Neutral Citation Number: [2014] EWCA Civ 1652

Case No: B2/2013/3525

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON CIVIL JUSTICE CENTRE
District Judge Langley
2CL10269

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 18th December 2014

Before :

LORD JUSTICE MOORE-BICK,
VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE UNDERHILL
and
LORD JUSTICE BRIGGS

- -

Between :

	NATA LEE LTD	**Appellant**
	- and -	
	ABID & ANR	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

TOM WEEKES (instructed by **DWFM BECKMAN**) for the **Appellant**
NICHOLAS ISAAC and HARRIET HOLMES
(instructed by **RONALD FLETCHER BAKER LLP**) for the **Respondent**

Hearing dates : Thursday 4th December 2014

- -

Judgment**Lord Justice Briggs :**

Introduction

1.This is an appeal against the Order of District Judge Langley made in the Central London County Court on 5th November 2013, in which she made detailed declarations after a liability-only trial of a claim by the respondents, Mr. and Mrs. Abid, against the defendant, Nata Lee Limited, for trespass and interference with a right of way. After a three-day trial the judge found for the claimants broadly on all the heads of their claim, and gave case management directions for the necessary further hearing as to remedies.

2.Nata Lee appeals against all the declarations made, seeking for the most part determinations in

its favour, but in the alternative a re-trial.

3.As Mr. Tom Weekes, counsel for Nata Lee, very properly emphasised at the beginning of his submissions, this was a trial which presented the learned District Judge with very real difficulties. The case raised a confusing mass of issues. There was no proper trial bundle, but a mass of documents, presented non-chronologically. There was a stark inequality of arms between the parties. The claimants were represented by leading and junior counsel, whereas the defendant appeared via one of its directors, in an essentially chancery case in which legal complexity makes effective self-representation even harder than it usually is. As will appear, I have concluded that many of the appellant's criticisms of the fact-finding and legal analysis in the judge's promptly-delivered reserved judgment are well-founded. Nonetheless, my detailed conclusions about the shortcomings in the judgment do not diminish my appreciation of the difficulties which the judge had to surmount. It was a case which a County Court judge, and even a High Court judge, would have found challenging.

4.The dispute arose from the re-development, in 2007-08, of former warehouse premises in Clarence Road, London, E5, which Nata Lee acquired in late 2005. Those premises, now known as 99-103 Clarence Road (but previously 99-105), lie on the west side of Clarence Road. The claimants own the adjoining property to the north, known as 105-107 Clarence Road, having acquired it in April 1995. The claimants have, throughout their ownership of it, run a printing business from their property.

5.Nata Lee's redevelopment consisted of the demolition of the former warehouse and its replacement with a mixture of offices and apartments on, substantially, the same footprint as the warehouse. Between the warehouse (now the new development) and the printing works, a viewer from Clarence Road would see a gated yard giving access to both buildings, free of built structures save for a metal fire escape staircase on the right (serving the printing works) and some modest structures at the western end of the yard which may have been lavatories. I shall refer to the two properties, for brevity, as "No. 99" and "No. 105".

6.The boundary line between the two properties was originally created by a transfer of No. 105 out of common ownership dated 14th June 1963, by reference to a plan ("the 1963 Plan"), which Mr. and Mrs. Abid's expert, Mr. Carl Calvert FRICS, described in his report as "one of the best I have seen in the last 10 years…". It provided a precise delineation of the newly-created boundary between the two properties in such a way that the front (eastern) part of the yard remained part of No. 99 and the rear (western) part of the yard was transferred as part of No. 105. Unsurprisingly, the 1963 Transfer granted a right of vehicular access to the owners of No. 105 across the front part of the yard. It was in the following terms:

> "A right of way at all times for the purpose of ingress and egress only and for loading and unloading for the Purchaser and his successors in title, the owners or occupiers for the time being of the property hereby transferred (in common with the Vendor and all other persons having the like right) their tenants, servants and visitors with or without vehicles to and from the property hereby transferred over and along the roadway about 15 feet wide etched green on the plan attached hereto and to the use by the Purchaser

> and such other persons as aforesaid of the entrance gate subject to payment by the Purchaser of one-half of the expense of maintaining such roadway and gate in repair."

Similarly, there was reserved for the benefit of No. 99 a right of access for maintenance and repair of the (then new) warehouse over the rear part of the yard transferred as part of No. 105.

7. I have thus far described Mr and Mrs Abid's claim as one for trespass and interference with their right of way. At the heart of the issues between the parties however lies a boundary dispute. Mr. and Mrs. Abid claim (and the judge in due course held) that their predecessors in title to No. 105 had acquired a small but significant three metre slice of the yard, having the effect of varying the boundary across the yard shown on the 1963 Plan three metres to the east. In fact the original boundary had a dog-leg in it around the metal fire escape, whereas the alleged new boundary ran right across the yard just to the east of the fire escape structure. The claim was that this variation of the boundary had been accomplished by an informal agreement between unknown predecessors in title to both properties, at some time between 1963 and 1989. The significance of the variation was it increased the part of the yard falling within the title to No. 105 to a size which comfortably accommodated a parked car. I will refer to this three metre slice of the yard as "the disputed land".

8. The legal basis for Mr. and Mrs. Abid's claim to be the owners of the disputed land (which was part of the registered title to No. 99) was pleaded as based upon an oral agreement supported by part performance, upon estoppel and upon adverse possession. It is not clear whether the estoppel claim was pursued at trial. The judge found in Mr. and Mrs. Abid's favour upon the basis of the oral agreement supported by part performance, and adverse possession. She said nothing about estoppel, and it was not pursued on appeal.

9. The boundary dispute was central to the issues between the parties because the access door to the residential part of Nata Lee's new development opened onto the disputed land. Thus, whereas Nata Lee claimed that the door opened onto the far end of its part of the yard, Mr. and Mrs. Abid claimed that it could not be reached without trespass upon the front section of their part of the yard. Further, Mr. and Mrs. Abid claimed that the threshold to the doorway was itself built on the disputed land, and that the whole of the new development encroached into the yard, so as to trespass upon their part of it and to constitute an actionable interference with their right of way over Nata Lee's part of it.

10. In addition, Mr. and Mrs. Abid claimed that the foundations of the new development trespassed even further into their part of the yard, that Nata Lee had trespassed by re-routing drains under their part of the yard, and had obstructed their right of way both by narrowing the gap between the gates at the junction between the yard and Clarence Road, and by numerous specific acts of temporary obstruction, by vehicles, scaffolding and other materials, during the carrying out of the redevelopment works.

11. The judge found, and so declared in her Order, that all of these claims by Mr. and Mrs. Abid were well-founded. I have explained the basis of her findings in relation to the boundary dispute. The trespass by the erection and use of the doorway to the residential

part of the development followed as a matter of course. Her conclusion that the new development encroached into the yard, both at the Abids' end and Nata Lee's end was based upon her preference for the evidence of the Abids' expert over the expert called by Nata Lee. I shall have to describe the basis of her conclusions that the drainage trespass and the interference with the Abids' right of way were made out in due course.

12. The question whether the infringements of Mr. and Mrs. Abid's rights found by the judge to have occurred should be remedied by damages or injunction remains at large, save that I note that Mr. Nicholas Isaac for Mr. and Mrs. Abid (who did not appear at the trial) told us that the relief sought in respect of the encroachment by the new development and its foundations would be monetary only, rather than an injunction to require its partial demolition.

The boundary dispute

13. I need say little about the case advanced and accepted by the judge, based upon an oral agreement supported by part performance. Upon reading Mr. Weekes' skeleton argument for this appeal, Mr. Isaac very sensibly did not seek to uphold the judge's analysis of that point. It was manifestly wrong because, although prior to its abolition by the Law of Property (Miscellaneous Provisions) Act 1989 part performance did operate as a way round the formalities required by Section 40(1) of the Law of Property Act 1925 for a contract for the sale or other disposition of land, it afforded no way of supporting an action based upon an immediate oral disposition of land (rather than a contract for its disposition in the future) which Section 53 of the 1925 Act requires to be by deed, subject to irrelevant exceptions: see *McLaughlin v Duffill* [2008] EWCA Civ 1627.

14. Nonetheless Mr. Isaac sought to uphold the judge's determination of the boundary dispute in Mr. and Mrs. Abid's favour first, upon the basis of adverse possession, as found by the judge, and secondly upon the basis that the facts found by her constituted an informal boundary agreement within the doctrine laid down by Megarry J in *Neilson v Poole* [1969] 20 P&CR 909, and approved by this court in *Joyce v Rigolli* [2004] EWCA Civ 79.

15. Although those two surviving ways of putting Mr. and Mrs Abid's case on the boundary dispute need separate legal analysis, it is convenient to begin with the pleadings, the evidence and the judge's findings of relevant fact.

16. Paragraph 4 of the Particulars of Claim pleaded that:

"Not less than 15 years prior to the Defendant acquiring title to its

> land the Defendant's and Claimants' predecessors in title entered into an oral or other agreement to vary their respective boundaries so that the true boundary was to be "the blue line", that is, a line running straight across to the wall of the Defendant's then building from the upright of the fire escape stairs (such upright leading to the metal platform and being the upright nearest to Clarence Road)."

Paragraphs 5 and 6 dealt with part performance and estoppel. Paragraph 7 pleaded that:

> "Further or alternatively, the Claimants and their predecessors in title were in adverse possession of the said land for a period of not less than 12 consecutive and uninterrupted years prior to the coming into force of the Land Registration Act 2002, in that they used, occupied and managed the said land to the exclusion of the Defendant's predecessors in title and/or the Defendant."

17. No Particulars were sought of either of those paragraphs. They were, in substance, denied in Nata Lee's home-made Defence.

18. The relevant evidence came mainly from two short witness statements and the examination in chief and cross-examination of their deponents. The first was Mr. Alan Garfield, who had been the owner of No. 99 from about 1989 until 2004. The second was Mr. Harold Karmel who (or whose company) had been the owner of No. 105 from June 1991 until April 1995, when it was sold to Mr. and Mrs. Abid.

19. Mr. Garfield said in his witness statement that it had been explained to him when he purchased the property that the boundary between No. 99 and No. 105 ran from the metal posts at the Clarence Road end of the fire escape structure horizontally across the yard, so that the area in front of it belonged to No. 99 and the area behind it belonged to No. 105. In cross-examination he said that he could not remember being given that explanation, it having been too long ago. He continued:

> "If anybody would explain it would be Mark Shimal because I bought the place from him so he would have said it was a shared drive…"

Later he said that he had never looked at the Land Registry plans for his property.

20. So far as concerns use of the yard, Mr. Garfield said in cross-examination (in relation to the period after Mr. and Mrs. Abid purchased No. 105 in 1995 until Mr. Garfield sold in 2004):

> "As long as Mr. Abid went to the… parked his car at the end we would… we had access to the shutters so it didn't make any difference to us."

It is clear from other evidence, and from photographs, that Mr. Abid parked his car partly on the disputed land and partly on the rear part of the yard, of which he and his wife

were the registered proprietors. In his examination in chief Mr. Garfield was asked whether there was a line on the ground (along the boundary as explained to him) and he responded that he could not recall any such line, but he said that:

> "We drew a line across to the… to my building which was a… at the time there was a shutter."

21. Mr. Karmel said in his witness statement that, when he purchased No. 105 in 1991:

> "The agreed boundary between 105-107 Clarence Road and 99-103 Clarence Road was already in existence and was explain [sic] to us a such:
>
> > There is a black line painted across the drive starting at the front metal uprights on the external stairs on 105-107 Clarence Road and following straight, horizontally across the yard to 99-103."

He added that it had been explained to him that each premises would be responsible for the maintenance and upkeep of their own section of the yard, but with joint responsibility for the maintenance and upkeep of the security gates and locks.

22. In his examination in chief, in response to the question:

> "Did the company in fact maintain the yard?" (*a reference to Mr. Karmel's company*)

Mr. Karmel replied:

> "Of course it did, it had to ensure that there was easy access, that any skips that were in the back were kept and maintained, and no spillage at all because it would have been detrimental both to ourselves and to our neighbours, Garland Trimmings, at the time who we enjoyed considerable harmony and easement of access on all occasions." (*Garland Trimmings was Mr. Garfield's company, then in occupation at No. 99*.)

23. With the benefit of a site visit and numerous photographs, the judge made the following findings. I interpose that her references to "the blue line" refer to a line marked in blue on Mr. Calvert's survey plan, designed to show the subject matter of the boundary variation agreement, and coincident with the black line referred to by Mr. Garfield and Mr. Karmel, and visible from some of the photographs. First, she found (at paragraph 19) that:

> "It is clear that the previous owners of 99-103 Clarence Road had agreed with the previous owners of 105-107 Clarence Road that the land behind the blue line would become the property of the owners of 105-107 Clarence Road."

At paragraph 20, she continued:

> "There is no evidence as to whether any consideration was given for this or indeed whether there was any written contract, suddenly none has been produced to the Court. What is clear is that both adjoining owners acted upon the agreement reached for at least fifteen years prior to 2005. This is demonstrated by the painting of the blue or black line on the ground to show where the boundary was agreed to run."

At paragraph 23, she continued:

> "In this case the previous owners of 99-103 Clarence Road appeared to give this piece of land (*by which she meant the disputed land*) to the previous owners of 105-107, apparently on the basis that the owners of 105-107 would then become responsible for the maintenance and upkeep of it and would be entitled to use the same. The claimant clearly does use the same and has done so since he purchased the properties."

24. Earlier, at paragraphs 13 and 14, she referred to the black line as still visible in some of the photographs, and continued:

> "Mr. Abid has used the area behind the blue line to access and park his car. On these facts it is clear that the claimants have established actual possession of this area for at least 15 years. It is also clear that the owners of 105-107 Clarence Road had the intention to and did occupy this piece of land, and that the then owners of 99-103 Clarence Road accepted this and acted upon it."

25. Later, in relation to the claim based upon adverse possession, she said, at paragraph 28 and 29, that Mr. Abid and his predecessors in title:

> "Clearly intended to and did possess the land in question and in doing so excluded the legal owners who were, and remain, the registered proprietors of 99-103 Clarence Road."

She noted that the right of way conferred upon the owners of No. 105 by the 1963 Transfer did not confer parking rights and continued, at paragraph 33:

> "I am satisfied that the land behind the blue line… was used by the owners of 105-107 Clarence Road for this and other purposes. It also appears to have been maintained solely by them, certainly to the exclusion of the owners of 99-103 and it was Mr. Karmel who confirmed that in his evidence.
>
> (34) Accordingly I find both as a fact and in law that the present and previous owners of 105-107 Clarence Road had exercised possession of the land behind the blue or black line… from at

least June 1991 to 13th October 2003, during which period they had used and maintained the land continuously and without interruption to the exclusion of the registered proprietors of it, being the owners for the time being of 99-103 Clarence Road.

(35) In doing so I am satisfied they had acquired possessory title to this land prior to the coming into force of the Land Registration Act 2002…"

Analysis

Boundary agreement

26. In *Neilson v Poole* [1969] 20 P&CR 909, the parties had orally agreed, and staked out so as to make it visible, a boundary between their two gardens which Megarry J concluded had accurately reflected on the ground the boundary set out in the relevant conveyance, properly construed. At page 918 he continued:

> "Now a boundary agreement may constitute a contract to convey land. The parties may agree that in return for a concession by A in one place, straightening the line of division, B will make a concession in another place; and the agreement may thus be one for the conveyance of land. But there is another type of boundary agreement. This does no more than identify on the ground what the documents describe in words or delineate on plans. Nothing is transferred, at any rate consciously; the agreement is to identify and not to convey. In such a case, I do not see how the agreement can be said to constitute a contract to convey land.
>
> In general, I think that a boundary agreement will be presumed to fall into this latter category. This view is supported by words of Lord Hardwicke L.C. in *Penn v. Lord Baltimore*, a case concerning an agreement relating to the boundaries between Pennsylvania and Maryland. There the Lord Chancellor said:
>
> > To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be the true and ancient limits."

On page 919, he continued:

> "I must, too, bear in mind that a boundary agreement is, in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured in the law."

At page 920, he continued:

> "I may add that there was a further contention in relation to the

> boundary agreement by the defendant; and this, too, I reject. This contention was that once the boundary agreement was made, it superseded the conveyance in so far as the conveyance defined the boundary. Yet what the agreement did was merely to establish on the ground, by agreement, what it was that the conveyance showed. A boundary agreement that merely demarcates is, I think, an agreement that is ancillary to the conveyance; it does not supersede it."

27. In *Joyce v Rigolli* [2004] EWCA Civ 79, the parties had measured and orally agreed their common boundary, for the purpose of defining it by a fence, but so that it made a very small deviation in order to accommodate within the claimant's land a cherry tree which would otherwise have been bisected by it. To that extent, the defendant was consciously giving up a small triangle of land round the cherry tree, as part of what was otherwise a boundary demarcation agreement. The question for the Court of Appeal was whether Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 applied to a boundary demarcation agreement which involved the conscious transfer of a trivial piece of land. In concluding that it did not, Arden LJ said this, at paragraph 33:

> "Section 2 applies as much to exchanges of land as to other dispositions of interests in land. Accordingly, in deciding what is trivial, the court should not "net" the transfers by either side but aggregate all the conscious transfers involved of either party, if more than one. It is presumed, until the contrary is shown, that any transfer of land effected by a boundary agreement of the demarcating kind is trivial for this purpose."

At paragraph 34 she continued, after referring to *Neilson v Poole*:

> "If Section 2(1) applies whether trivial transfers of land are consciously involved, the expense to the parties will also be disproportionate to the value of the land involved. Accordingly, in my judgment, it can in this case properly be concluded that Section 2 does not apply to trivial dispositions of land consciously made pursuant to an informal boundary agreement of the "demarcating" kind."

28. Taking those two authorities together, there is to my mind a real difference between an agreement, the purpose of which is to move a boundary so as to transfer land from one neighbour to another, and an agreement the purpose of which is to define a previously unclear or uncertain boundary, even if that agreement may involve some conscious transfer of a trivial amount of land. The former agreement is subject to the formalities of the 1925 Act and the 1989 Act whereas the latter is not.

29. In my judgment, the agreement found by the judge to have taken place falls into the first of those two categories. My reasons follow.

30. First, there was and is no uncertainty as to the boundary created by the 1963 Transfer. It was clearly set out in what Mr. Calvert (with the judge's assent) regarded as an extremely clear plan, and ran across the yard several metres to the west of the blue (or

black) line. The agreement was pleaded as designed to vary rather than demarcate the existing boundary, and that is how the judge described it. She said that the previous owners of No. 99 "appeared to give this piece of land" to the previous owners of No. 105. (paragraph 23)

31. Secondly, it does not appear that the agreement, made before Mr. Garfield became the owner of No. 99, was made for demarcation purposes. There was no demarcating line on the ground when he acquired No. 99, and he painted a black line himself. Thirdly, the land thereby transferred from the owners of No. 99 to the owners of No. 105 was not, in the context, trivial. While a plot measuring some three metres by four metres may be trivial in the context of a field or a garden, where it enables the recipient (by adding it to his existing land) to obtain a car parking place in a busy urban setting, it is of real significance.

32. Fourth, it is difficult to see what consideration for the agreement to transfer the disputed land was provided by the then owner of No. 105. In a true boundary demarcation agreement, the consideration is provided, each way, by the substitution of certainty for uncertainty as to the boundary, and the relief of both neighbours from the risk of future dispute. In the present case, the judge found that there was no evidence as to whether any consideration was given for the transfer of the disputed land. If none was given, then the agreement would be without effect for that reason alone.

33. Mr. Isaac sought to rely on the presumptions in favour of a boundary demarcation agreement identified both by Megarry J and Arden LJ, in the passages from which I have cited. They are, in my view, two slightly different presumptions, and neither of them assists Mr. and Mrs. Abid. The presumption identified by Megarry J was designed to assist in distinguishing between, on the one hand, a pure boundary agreement, for identification or delineation where no land is consciously transferred, and a boundary agreement where, by straightening a line of division, each side gives some land to the other: see page 918. His presumption favours the former over the latter. But in my judgment the agreement in the present case, to transfer the disputed land from No. 99 to No. 105, fell into neither of those categories, so that Megarry J's presumption has no application.

34. Arden LJ's rebuttable presumption was simply that, where the purpose of an agreement was to delineate a boundary rather than to transfer land, it was to be presumed that any consequential transfer of land was trivial, unless the contrary was shown: see paragraph 33. Again, the evidence and findings of the judge in the present case do not suggest that the purpose of the agreement was to define an uncertain boundary, but rather to transfer the disputed land. Accordingly, Arden LJ's presumption has no application to this case either. Even if it did, I would have concluded that the disputed land was by no means trivial in its context, so that the presumption would (had the matter been pleaded and investigated at trial) have been rebutted.

Adverse possession

35. I have described the judge's findings about this issue. It is common ground that she was right to address the matter by reference to the law as to adverse possession as it was before the coming into force of the Land Registration Act 2002, and that no issue arises as to the duration of the conduct of the owners of No. 105 which Mr. and Mrs. Abid relied upon. Nata Lee's appeal asserts, simply, that the facts found by the judge were insufficient to support a case of adverse possession, because the relevant conduct fell short of the necessary exclusion of the owners of No. 99 from the disputed land. Adopting the language of Mummery LJ in *Tennant v Adamczyk* [2005] EWCA Civ 1239, at paragraphs 22-23, Mr. Weekes said that the acts of the owners of No. 105:

> "were acts of non-exclusive user… They did not involve factually any control or custody or exclusive possession of any part of the appellant's land. There was nothing else done by the respondents on the disputed land to exclude the appellants from the land to which they had a registered title."

That was a case where the acts alleged to constitute adverse possession included parking, taking deliveries, storing vehicles and stock on the land, but not (for a sufficient part of the relevant period) the enclosure of it by fencing or any other obstruction.

36. Mr. Isaac very properly warned against taking the words of a judgment in a particular case as if they amounted to a statute, ignoring differences in context. In the *Tennant* case, as he pointed out, the land in question was a much larger plot than the disputed land in the present case, and it was not suggested that the relevant car parking occupied the whole of the *locus in quo*. He submitted, by reference to cases about whether a right to park could constitute an easement, that the question whether parking amounted to exclusive use of land was one of fact and degree.

37. I agree with Mr. Isaac's analysis, but not with the consequences of the application of his 'fact and degree' test to the present case. The judge relied upon parking on the disputed land, upon the assumption by the owners of No. 105 of responsibility for its maintenance, and (perhaps) upon the painting of the black line. Her conclusion, at paragraph 29, that "the claimants and their predecessors in title clearly intended to and did possess the land in question and in doing so excluded the legal owners…" appears to accord with the legal requirement for exclusion of the paper title owner, but I have been unable to understand how parking, maintenance and the painting of the black line did so in fact.

38. Taking each element in turn, it is evident from the photographs that parking on the disputed land did not occupy the whole of it, still less exclude the owners of No. 99 from using it as a means of access to the side of their warehouse. The photographs show that, prior to the demolition of the warehouse, there was some form of aperture in it further down the yard, probably beyond the disputed land, to which the owners of No. 99 would have needed to use the disputed land for gaining access. The assumption of a responsibility for maintenance appears, on the evidence to which I have referred, to have been very limited. Maintenance appears to have amounted to little more than keeping the disputed land clean and tidy. Finally, the painting of the black line was not carried out by the owners of No. 105 at all, but by Mr. Garfield while he was the owner of No. 99. Taking his evidence as a whole, it appears that he did it so as to mark out the furthest limit of the permitted parking by the owners of No. 105, in such a way as to ensure that it did not interfere with his access to what he called his "shutter" which appears to have

been a large opening into the warehouse (different from the one which I have just described) which had been bricked up before the relevant photographs were taken. Far from being an act of possession or exclusion by the claimant sufficient for adverse possession, painting the black line was something done for a quite different purpose by the paper title owner, and did not in any way exclude his continuing access to the disputed land.

39. Taking the three elements of conduct relied upon in the aggregate points no more to the exclusion of the owners of No. 99 from the disputed land than does a review of each of them separately. For those reasons, I consider that the judge was wrong to find that the owners of No. 105 acquired adverse possession of the disputed land. The result of that conclusion, coupled with the abandonment of a claim based upon part performance, and the inapplicability of the *Neilson v Poole* doctrine as to boundary agreements, means that, without the need for a retrial, I would allow the appeal on this point, and substitute a declaration that the disputed land continues to form part of No. 99.

Trespass

40. The judge sensibly divided this part of the case into three aspects:

i) Trespass by encroachment of the new building and its foundations onto (a) Mr. and Mrs. Abid's part of the yard and (b) onto the disputed land;

ii) Trespass by use of the new entrance into the residential parts of No. 99, across the disputed land, and;

iii) Trespass by the re-routing of drains, necessitated by the new development, under both the Abids' part of the yard and the disputed land.

41. If my Lords agree with my conclusion that the boundary dispute is to be resolved in favour of Nata Lee, then there can be no question of trespass on the disputed land, either by encroachment or by the use of the new doorway. Trespass must, by definition, be confined to that part of the yard falling within Mr. and Mrs. Abid's paper title, at the western end of it.

42. The judge resolved this issue in the Abids' favour because she preferred the expert evidence of Mr. Calvert over that of Nata Lee's expert. There is no appeal that, viewing those two experts as providing the only relevant evidence, she was wrong to do so. On the contrary, her judgment convincingly explains why she was right to do so. Mr. Calvert's plan (annexed as Plan B to the Particulars of Claim) shows, if correct, that there was a small encroachment of the new building over part of the rear of the yard within the Abids' paper title having a width of 0.24 metres in the east, and 0.21 metres in the west. Other evidence suggested a slightly larger encroachment by certain foundation pads, underground.

43. The appeal on this point is that, in simply preferring Mr. Calvert's expert evidence, the

judge had by a case management decision on the first day of the trial, wrongly excluded what was arguably the best evidence in relation to this issue, namely measurements taken by a Mr. Shattock, both before and after the construction of the new building on No. 99 which, if correct, suggested that the encroachment of the building itself (rather than the foundations) was, at the Abids' end of the yard, no more than one centimetre and therefore *de minimis*. Mr. Shattock was Nata Lee's party wall surveyor for the purposes of the redevelopment of No. 99. Mr. Weekes submitted with force that 'before and after' measurements on the ground were inherently likely to be a more reliable measure of any encroachment than measurements taken from the 1963 Plan, scaled up and applied to a modern survey of the *locus in quo*.

44. The question for this court is therefore whether the judge's case management decision to exclude Mr. Shattock's evidence of his measurements fell outside the broad discretion which this court habitually affords to a first instance judge. If it did, then Mr. Weekes accepted that the only remedy for his client would be a retrial of this issue.

45. The case management decision to exclude Mr. Shattock as a witness had a long procedural pre-history during most, but not quite all, of which Nata Lee was without professional representation. It began with an order for directions on 26th November 2012 (following a hearing) which required factual witness statements by 11th January 2013, and which permitted the claimants (alone) to rely upon the expert evidence of Mr. Calvert, on the basis that his report had already been served. It permitted questions of Mr. Calvert from the defendant, within a tight timeframe, but was silent about any expert evidence for the defendant for which, I infer, there had at that stage been no application.

46. This court was told that Nata Lee had already, in an earlier allocation questionnaire, indicated its wish to call Mr. Shattock. It is evident that he was perceived by Nata Lee to have useful evidence in respect of two matters: the first as to the drainage issues, for which it was proposed that he should give non-expert evidence, and secondly his measurements and conclusions about encroachment, for which it was conceived that his evidence would be of an expert category.

47. The result was that a non-expert witness statement about the drainage issue was served, three days late, but otherwise pursuant to the judge's directions. Mr. Shattock then signed an expert's report of 28th January 2013 about the encroachment. An application by Nata Lee to call Mr. Shattock as an expert was refused by the judge on 17th May 2013, on the basis that, having previously acted for Nata Lee as its party wall surveyor, Mr. Shattock lacked sufficient independence. This was, in my view, a wholly inappropriate basis for rejecting his expert evidence, but the judge's Order was not appealed. The judge did however tell Nata Lee (through its director Mr. Lee who attended the hearing) that her rejection of Mr. Shattock as an expert did not prevent him being called as a purely factual witness, nor did it prevent Nata Lee substituting a different expert for Mr. Shattock.

48. Nata Lee did substitute a Mr. Dawson for Mr. Shattock as its expert. His report was dated 21st June 2013. Nonetheless, at a pre-trial review on 4th September 2013 (at which Nata Lee was represented by counsel) an attempt was made to obtain permission

to call Mr. Shattock as a purely factual witness to prove his measurements. No signed witness statement was proffered and the judge decided that, in the absence of such a witness statement, she could not give permission in the abstract, and left the matter to be dealt with by an application on notice. Again, that decision was not appealed.

49. An application was made on notice, very shortly before the trial, and was inevitably adjourned to the beginning of the trial, when a witness statement from Mr. Shattock proving his measurements by reference to his contemporaneous notes was, again, refused by the judge. The tape recording of the hearing and determination of that application is corrupt, but a note from the Abids' junior counsel shows that her leader Mr. Geraint Jones QC opposed the application on the basis that there was still a risk that Mr. Shattock would veer into giving expert evidence, once in the witness box. He said that, in any event, Mr. Shattock's contemporaneous notes (on hand-drawn sketches) had been disclosed and that the Abids "would seek to rely on them".

50. The judge's reasons for dismissing the application were that it was too late, that no good explanation had been given for its lateness, and that she was satisfied that it would be difficult for Mr. Shattock not to cross the line between expert opinion and acting as a lay witness. It may be that (although counsel's note does not make this entirely clear) the judge was also concerned that if Mr. Shattock was called, then the Abids' party wall surveyor might also have to be called, with a consequential increase in the length of the hearing, and cost. Later in the trial, Mr. Jones QC did indeed rely upon one aspect of Mr. Shattock's contemporaneous notes, in relation to the reduction in the width between the gateposts at the east end of the yard, but no reference to or reliance upon Mr. Shattock's one centimetre measurement of the encroachment of the new building at the other end of the yard was made, nor does it appear anywhere in the judgment.

51. Mr. Weekes submitted that the procedural history which I have just described, in which his client, acting for the most part without legal representation, made diligent efforts to have admitted the best evidence of any relevant encroachment led to the wholly unjust exclusion of it, initially on a basis which was misconceived in law, and latterly upon a case management assessment which relied wholly on inexcusable delay, without any attempt to balance the importance of the evidence against any prejudice which its late admission might cause to Mr. and Mrs. Abid. He pointed out that the substance of Mr. Shattock's evidence had been disclosed to and known by the Abids and their legal team for many months prior to the trial, since it had been set out, by reference to his disclosed contemporaneous notes, in the report which Nata Lee sought unsuccessfully to rely upon in May. He also submitted that, even if the Abids needed to call their own party wall surveyor to prove his measurements by way of response, this was not a prejudice caused by the lateness of Nata Lee's application, since there was nothing to show that the Abids' surveyor was unable to attend within the trial window which had been set aside.

52. For his part, Mr. Isaac submitted that, since Nata Lee been told in the previous May that Mr. Shattock's non-expert evidence could be adduced, if appropriately presented in a witness statement, leaving it until an application which could only be heard at the beginning of the trial was inexcusable, so that the judge's case management decision to exclude it could not be challenged.

Analysis

53. I make it clear at the outset that, in my view, the fact that a party (whether an individual or a corporate body) is not professionally represented is not of itself a reason for the disapplication of rules, orders and directions, or for the disapplication of that part of the overriding objective which now places great value on the requirement that they be obeyed by litigants. In short, the CPR do not, at least at present, make specific or separate provision for litigants in person. There may be cases in which the fact that a party is a litigant in person has some consequence in the determination of applications for relief from sanctions, but this is likely to operate at the margins.

54. Nor is this a case in which Nata Lee's lack of representation led it, for example, to misunderstand the timetable for evidence laid down in the judge's directions to which I have referred, nor her perfectly clear explanation, in May, that her refusal of permission to call Mr. Shattock as an expert did not rule out an application to admit purely factual parts of his evidence. It is not, therefore, a case in which the relevant requirements with which Nata Lee failed to comply were dressed up in legal jargon of a kind it simply did not understand.

55. Nonetheless, I consider that the judge's refusal to admit Mr. Shattock as a witness on what was undoubtedly a very late application was seriously flawed, both by a failure to balance the relevant considerations, and by reliance upon a supposed risk that he would veer into expert evidence if permitted to give factual evidence. The latter ought not to have been regarded by the judge as a significant factor against the giving of permission. Taking that aspect first, it seems to me that the judge continued to be influenced by the erroneous view to which she had come in May that Mr. Shattock's lack of independence meant that expert evidence from him would be inappropriate. In reality, that lack of independence went only to the weight of his evidence. More importantly, I consider that this was a risk which, were it to materialise, could easily have been addressed by the judge while Mr. Shattock was giving evidence, rather than as a reason for not permitting him to give factual evidence at all.

56. But the lack of balance in the judge's determination was a more serious flaw. The evidence was plainly important because, unlike the evidence of either of the experts, it consisted of measurements taken before and after the erection of the allegedly encroaching building. It was supported by contemporaneous notes, and reached a conclusion significantly different from that of Mr. Calvert, since it reduced the encroachment in the only part of the yard which mattered to an insignificant one centimetre. It was simple and straightforward evidence which would have taken little time to deploy, or even to cross-examine, and there appeared to be no significant prejudice caused to the Abids by its admission. They had been aware of it for many months and their legal team had appraised its potential value in relation to the gap between the new gateposts. Furthermore, although there was an obviously unexplained delay between May and September in Nata Lee's attempts to adduce that evidence, it was not something which it sought to introduce into the litigation for the first time at the beginning of the trial.

57. It follows from this vitiating lack of balance in the judge's assessment that, in my view, the balancing exercise has to be done afresh by this Court. I consider that while the delay was serious and to a large extent not satisfactorily explained, the balance ought to have come down in favour of admitting Mr. Shattock's factual evidence, so that the judge's decision about encroachment was undermined by a refusal to admit and therefore to consider persuasive evidence on that issue. If my Lords agree, this will therefore necessitate a retrial of the encroachment issue, but only so far as it affects that small part of the yard within the Abids' paper title.

The foundations

58. Paragraphs (4) and (5) of the judge's Order make declarations that the new building and the foundations of it encroach onto the Abids' part of the yard, at the extreme western end, by 0.29 metres. On the face of it, it does not appear to be declared that the foundations project by way of encroachment any further than the new building itself.

59. It follows that the outcome of the issue in relation to the foundations should be governed by the outcome of the same issue in relation to the new building, which I consider ought to be re-tried, for the reasons already given. But the judge appears to have relied to some extent on separate evidence in relation to the foundations, namely the evidence of a Mr Redler: see paragraphs 68-73 of the judgment. So far as concerns the Abids' part of the yard (excluding the disputed land) she summarises the evidence, but appears to make no findings about it, at paragraphs 70-72. The result is that I have been unable to disentangle any finding about encroachment by foundations from the Judge's approach to the encroachment caused by the building, with the result that this issue, very small in its consequences as it probably is, must also be re-tried.

The drains

60. Prior to the redevelopment of No. 99, the drains serving No. 105 reached Clarence Road by passing under the warehouse built on No. 99. Since new buildings may now no longer be built over such drains, the redevelopment of No. 99 necessitated re-laying the drains serving No. 105 so that they connected with Clarence Road by running down the yard. This required digging down beneath the Abids' end of the yard, laying the new drains, and leaving inspection covers and access for rodding at various places in the yard, including in the Abids' part of it.

61. This drainage works were the subject of an Addendum Party Wall Award signed by both parties' party wall surveyors, Mr. Shattock and Mr. Anatolitis, and it is not suggested (or at least the judge made no finding) that the works actually carried out departed from the

specification and conditions in the Addendum Award in any respect.

62. In those circumstances it is, to say the least, surprising to find, at paragraphs (8) and (9) of the judge's Order, declarations that the rodding eye and drainage pipes laid by Nata Lee in the Abids' part of the yard constitute a permanent trespass on their land. Reference to the relevant part of the judge's judgment, at paragraphs 76-82, provides no real elucidation. She notes an assertion that, in certain respects, the drains actually contravened the Party Wall Award but makes no finding that they did. At paragraph 82 the judge concludes:

> "The issue is whether "the excavation for the new materials and drain runs under and adjacent to the yard" (*a passage in the Addendum Award*) includes any part of the claimants' land. It appears to, and although it cannot grant the building owner a right to trespass on any adjoining owners' land, the fact that this Addendum was signed by the claimants' party wall surveyor is sufficient consent on the part of the claimants."

63. Mr. Isaac submitted that, since the Party Wall Act 1996 did not confer statutory authority on an owner to carry out works on his neighbour's land, the signature of the Addendum Award by Mr. Anatolitis (which purported to do so) was in excess of his authority as the Abids' party wall surveyor. That submission appears to be directly contradicted by paragraph 82 of the judgment, cited above. The judge appears to have concluded that the Abids did consent, through their party wall surveyor, to the construction of the drains as carried out. In the circumstances, I cannot envisage how those works can have constituted a trespass. On any view, there is nothing in the judgment which justifies the declarations made that the drainage works constitute a trespass and I consider that the appeal should be allowed in this respect.

Interference with the Right of Way

64. This general issue breaks down into the following three topics:

i) Interference by narrowing the width of the yard,

ii) Interference by narrowing the gap between the gate posts, and

iii) Specific incidences of temporary interference by vehicles and otherwise.

I will deal with the appeal about each of these in turn.

Interference by narrowing the yard

65. For this purpose, the relevant part of the yard includes the disputed land which, although I have concluded that it remains part of number 99, is of course subject to the Abids' vehicular right of way. By contrast, the judge's analysis was focused upon what she regarded as Nata Lee's part of the yard but, as will appear, that will make no significant different to the analysis.

66. At paragraph 84 of the judgment, the nature of the interference caused by narrowing of the width of the yard is identified as having made it no longer possible for delivery lorries serving the printing business run by the Abids to reverse into the yard for the purpose of making deliveries. This is said to have been:

> "Caused by the reduction in the width of the yard by the reason of the defendant's trespass as shown on Appendix B of the Particulars of Claim."

Appendix B is Mr Calvert's plan, which shows a reduction in the width of the relevant part of the yard caused by the new building by an amount of 0.29 meters at the western end and 0.39 metres at the eastern end.

67. The Judge described Mr Calvert's " clear evidence" as being to the effect that the new building had reduced the width of the relevant part of the yard from about 15 feet as set out in the 1963 Plan to about 14 feet, i.e. a reduction of 1 foot. At paragraph 91 the judge accepted Mr Calvert's evidence and, at paragraphs 95-96, she decided that the 1 foot reduction in the width of the yard itself, ignoring the narrowing of the gap between the gate posts, was enough to cause the driver of a wide commercial vehicle to face "considerably more difficulties" than previously.

68. Bearing in mind the judge's recording, apparently without criticism, of Mr Lee's evidence that the longest lorry permitted on British roads had a maximum width of 2.445 meters, I find it difficult to understand how the judge could have concluded that the narrowing of the width of the yard from 15 feet to 14 feet could significantly have increased the difficulties experienced by large delivery lorries reversing into it. Furthermore, the extent of that narrowing is itself rendered uncertain by the need for a retrial of the question whether Mr Calvert's measurements can confidently be relied upon after the exclusion of Mr Shattock's evidence, which extended to both parties' parts of the yard, and indeed to the width between the gate posts.

69. But I consider that even giving full credit to Mr Calvert's evidence (as the judge did) to the effect that the narrowing of Nata Lee's part of the yard was about 1 foot, this plainly falls short of a sufficient interference with a vehicular easement. 14 foot is over 4.25 metres. The judge noted evidence that lorry drivers had experienced difficulties at getting through the narrowed gateway, such that the gateway had proved a barrier which had prevented them entering the yard at all. Accordingly, she had no evidence from lorry drivers as to the consequences of the narrowing of the yard itself, as opposed to the gateway, and was forced to extrapolate by reference to Mr Abid's experiences in parking his car. This was in my view a wholly unreliable basis for determining whether a decrease in width of the yard from 15 feet to 14 feet was a significant obstruction of a

right of way for vehicular deliveries, and in my view the appeal on this point should also be allowed, rather than having that issue re-tried.

The gap between the gateway

70. I have reached the opposite conclusion in relation to the gateway. The judge recorded, at paragraph 93, an admission by Mr Lee (appearing for Nata Lee) that the width between the gateposts had been narrowed by about 1 metre and she was entitled to reject Nata Lee's expert's evidence that this made no difference to commercial vehicles as out-with his area of expertise. She had the benefit of one letter appearing to emanate from a delivery driver serving the Abids' business, and hearsay evidence from Mr Abid himself that other drivers had told him about the difficulties which they faced by reason of the reduction in width of the gap between the gateposts. The difficulties were not simply a matter of width in the abstract, but of the effect of the narrowing of the gateway when taken in conjunction with the features of Clarence Road outside it.

71. Although the evidence about those difficulties was by no means of the best, Mr Abid having an obvious axe to grind and no driver being called to give evidence, the weight of that evidence was none the less a matter for the judge and I do not consider that she made any error of principle in her assessment of it. One metre is a very much more significant narrowing than one foot, so that there is no basis, as in relation to the width of the yard itself, for a conclusion by this court, in the absence of hearing all the evidence, that no significant interference with the right of way could have been caused. Accordingly I would dismiss the appeal on this issue.

Specific temporary interferences

72. The only pleaded interference of this kind (in Paragraph 17 in the Particulars of Claim) was obstruction by the parking of vehicles. By contrast, Mr Abid's evidence in support of this part of his case included a detailed schedule of obstructions, not merely by vehicles but, as the judge put it:

> "Also other obstructions in the yard which prevented the claimants' exercising their right of way."

The schedule includes obstruction, for example, by scaffolding, and is specific as to dates although not, for example, as to the length of time during which any offending vehicle remained parked. In paragraphs 97 and 98, the judge describes the issue for the court to decide as concerned with parked vehicles, but she concludes by accepting Mr Abid's evidence as to all the obstructions. Because the Party Wall Award required the building owner to ensure that the pedestrian and vehicular access to the rear section of the yard was maintained at all times throughout the duration of the works, she concluded that all the obstructions were actionable interferences with the Abids' right of way.

Paragraph (12) of the Order declares that:

> "The Defendant has obstructed the Claimant's right of way over the land edged green (as shown on the plan in annexed tier two) on the occasion set out in the schedule annexed hereto".

No such schedule is annexed to the copy of the Order in the Court of Appeal bundle, but I assume that it was intended that Mr Abid's schedule of obstructions by vehicles and otherwise was intended to be annexed.

73. I have two difficulties with the judge's handling of this issue. First, it by no means follows from the fact that the Party Wall Award required the yard to remain accessible at all times that any instance of parking in or across it, for however short a time, constituted an actionable interference with the right of way. However constant were the printing works' requirement for deliveries, temporary parking would not infringe the right of way, if, upon request, the parked vehicle were promptly removed. Yet Mr Abid's schedule condescended to no detail in that respect.

74. My second difficulty is that the judge's declaration, extending as it did to forms of obstruction otherwise than by vehicles, went beyond the issue which she described as falling for her decision, as well as beyond the Abids' pleaded case, which was limited to obstruction by vehicles.

75. In a trial with professional representation on both sides, the absence of objection to a schedule extending a case of obstruction beyond the claimant's pleading might be taken as a permitted extension of the issue. But I am by no means satisfied that the silence of a litigant in person faced with the same un-pleaded extension of the claimant's case ought to be so regarded. Furthermore, the judge does not appear to have regarded it in that way because of her definition of the issue as being confined to obstruction by parking of vehicles, in paragraph 97 of the judgment.

76. Taking those two points in the aggregate, I consider that this part of the case will also have to be retried.

Conclusions

77. The outcome of the foregoing, necessarily lengthy, analysis of the many issues raised by this appeal is, if my Lords agree, as follows:

i) The appeal in relation to the boundary dispute must be allowed.

ii) There must be a re-trial of the question how far, if more than *de minimis*, the new building and its foundations encroached into the Abids' part of the yard, to the

west of the disputed land.

iii) The appeal must be allowed in relation to all other aspects of the claim in trespass.

iv) The appeal must be allowed in relation to the claim that the narrowing of Nata Lee's part of the yard (including the disputed land) constituted an actionable interference with the Abids' right of way.

v) The appeal is dismissed in relation to the interference with the right of way constituted by the narrowed gap between the new gateposts.

vi) There must be a re-trial of the claim of temporary interference with the easement by vehicles. The question whether that claim should be permitted to be enlarged so as to encompass other forms of temporary interference would therefore be a matter for case management in that re-trial.

78. Finally, I express the hope that, in the light of the outcome of this appeal, the issues which have to be retried, together with the remedy issues arising out of the narrowing of the gap between the gateposts, are no longer beyond the scope for settlement, whether by a further mediation or otherwise.

Lord Justice Underhill:

79. I agree.

Lord Justice Moore-Bick:

80. I also agree.