care went into the laying out and measuring of these three plots forming the 'T' section and, at the same time, the surveyor measured the frontage of The New House (subsequently to become The Croft) and the disputed land, having had the advantage of considering the original conveyances and the plans. They were drawn to a scale of 1:500. They were plainly drawn professionally and after a measurement of the dimensions shown on those plans…."

14. The ownership of the two northern plots in the T-shaped area, and of the disputed land, remained with the Potts and Wedgbury families, until September 1979, when they were conveyed to Mr Ali. Viewed from their perspective, the history reveals nothing which would suggest any change in the position of the disputed boundary over the intervening period, or since.

15. The earliest conveyance concerning Greenacres (then known as Yew Tree Bungalow) was in December 1953. No plan was attached to the conveyance, which described the holding by reference simply to its name and gave an area of about six acres. The absence of a plan seems to suggest that the boundaries were regarded as well-established by then. There was a further conveyance in March 1965, to which a 1/2,500 plan was attached showing a straight boundary with the disputed land. In October 1969 Greenacres was sold to William Attridge, the land being conveyed by reference to the earlier conveyances. Finally, in November 1985, Mr Attridge conveyed Greenacres to Mr and Mrs Lane. As I have said, the attached plan was based on the 1979 OS map.

<u>The judge's conclusions as to the boundary</u>

16. The judge relied on Mr Worley's analysis of the 1947 conveyances, as related to features apparent on the ground. Mr Worley's plan showed the boundary as a straight line from Point B on the road, running through Point D west of the kennel block, to Point C at the western side of the disputed land. The judge summarised Mr Worley's methodology in his judgment (para 81-83). It is unnecessary to repeat the whole of that summary here. I merely observe:

    i) All the plans appeared to show the disputed boundary running in a straight line. If this was a correct indication, the only problem was to fix the end points of the boundary to east and west.

    ii) To the east, the starting point for Mr Worley's analysis was his Point A. This

represented the northern boundary of the disputed land where it abuts the road. It corresponded to a hedge feature forming the southern boundary of the property known as The Croft (not owned by either party). As I understand, there is no dispute about the position of Point A.

iii) Mr Worley's Point B lay 31 yards to the south of Point A, along the road frontage. This measurement was taken from the 1947 plans. As a matter of measurement, it was agreed that Point B was accurately identified. Accordingly, if the 1947 plans were accurate, there could be no serious dispute about the eastern end of the boundary.

17. On this footing the only issue would be the western end, which could not be deduced directly from the 1947 plans. In relation to that, Mr Worley was able to arrive at a series of deductions which the judge accepted. He summarised Mr Worley's approach:

> "… Mr Worley *assumed* that the boundary line started with the rear most oak tree in the line of mature oak trees and he called this Point C. He took a straight line through from Point C to Point B. Roughly this line passed through the centre or along the line of the oak trees, skirting the north wall of the kennel and through to Point B and the low wall. He concluded that this was the correct line of the boundary, along the line C, D, B. He then set out to check whether this assumption was internally consistent. He found Point Z an original fence post, on the boundary next to Pretoria Cottage which was in line with a mature hawthorn hedgerow. He then measured from this Point Z to Point Y, a fixed dimension shown on the marked plan of 27th March 1947. It was 76 yards 2 feet which corresponded with the length of the cross bar on the letter 'T' shown in the 1946 conveyance. Finally, he measured from Point Y (The Croft/disputed land boundary point) travelling north south across the rear of the disputed land to Point D where it intersected the line drawn between the last oak tree and Point B. He measured the distance Y to D as 48 metres which he calculated was the distance shown on the conveyance plan of 27th March 1947 between these two points. It should be noted that the conveyance itself did not express what the dimension was between Points Y and D. Mr Worley measured the distance on the conveyance and calculated it using the scale on the plan of 1:500. He then checked to ensure and confirm that Point A had been correctly identified as the starting point."

The judge described this analysis as:

> "…internally consistent, consistent with the land features, and consistent with the dimensions shown on the 1947 conveyances".

18. For good measure, after preparing his analysis, Mr Worley had discovered that at the east end his proposed line corresponded with the return section of a low "boundary wall" erected by Mr Attridge Senior. The judge commented:

> "Mr Worley had no reason to know that this line would intersect the boundary wall at the time he prepared his first report postulating the true boundary line along the line C,D,B. It is either a coincidence that this line, when projected, did intersect this turning point in the boundary wall or it is some support for the proposition that his calculations are correct." (para 80)

For reasons which will become clear, I would not myself have attached any significance to this point, which begs the question of Mr Attridge's knowledge when building the wall. However, that does not detract from the force of the judge's conclusions on Mr Worley's overall analysis.

The magenta line

19. The evidence in support of the rival magenta line was presented by the Lanes' surveyor, Mr Rock. It was summarised by the judge:

> "This line is derived from extrinsic evidence, namely the remnant of a hawthorn hedge on The Croft side of the line of mature oaks, some barbed wire in the remnant of a hedge, a line of remnants of concrete godfather posts and a seven feet stretch of old fencing discovered by Mr Mitchinson close to the A435. This line, and the 1985 boundary line, are further promoted by the independence because it would result in remnants of an old track, a manhole cover and a line of conifers all being positioned within the ownership of Greenacres". (para 59)

(Mr Mitchinson is a civil engineer, who was commissioned by the Lanes in 2002 to carry out some demolition and rebuilding works at Greenacres. He had no direct knowledge of the site prior to that time.)

20. The judge set out his reasons for rejecting the magenta line at some length (paras 60-77). Rather than setting them out in full it will be convenient to consider the relevant passages in the context of the criticisms made by Mr Gaunt on his appeal.

Extrinsic evidence

21. The magenta boundary is accurately described as the "extrinsic evidence" boundary, since it largely relies on evidence which is separate from and subsequent to the 1947 conveyance. Before coming to the detail of the submissions, I should make some general comments on the relevance and scope of such extrinsic evidence in this context.

22. There appear to have been no detailed submissions before the judge on this issue. Perhaps understandably the emphasis of the argument was directed more to the adverse possession claim. However, in their skeleton argument, counsel for the Lanes raised the issue for the first time. They advanced an argument that it was not permissible for the judge to interpret the conveyance of 25th March 1947 by reference to information in later conveyances of other land. In the words of the skeleton:

> "…. At one time it was thought it was permissible to assess the extent of land conveyed by one conveyance by reference to later conveyances: see *Neilson v Poole* [1969] 20 P&CR 909, following *Watcham v Attorney General of East Africa Protectorate* [1919] AC 533, but later decisions have shown that to be incorrect: *L Schuler AG v Wickman Machine Tools Sales Limited* [1974] AC 235, *Beale v Harvey* [2004] 2 P&CR 18."

23. As applied to the 1947 conveyances this argument seemed technical in the extreme, given that they were clearly part of a single group of transactions within the space of a few days. In the event, Mr Gaunt did not press the point before us. But he could not avoid it being turned against him by Mr Cousins, in respect of the "extrinsic evidence" relied on by the Lanes as to the actions of their predecessor, Mr Attridge in the 1970s. In the end neither counsel sought to analyse the authorities in any depth, both being content for us to approach the matter on the basis that the question was not so much one of principle, but as to the probative value of any material relied on.

24. However, since there seems to be some uncertainty on this potentially important subject (particularly since *Beale v Harvey*), it may be helpful if I make some comments on the state of the authorities as I understand them, acknowledging that we have not had full argument.

25. In the law of contract generally the position is clear. As was said in *Wickman Tools* (above, at p 261 per Lord Wilberforce):

> "The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used."

That case concerned the construction of an ordinary commercial contract. Lord

Wilberforce recognised that there were exceptions to this general rule.

26. One well-established exception is in relation to the construction of conveyances of land. The reasons for the exception were explained by Megarry J in *Neilson v Poole*:

> "… in the construction of the parcels clause of a conveyance and the ascertainment of a boundary the court is under strong pressure to produce a decisive result. The prime function of a conveyance is to convey. As to any particular parcel of land, either the conveyance conveys it, or it does not; the boundary between what is conveyed and what is not conveyed must therefore be proclaimed. The court cannot simply say that the boundaries are uncertain, and leave the plot conveyed fuzzy at the edges, as it were. Yet modern conveyances are all too often indefinite or contradictory in their parcels. In such circumstances, to reject any evidence afforded by what the common vendor has done in subsequent conveyances seems to me to require justification by some convincing ground of judicial policy; and I have heard none." (p 915)

27. Contrary to the Defendant's skeleton, *Neilson v Poole* remains live and well. That was confirmed by Peter Gibson LJ (also author of the main judgment in *Beale v Harvey*) in *Clarke v O'Keefe* (1997) 80 P&CR 126, 133:

> "It was said, as long ago as 1969, by no less an authority than Megarry J in *Neilson v Poole* (1969) 20 P&CR 909 at 912, that the then modern tendency was towards admitting evidence in boundary disputes and assessing the weight of that evidence rather than excluding it. That tendency has, in my experience, not diminished in the intervening years."

In that case the plaintiff had bought from the vendor a piece of land, bordering a field retained by him. The conveyance plan showed a vegetation boundary with a dotted line, but its precise position on the ground was unclear to them both. Accordingly, they went out together and staked out the boundary. A subsequent purchaser of the field sought to challenge the agreed line, on the basis that it conflicted with the plan attached to the conveyance. This argument was rejected. Peter Gibson LJ said:

> "I have to say that it would seem to me to be somewhat absurd, in a case where there is no verbal description of the land such as would serve to identify its boundary accurately and where the plan is imprecise in showing the boundary as following a vegetation line in 1977, and where both vendor and purchasers agree its exact position, if the court were then to shut its eyes to evidence of what they agreed was the true boundary."

Similarly, in *Hillman v Rogers* (1998, unreported), having found that the only conveyance plan was ambiguous, Robert Walker LJ said:

> "It is to my mind clearly a case in which the court needs all the help it can get, and is entitled to make use of all the help it can get, from extrinsic evidence: see the observations of Megarry J in *Neilson v Poole* at page 915."

On any view of the scope of this exception, I have no doubt that the judge was entitled for the purpose of construing the 1947 conveyance of the dispute land, to have regard to the measurements shown in the other related conveyances, and to evidence relating to physical features on the land at that time.

28. More controversial is the use for the same purpose of evidence of subsequent conduct. The only case cited to us by Mr Gaunt was one from the 1869 Sussex Spring Assizes: *Lord St Leonards v Ashburner* (1869) 21 LT 595. Lord St Leonards had bought some land and planted trees on what he thought was his side of the boundary. Some 20 years later Mr Ashburner bought the adjoining land and claimed that the trees were on his side of the boundary. The plan was too small to provide a clear answer. Bramwell B told the jury:

> "Title deeds come to little without evidence of actual enjoyment, for otherwise anyone might pretend to give away the lands of anybody else. Parchment, of itself, comes to little; the real question is as to actual enjoyment…"

That may have been a fair way of summing up the particular case; and no doubt Lord St Leonards was entitled to the verdict which the jury duly awarded. However, it cannot on any view be taken as a useful expression of the law as it is today. Even Bramwell B might have been surprised to know that his words to the Sussex jury would be cited 135 years later as a definitive statement on the subject. In the modern law the conveyance (parchment or not) is undoubtedly the starting point. It is only to the extent that it is unclear that extrinsic evidence may have a place.

29. Much water has flowed since that case, not least the waters of the Nairobi River, which were the subject of consideration by the Privy Council in *Watcham v Attorney General of East Africa Protectorate* [1919] AC 533. The Watcham family held land along the bank of the river, which had been conveyed to them by the Crown by a certificate under the East African Land Regulations. The certificate gave the area transferred as "66 ¾ acres, or thereabouts", but included a description by reference to physical features on the ground which would have resulted in an area of 160 acres. There was evidence that the Watcham family had never occupied the more extensive area, part of which had been occupied without objection from them by someone else. This evidence was held to be admissible as an aid to construction, to show that the description in the certificate must be "*falsa demonstratio*". The ratio of the case, based on a detailed review of earlier

authorities, can be taken from the headnote:

> "The principle that when an instrument contains an ambiguity evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient document, and where the ambiguity is patent as well as where it is latent."

As a statement applicable to modern instruments generally, this cannot of course stand with the law as since established by *Wickman Tools*. As a statement applicable to conveyances of land, it may still have value.

30. In *Beale v Harvey* Peter Gibson LJ referred to judicial criticisms of *Watcham*, *and* to the statement in the then current edition of *Chitty on Contracts* (28th Ed para 12-124) that its authority was "now extremely fragile". In the light of those criticisms he concluded:

> "A decision of the Privy Council is not binding on this court and I decline to follow it on this point." (para 30)

The other members of the court (Hale and Rix LJJ) agreed.

31. It is fortunately unnecessary in this case (in view of the approach adopted by the parties) to decide whether the last statement is binding on us as to the effect of *Watcham*. Coming from that source, of course, it is entitled to the greatest respect. I would, however, be reluctant to treat it as the last word on the subject in this area of the law for the following reasons.

32. In the first place, most of the cases mentioned by Peter Gibson LJ were in other legal contexts, and the statement from *Chitty* was made in relation to the law of contract generally. It is true that Harman LJ in 1961 described *Watcham* as a case "which has been long under suspicion of the gravest kind from real property lawyers." (*Sussex Caravan Parks Ltd v Richardson* [1961] 1 WLR 561,568). But in spite of that "judicial slingshot" as he called it, Danckwerts LJ in 1962 thought that *Watcham* was still good law in the context of title to land (*GWH (Midlands) Ltd v Giblett* [1962] EGD 335, 337). In *Wickman Tools* itself the issue was left open both in argument (see p 241D, 245H) and (with varying degrees of scepticism) in the speeches (p 252D-E per Lord Reid, p 261F-G per Lord Wilberforce, p 272E-F per Lord Kilbrandon).

33. Megarry J himself returned to the subject in 1973, following *Wickman Tools*. He explained why the context of boundary disputes justified a special rule:

> "One may accept to the full that it does not apply to commercial contracts or, for that matter, to any language of obligation, whatever the document. If the question is what one party is

> obliged to do under some document, the effect of measuring the obligation by what in fact that person has done under the document is to convert into a binding obligation what may have been done as of grace or to promote good relations or to avoid argument….
>
> In the *Watcham* case itself, as in *Neilson v Poole*, the matter in dispute was a matter of boundaries; and the application of the doctrine in this field involves very different considerations. Parcels clauses and plans in a conveyance not infrequently give rise to disputes on the application of what appears on the piece of paper to what lies physically on the ground. Even if there is no uncertainty as to the meaning of the words used or the ambit of what is coloured on the plan, there may still be serious problems of application. Furthermore, in these problems of application the passage of time often brings its own cure: the passing of 12 years may stifle an incipient boundary dispute, whereas it would do nothing to resolve the extent of a contractual obligation. In such circumstances, it seems to me that the doctrine may still play a useful part."

He illustrated this by reference to the instant case:

> "Where for some 25 years or more the parties have acted on the footing that the disputed strip had passed to Mr. Clark, then even though the full period of limitation has not run (the period for a spiritual corporation sole is 30 years), this seems to me good reason for tending to construe the 1945 conveyance as having done what the parties appear to have treated it as having done, and as what by the passage of a sufficient period of time would by another means ripen into right. The application of the doctrine in territory such as this does not seem to me to be necessarily affected by the rejection of the doctrine in its application to far less suitable terrain…" (*St Edmundsbury and Ipswich Diocesan Board of Finance and Another v Clark (No 2)* [1973] 1 WLR 1572, 1585-6)

34. In *Beale v Harvey* Peter Gibson LJ made no reference to this passage. Furthermore, the factual context of his comments is important. Two adjacent plots were being developed. Mrs Harvey bought one of these plots. At that time there was a fence on the land running from one of the retaining walls. After she had exchanged contracts, but before she had completed, she asked the developer if she could start landscaping her garden along this fence. The developer agreed and she planted about 50 plants along it. Shortly after this Mr Beale bought the neighbouring plot. After exchange but before completion, he noticed that the fence separating his property from Mrs Harvey's was in the wrong place, according to the plans on which both sales were based. The developer agreed to realign the fence, and offered to make good the loss to Mrs Harvey. She refused, relying on the

developer's conduct in approving her subsequent use of the land. This argument failed.

35. As I read the judgment, the important point in that case, distinguishing it for example from *Clarke v O'Keefe* and *Hillman v Rogers*, is that there was no uncertainty about the position of the boundary line as shown in the conveyance plan. That was held to be the "dominant description" (para 28), and was not displaced by the evidence of the existence of an actual fence on a different line, or of the parties actions in relation to it. Peter Gibson LJ commented:

> "I find strange the notion that the true intention of the parties to Mrs Harvey's Transfer as to what they intended to be the boundary line between their properties should be ascertained by reference to what the parties did in the first few months after the Transfer at a time when it had not been pointed out, nor had it occurred to either of them, that the wall and fence had been wrongly positioned." (para 30)

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.

38. I would add that in principle reference to the intentions of the parties means the parties to the *original* conveyance. Thus in *Watcham* the user relied on by the Privy Council was that of the Watcham family, who were the beneficiaries of the original certificate. In none of the cases reviewed above was account taken of the conduct of subsequent owners. Megarry J might possibly have been willing to go further. Where the evidence of the intentions of the original parties is unclear, long and unchallenged usage may, as he said, be

> "… good reason for tending to construe the (original) conveyance

> as having done what the parties appear to have treated it as having done…"

I do not read that as necessarily confined to long usage by the original parties. We need not decide whether that is a permissible extension of the *Watcham* principle. It would only apply if there were evidence of a long period of acceptance of a specific boundary by a succession of parties on *both sides* of the boundary. That is not this case. The unilateral actions of the owner of one side (in this case Mr Attridge) could not be relied on as binding on the owner of the other.

Mr Gaunt's 8 points

39. Mr Gaunt's submissions were made under 8 heads (which I have recast into what seems to me more logical order):-

i) The 1985 conveyance.

ii) The hawthorn hedge at the west end.

iii) A track to the north of the kennel block.

iv) The remains of concrete godfather posts to the north of the kennel block.

v) A drain and inspection chamber north of the kennel block.

vi) Mr Unwin's evidence about the footings of the kennel block.

vii) A section of fence close to the A435.

viii) A row of conifers to the east of the kennel block.

40. In addition, he sought permission to rely on new evidence relating to the alleged track and fence, and the inspection chamber north of the kennel block, and to the existence of another manhole close to the A435. Although that application was opposed, it was agreed that we should consider it as part of Mr Gaunt's arguments, without prejudice to the decision on admissibility. With that introduction, I turn to the points relied on by Mr Gaunt:-

(i) The 1985 Conveyance

41. It was agreed between the experts that the 1979 Ordnance Survey map, on which the 1985 conveyance was based, showed a gap of approximately 2 metres between the rear wall of the kennel block and the boundary feature shown in the plan. However, there was no agreement as to what that feature was, still less as to its legal significance if any. Mr Rock acknowledged that such a survey is not designed to show legal boundaries, but simply to show physical features as they appear on the ground. At most, the 1979 plan was some evidence contradicting Mr John Attridge's evidence that the kennel block was built up against the boundary as it was in the 1970s. In any event, Mr Rock himself pointed to "significant errors" in the O.S. mapping of this area (report para 6.26). The judge concluded that the plan was "simply inadequate for any meaningful, safe or reliable conclusion". He was entitled to take that view.

(ii) The hawthorn hedge at the western end.

42. It was common ground that there was some evidence of a hedge parallel to the line of oak trees at the west end of the boundary close to an old piggery building. The agreed statement by the experts recorded:

> "The photograph attached to this statement shows the piggery building with mature trees directly behind what is possibly the remnants of a hawthorn hedge beyond. Mr Rock believes that the hedge remains are the old OS feature. Mr Worley believes that the OS feature was the tree line."

The judge preferred Mr Worley's evidence on this:

> "I accept that there was at one stage a hawthorn hedge which ran parallel with the line of mature oak trees but on The Croft side of the line of mature oak trees. There is no evidence as to the age of that hedge or as to the age of the mature oak trees.
>
> However, having visited the site, I was impressed by the line formed by these substantial oak trees. Whilst their age remains unknown, I am satisfied from the aerial photographs they were clearly established and mature trees well before the earliest of the aerial photographs in the middle of the 1970's. Those oak trees show clear evidence having had barbed wire passing alongside them not only because of the remnants of barbed wire found in them but also because of the gouge marks created by the line of the barbed wire as it bit into the tree or as the tree grew around it." (paras 62-3)

This conclusion, arrived at after hearing the evidence and viewing the site, is

unimpeachable in this court.

(iii) The hard core track.

43. There was some evidence of the existence of a track north of the kennel block during Mr Attridge's tenure. Mr Mitchinson gave evidence of the existence of some hard core in this area. A Mr Doyle, who had known the late Mr Attridge and had been working in the vicinity in 1975, described seeing Mr Attridge's vehicles going along the north of the kennel block. The judge did not accept this evidence, although he regarded Mr Doyle as honest. He considered that he must have been mistaken, having regard to aerial photographs from that period which in the judge's view made it impossible to see how a roadway could have existed there. Even if there had been such a track at some stage bordered by fencing, the judge concluded that it was:

> "…a temporary use which constituted a trespass on the disputed land and did not represent a boundary line separating Greenacres from the disputed land" (para 74)

44. Mr Gaunt challenged the judge's conclusion on the material before him. His criticisms were reinforced by the new evidence which had been obtained from a Mr Chandler and a Mr Cashmore, who worked on the site in about 1975. They confirmed the existence of a track north of the kennel block with a fence immediately to the north of it. Mr Chandler's evidence was that there was:

> "…a rough brick roadway in that position some 12-13 feet wide and that the far side of the roadway was separated from the adjacent land by a wire fence about 3 feet high consisting of big mesh and barbed wire, and towards the rear of the block a more substantial fence with 6 foot high concrete posts and chain link fencing"

This evidence, if accepted, would have thrown considerable doubt on Mr John Attridge's evidence that the kennel block was built by his father right up against the trees.

45. For the reason I have explained, however, even taking the evidence at its highest, the judge was entitled to conclude that it was of no probative value in relation to the boundary as it was in 1947, in the absence of any evidence to connect the fence or the track with physical features in existence at that time.

(iv) The concrete godfather posts.

46. Similar considerations apply to this point. Mr Mitchinson gave evidence of having discovered a "line of buried concrete godfathers, five in number," at a distance of 4.4

metres from the kennel block. The judge commented that this aspect of the evidence was "unsatisfactory", in that none had been photographed in situ and the ground had not been excavated to see whether the line continued. He accepted Mr John Attridge's evidence that they were not visible during the period of his father's ownership between 1969 – 1985. It was "merely speculation and conjecture as to why they were there and when they were put there". Mr Gaunt submitted that the judge gave insufficient weight to Mr Mitchinson's evidence as to the position where these godfathers were found, and placed too much reliance on the evidence of Mr John Attridge.

47. Again, in my view, the judge was entitled to take the view that, in the absence of evidence as to when and why the posts were erected, this evidence was of no probative value.

(v) The drain and inspection chamber.

48. This point concerned an inspection chamber or manhole in the area to the north of the kennel block. Mr Rock said of it:

> "I inspected the manhole in place at the rear of the kennel building and in my opinion this manhole is of similar age to the adjacent buildings which I understand were built in the 1970's. There is no evidence of any old drains entering the manhole from across the land claimed by adverse possession. In my opinion it is clear that this manhole was originally installed in its current position to serve buildings within Greenacres and has not had any other purpose"

49. The judge accepted Mr John Attridge's evidence that neither he nor his father were aware of it, and they were not involved in its construction. In any event he did not accept that it was a boundary feature. He noted the reservation of drainage rights in the 1947 conveyance and the fact that the manhole cover was not far from the line A,B,C shown on the 1947 plans. He considered that the drain was "entirely consistent with the existence of an easement".

50. The new evidence of Mr Chandler and Mr Cashmore would cast some doubt on Mr John Attridge's evidence that his father was not involved in the construction of the manhole. However, even if this is accepted it provides no evidence as to the boundaries in 1947. Nor, as the judge said, was there any reason to treat it as evidence of a boundary feature rather than an easement.

(vi) Mr Unwin's evidence.

51. Mr Unwin was a tree expert whose evidence was admitted in the form of a written

statement without objection. Among other matters covered by him was the inspection of a trial pit recently dug on the kennel block's north west elevation. The effect of this evidence was summarised in the appellant's skeleton:

> "Mr Unwin referred to trial pits dug to the north west of the kennel block on Greenacres. These revealed a neatly shaped concrete footing for the kennel block at about 0.5 metres depth, extending about 0.4 metres north west from the kennel wall. Mr Unwin said that this must have been poured into a trench at least 0.5 m deep and extending about 0.45 m north west of the buildings elevation. It was highly unlikely that a trench with such even sides could have been dug with trees nearby."

Mr Unwin concluded:

> "…Based on the trial pit evidence, it is likely that an oak tree (or trees) were located several metres from the kennel block"

52. The judge made no reference to this aspect of Mr Unwin's evidence. It is not clear to what extent it was relied on in argument before him, since it is not mentioned in the particulars given in the amended defence. Indeed, Mr Gaunt accepted that it had not been put in cross-examination to Mr John Attridge, to counter his evidence that the wall was built up against the trees. In any event it is open to the same objections as the other evidence of activities in the north of the kennel block. Even if the judge had taken it into account it could not properly have affected his conclusion.

(vii) Fencing near the A435.

53. Mr Mitchinson gave evidence of discovering the remains of some fencing along the magenta line close to the A435. The judge accepted that it supported the magenta line; but "what its provenance was, why it was there, who erected it is unknown". He concluded that it was insufficient, whether taken individually or cumulatively with the other matters, to displace the blue line. Again that conclusion seems to me unimpeachable.

(viii) The conifers.

54. The judge accepted that a row of conifers had been planted by Mr Attridge on land to the east of the kennel block in a position beyond the blue boundary and close to the magenta line. On this point he rejected the evidence of Mr John Attridge that the trees had been in existence in 1970 when Mr Attridge bought the land. The evidence from the tree expert, Mr Unwin, which was unchallenged, had dated the planting of the trees within the time that Mr Attridge Senior occupied the Greenacres.

55. The judge commented that Mr Attridge Senior was "very fond of conifers" and had planted several around Greenacres. He said:

> "I do not think that Mr Attridge applied his mind to whether he was planting these trees off or on the disputed land. The fact is they provided a convenient screen against the A435 and they were planted in the area immediately adjacent to the eastern end of the kennel building. I am satisfied that no reliable inference or conclusion can be drawn from these conifers either on their own or in conjunction with any other extrinsic evidence upon which the defendants rely." (para 75)

56. Mr Gaunt criticises this reasoning. He says that there was no evidence that Mr Attridge, whatever his fondness for conifers, was in the habit of planting them on other peoples' land; nor, by reference to the 1989 aerial photo, could it be said that they would have provided a convenient screen to the A435. There is some force in these criticisms. Having rejected the evidence of Mr John Attridge on this aspect, the judge had no real basis for speculating as to his father's intentions in planting the trees.

57. Equally, however, there was nothing to connect this row of conifers with any pre-existing boundary features or to relate it in any way to the 1947 conveyance. I would have made the same comment in relation to Mr Worley's reliance on the boundary wall erected by Mr Attridge close to the road. Taken together, as indications of Mr Attridge's understanding of the boundary, the two points may be thought to cancel each other out.

Summary

58. I have dealt with these points relatively shortly because, (with the possible exception of the hawthorn hedge and the fence) they are all open to the objection that, taken at their highest, they are not probative of the relevant issue, namely the position of the boundary in 1947. At most, they undermine parts of Mr John Attridge's evidence, on which the judge relied to some extent in rejecting the magenta boundary. However, even when that evidence is discounted, it leaves unaffected the conclusions which the judge drew on the basis of Mr Worley's analyses of the 1947 conveyance and related boundary features still evident on the land.

59. The hawthorn hedge to the west of the site might have provided evidence of a boundary feature along that line, however, the judge was entitled to reject it and to prefer the line of oak trees for the reasons he gave. That depended not simply on his view of the site, but also on the corroboration derived from Mr Worley's analysis.

New evidence

60. We had before us two applications to admit new evidence not available to the judge.

The first dated 17th February, 2006, was supported by a statement from Mrs Lane. The second dated 4th October, 2006, related to the evidence of Mr Chandler and Mr Cashmore. The traditional test for the admission of new evidence was established in *Ladd v Marshall* [1954] 1WLR 1489. In summary it had to be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; it must be such as would probably have had an important inference on the result; and it must be apparently credible. While these principles remain relevant, more recent authority supports a more flexible approach: see *Hertfordshire Investments Limited v Bubb* [2001] WLR 2318.

61. I have largely disposed of the points made in the second application already. The first and third of the *Ladd v Marshall* test appear to be satisfied. The existence of these witnesses came to light by pure chance when Mr Chandler visited Greenacres to buy a puppy and fell into more general conversation with Mrs Lane. There is also no reason to doubt their credibility as witnesses. However, Mr Cousins objected to the evidence on the grounds of relevance. For the reasons I have already given when dealing with the individual items, this objection is in my view well founded. The evidence might have undermined some of that of Mr John Attridge, but it did not throw any light on the boundaries as they were in 1947.

62. The other application is more problematic. Mrs Lane referred to work recently carried out on the disputed land including excavations carried out near the road and to the blue line ("the Worley boundary"). She says this:

> "….the work recently carried out by Mr Kelly…included excavating parts of the disputed land. The excavations undertaken by Mr Kelly's workmen have revealed that there was no drain running immediately to the north of the Worley boundary, but there was an old drain, a 6 inch clay pipe, which was located about 4.5 metres to the north of the Worley boundary, running towards the main road. That is exactly the place one would have expected to have found an old drain if the magenta line….was the true boundary. In the course of Mr Kelly's works, I saw workmen excavating trenches from the manhole heading in a straight line towards the main road and at no point was any old drain revealed by those excavations…."

63. This evidence is in a different category to the other new evidence, because it relates directly to the physical features as they were at the time of the 1947 conveyance. The drainage line A,B,C shown on that plan arrived at the road immediately adjacent to the disputed boundary. If the drain revealed by Mr Kelly is the same drain, then the plan was inaccurate because it should have been shown some 5 yards north of that boundary. Alternatively, the boundary of the disputed land on that frontage should be 26 yards rather than the 31 yards as shown in the 1947 plans. (26 yards, as Mrs Lane points out, was the measurement in fact used by Mr Ali himself when making a planning

application in 1987.)

64. Applying the *Ladd v Marshall* tests, there is no reason to doubt the credibility of this evidence in itself. It is less clear that it could not have been obtained "with reasonable diligence" before the trial. The potential existence of a drain in this position was evident from the 1947 plans. Someone wishing to check the point could have carried out the same excavations that Mr Kelly has now done. The fact that no one thought of the point at that stage does not mean that the evidence could not have been reasonably obtained. In any event I do not think it can be said that it would have had "an important influence" on the result of the trial. It would have been yet another matter to be weighed in the overall judgment. At its highest it throws some doubt on the accuracy of the 1947 plans: either the measurement of 31 yards was wrong, or the drain was shown in the wrong position. There is no other evidence about when the drain came to be constructed or of its state or visibility in 1947. Nor is there any reason to think that its precise location as it joined the road was a matter of particular significance. On the other hand, the measurements taken along the frontage were of significance, certainly in relation to the plots immediately to the north, and they are corroborated by the analysis carried out by Mr Worley.

65. If this new evidence were to be admitted, the best the appellants could hope for would be a new trial at which the evidence could be taken into account along with all the other material evidence and any further evidence on this point which the respondent wish to adduce. It certainly would not be possible for this court to resolve the matter finally. Taking account of the equivocal nature of the evidence, and the real possibility that it could have been obtained before the trial, I do not think it would be right to put the respondents to the burden of a new trial purely because of this point. For these reasons, I would dismiss the application to admit this evidence.

Conclusion

66. For all these reasons, I would dismiss the appeal and uphold the judgment of the learned judge.

Lord Justice Maurice Kay:

67. I agree.

Lord Justice Waller:

68. I also agree.