[2017] UKUT 444 (TCC)

Ref: UT/2016/0210

LAND REGISTRATION – adverse possession – whether application land within area demised in lease – topography and extrinsic evidence – held – not within lease – appeal dismissed.

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN

PORT OF LONDON AUTHORITY

Appellant

and

STAPLEFORD FROG ISLAND (RAINHAM) LIMITED **Respondent**

Re: Land lying to the South East of Creek Way Rainham.
Title No BGL 104878

Before His Honour John Behrens sitting as a Judge of the Upper Tribunal
at the Royal Courts of Justice, Strand, London WC2A 2LL on 6 and 7 November 2017.

Representation

Christopher Stoner QC instructed by the Port of London Authority for the **Appellants**

Duncan Kynoch instructed by Sanders Solicitors for the **Respondent.**

Cases referred to

Pennock v Hodson [2010] EWCA Civ 873
Ali v Lane [2006] EWCA Civ 1532
Neilson v Poole (1969) 20 P & CR 909

Introduction

1. This is an appeal by the Port of London Authority ("the PLA") against a decision of Principal Judge Cooke ("Judge Cooke") dated 30 June 2016. It concerns the ownership of a small triangular slither of land ("the Application Land") adjacent to Frog Island, Rainham, Essex.

2. Frog Island used to be a peninsula. It was a tongue of land in the angle between the River Thames and Rainham Creek where the Ingrebourne River flowed into the Thames. In or about 1980 the Ingrebourne River was dammed at its junction with the River Thames as part of the works ancillary to the installation of the Thames Flood Barrier. Part of the river bed was filled in and a road built across it. The purpose of the infill was to reinforce the dam and to keep the water of the Ingrebourne River away from the dam so as to prevent a build-up of stagnant water.

3. At that time Frog Island was owned by Phoenix Timber Ltd and/or its subsidiary Phoenix Wharf Ltd which ran a timber and wharfing business from Frog Island and an adjoining wharf. The precise relationship between Phoenix Timber and Phoenix Wharf is immaterial and I shall refer to them collectively as "Phoenix". The closure of the creek provided Phoenix and the PLA with an opportunity to build a road ("the causeway") over the creek so as to gain vehicular access from Frog Island to the A13 road. It also provided an opportunity to reclaim the land between Frog Island and the dam which would provide a storage facility.

4. Accordingly, sometime between 1986 and 1988 Phoenix laid down very substantial further quantities of infill on the bed of Rainham Creek and constructed the causeway. In 1988 the PLA granted Phoenix a lease ("the infill lease") of the infill and the causeway. The infill lease was surrendered to the PLA in 2007. It is not in dispute that the Application Land comprised part of the infill. As will be shortly explained the sole issue that arises in this appeal is whether the Application Land was included as part of that demise.

5. Frog Island now comprises two separate adjoining titles (referred to in these proceedings as Frog 1 and Frog 2) owned by associated companies. Frog 1 is held by the Respondent, Stapleford Frog Island (Rainham) Ltd ("Stapleford") under title EGL252026. Frog 2 is held by Stapleford Commercials Ltd ("Stapleford Commercials") under title EGL 391125. Stapleford Commercials is the holding company of Stapleford.

6. It will be necessary to describe the Application Land and to set out the history in more detail later in this decision.

7. For the purpose of the introduction it is sufficient to note that on 15 May 2014 Stapleford applied to H M Land Registry for first registration as proprietor of the Application Land as a result of adverse possession from 1998 by itself and its predecessor in title.

8. The PLA objected to the application which was referred to the First-tier Tribunal ("the Ft-T) under s73(7) of the Land Registration Act 2002 ("the 2002 Act"). Judge Cooke heard the application over 6 days in February and April 2016 during which she viewed the site. As already noted she gave her decision on 30 June 2016.

9. She dealt with a large number of issues which are not the subject of this appeal. It is, however convenient to summarise her main conclusions; she concluded

1. That the PLA derived paper title to the Application Land by virtue of an Indenture dated 24 February 1857 and the Thames Conservancy Act 1857 which conveyed

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

2. That although the title conferred by the 1857 Indenture was movable in the sense that its edges were defined by the mean high-water mark from time to time the PLA did not lose title to the Application Land when the dam was built. It continued to own the land that had formerly been covered by the tidal water. (See para 89).
3. The PLA did not lose its title when the Application Land was reclaimed by the laying down on infill in 1988. (See para 94 and the subsequent 7 paras.). Accordingly, the PLA retained paper title to the Application Land. (See para 102).
4. The PLA's title was unregistered, Thus, Stapleford's claim to have acquired title by adverse possession is governed by the pre 2002 law. The provisions of Sch 6 to the 2002 Act have no application. It was (after the evidence) common ground that Stapleford and its predecessor had been in possession of the Application Land for the relevant 12 year period with the requisite intention. (See para 106).
5. The issue between the parties was whether the occupation was adverse. The PLA contended that the Application Land (or part of it) was incorporated within the land demised by the infill lease. If so, the occupation was consensual and not adverse. If not, the claim to adverse possession was made out. Judge Cooke decided that the Application Land was not within the demise. (See amongst other places para 131 of the decision). It will be necessary to examine Judge Cooke's reasoning in detail and it is thus not convenient to summarise it here.
6. Accordingly Judge Cooke directed the Chief Land Registrar to give effect to Stapleford's application. On 3 August 2016 Judge Cooke granted permission to appeal limited to the construction of the infill lease. She stayed her order pending the outcome of the appeal. There is no cross appeal and thus the appeal is limited to the construction of the infill lease.

History.

10. The history is set out in some detail in paras 16 – 29 of Judge Cooke's decision. For present purposes the position may be summarised:

1. The construction of the Thames Flood Barrier gave rise to a risk of flooding within Rainham Creek. Following a public inquiry, the Rainham Creek (Closure Order) 1976 made provision for a dam to be built across the mouth of the creek. The dam was built in approximately 1980 and a layer of infill placed on its Rainham Creek side in order to reinforce the dam and also to keep the water of the Ingrebourne River away from it.
2. As already noted Frog Island was owned by Phoenix. In 1985 the PLA commissioned Binnie and Partners ("Binnie") to examine the feasibility of the construction of a causeway and the laying down of further infill. During the course of this exercise Binnie produced a plan ("the Binnie plan").
3. Sometime before 23 June 1988 Phoenix placed huge quantities of infill on the bed of Rainham Creek and constructed a road ("the causeway") across it. The construction was governed by an Agreement for a Lease and the use of the road and occupation of the storage area governed by the infill lease both of which were dated 23 June 1988. Accordingly, after that date Phoenix owned the whole of Frog Island and was the tenant under the infill lease. A feature of the case is that the plan attached to the infill lease is the Binnie plan drawn up in 1985 before the works were carried out.
4. In 1989 Phoenix sold Frog Island and assigned the infill lease to Redland Cement Ltd which changed its name to Lafarge Ltd. In 1998 Lafarge Ltd sold Frog 2 to Stapleford

Commercials together with an assignment of the infill lease. In 2001 Lafarge sold Frog 1 to Stapleford Commercials.

5. On 28 November 2003 Stapleford Commercials granted a 30-year lease of Frog 1 to Shanks ("the Shanks lease"). Shanks constructed and now operates a waste disposal plant from Frog 1. During the course of the construction Shanks made alterations to the estate road part of which was created when the causeway was constructed in the late 1980s. It is not in dispute that Shanks has occupied the Application Land as part of the road that runs round the plant since 2003.
6. In 2007 Stapleford Commercials surrendered the infill lease pursuant to a break clause.
7. In 2009 Stapleford Commercials transferred Frog 1 to Stapleford. In the same year the PLA granted Select Plant Hire Company a 10-year lease of land broadly coinciding with the land demised by the infill lease. It is not suggested that this lease included the Application Land.

Topography

11. It is impossible to understand the arguments without reference to plans. During the hearing I was shown a number of plans and photographs. I have included in the Appendix scanned copies of 3 of the plans I was shown.

The plan attached to the infill lease.

12. A number of features of the lease plan assumed importance. It shows the dam at the southern end coloured green. It shows the red line defining the demised area. The small pan handle at the north-western tip is referred to as "the nib".

13. The plan shows the position where the causeway was intended to be constructed hatched blue. It shows 7 "tadpoles", 3 on the northern side of the causeway, 3 on the southern side and 1 on the north-western side. It is common ground that the tadpoles represent a slope or embankment. It is to be noted the thin end of the northern and northwestern tadpoles extends to the red line representing the northern boundary. It thus appears to show the northern boundary at the bottom of the embankment supporting the causeway.

14. The area to the south of the causeway was the area to be used for storage.

15. As already noted this plan was based on the Binnie plan prepared some 3 years earlier before any of the reclamation works had taken place. Mr Kynoch pointed out that it contains no dimensions or areas.

The title plan.

16. The second plan was prepared by Mr Atkinson Stapleford's expert in the Court below. It is not controversial. It comprised Appendix 11 to his report. It is useful because it shows the current positions of Frog 1, Frog 2 and the Select Plant lease. It also shows the position of the Application Land.

The scaled-up plan.

17. The scaled-up plan was referred to on numerous occasions during the course of the hearing before me. It was also prepared by Mr Atkinson and was Appendix 12C to his report. It was agreed as accurate by the PLA's expert. Indeed, there is a joint plan showing many but not all of the features. It shows a number of important features:

18. It shows – edged orange – a scaled up version of the infill lease plan superimposed on the current topography.

19. It shows – edged red - the north-eastern boundary of Frog 1, Frog 2 and the Select Plant lease.

20. It shows edged green the extent of the Application Land.

21. It is apparent from the plan that there is overlap between the northwest corner of the land edged orange (the nib) and the Application Land, and further overlap between the extreme north west end of the land edged orange ("the nib of the nib") and Frog 1.

22. It shows the proposed position of the causeway with the letters "CR" in the middle. It shows the actual position of the causeway some 25m to the south east of the proposed position then sweeping round to the west to join the old estate road. It shows that old estate road has been widened so that part at least is within the Application Land.

The Application Land

23. The Application Land is described in some detail in Mr Atkinson's report. It is outside the limits of the original Frog Island. It is flat. It is built wholly on new fill which has extended the edge of the island. It is shown on the scaled-up plan and the title plan.

24. In para 8.2 of his report Mr Atkinson describes it as the area between the registered estates of Frog 1, the Select Plan site and the Shanks fence site. It runs 0.7m outside the south-east corner of the Shanks building. The length of the triangular area is 70m. Judge Cooke found (para 115) that the area of the nib was about 34 m^2 and that this represented about 30% of the area of the Application Land. On that basis the area of the Application Land is approximately 110m^2.

25. It forms part of the road now surrounding the Shanks building. If therefore the PLA can establish title it would represent a significant ransom strip and enable the PLA to claim a significant portion of the rent that Stapleford receive from Shanks.

The Agreement for Lease dated 23 June 1988

26. As already noted Phoenix's obligations in relation to the construction work were governed by the Agreement for Lease

27. The agreement contained definitions of accessway, infilling and premises as follows:

> **Accessway**
>
> A roadway for the passage of vehicles to be built on the premises by Phoenix for the purpose of crossing Rainham Creek to Frog Island the specifications of which are more particularly described in the Approved plans and the position of which is shown for the purpose of identification only hatched blue and coloured brown hatched blue on the plan annexed hereto
>
> **Approved Plans**
>
> The plans, sections and specifications approved by the PLA annexed hereto together with such additions to and alterations to or omissions therefrom as may from time to time be approved in writing by the PLA in accordance with the provisions of this Agreement provided that the said plans shall provide for use of the premises as open storage and associated parking of vehicles and for the accessway.

The premises

> The land forming part of the Creek bed at Rainham Creek Essex shown edged red on the plan annexed hereto.

Infilling

> The works specified in the Approved Plans including the construction of the Accessway.

28. There are 3 plans attached to the Agreement for Lease. The first is the plan showing the position of the accessway (for identification purposes only). This is similar (but not identical to) the infill lease plan. It shows the causeway in the same position as the Lease plan. It shows the tadpoles but the actual marking surrounding the area to the south east of the causeway is difficult to follow and uncertain.

29. It is not necessary to refer to the Approved Plans in detail. However, it was common ground at the hearing below that they showed that all the infill was to the south and east of the causeway. Thus, the infilling upon which the Application Land stands was not infilling in accordance with the Approved Plans.

30. Under clause 3 of the Agreement for lease Phoenix was obliged to complete the Infilling of the premises in accordance with Approved Plans. This was reinforced by clause 3(5) which forbade operations not authorised by the Approved Plans in the absence of the PLA's written consent.

31. On completion of the infilling to the reasonable satisfaction of the PLA the PLA was obliged to grant the infill lease to Phoenix.

32. As already noted, despite the wording of the Agreement for Lease it was common ground that the construction work and infilling must have been complete on the day it was executed. Otherwise the infill lease would not have borne the same date.

The Infill Lease

33. The infill lease is dated 23 June 1988. It is made between the PLA and Phoenix.

34. Under clause 2 the PLA demised "the premises" to Phoenix for a term of 25 years (subject to a break clause) at an initial rent of £3,500 p.a subject to five yearly reviews.

35. The premises are defined as follows:

> The land at Rainham Creek, Essex shown edged red on the plan which has been filled in and reclaimed from the Creek bed by the Tenant in accordance with an Agreement dated 23 June 1988

36. The lease also contained a definition of accessway in somewhat different terms from the definition in the Agreement for Lease.

> The roadway constructed at the north western edge of the premises by Phoenix for the passage of vehicular traffic across Rainham Creek to Frog Island and shown for the purpose of identification hatched blue and coloured brown hatched blue on the plan.

The authorised use was

> Use for open storage and associated parking of vehicles

37. The lease contained in Schedule 1 covenants by Phoenix which included:

1. A covenant (3(4)) to maintain the accessway in good repair … so that it is at all times capable of bearing heavy traffic.
2. A covenant (6(1)(a)) not to use the premises except for the authorised use.
3. A covenant (6(2)) to use the accessway only as a roadway for vehicular traffic in connection with any business carried out upon … Frog Island

Judge Cooke's reasoning.

38. Judge Cooke's reasoning is contained in paras 120 – 146 of her decision. In paras 120 - 128 she dealt with Mr Stoner's first argument and in paras 129 – 146 she dealt with what she described as his alternative argument. In this Tribunal Mr Stoner described the two arguments as options rather than alternatives. Nothing turns on this.

The nib was part of the Application Land

39. Judge Cooke pointed out that the infill lease plan showed the demised area extending from the dam to the foot of the embankment at the north side of the causeway. She noted that the parcels clause in the demise did not give any priority to the plan over the words in the lease. Both were entitled to equal weight.

40. In paras 122 and 123 she summed up the law in 3 propositions:

1. If the plan is unambiguous effect must be given to it.
2. If it is ambiguous extrinsic evidence can be admitted as an aid to construction.
3. Extrinsic evidence comprises the topography. It can also include evidence of conduct but only insofar as this sheds light on the intention of the original parties to the lease.

41. In para 124 she decided that the lease plan was ambiguous because it was not possible to discern from the lease plan whether the nib was part of the Application Land. It was part of Mr Stoner's argument before Judge Cooke that the lease plan was unambiguous. She gave further reasons for her conclusions in paras 128 and 129. She pointed out that expert evidence is needed to demonstrate the overlap. Furthermore, she pointed out that the causeway was built some 25m further south than is shown on the plan.

42. She pointed out (in paras 126 and 127) that the topography pointed in different directions. On the one hand the land is flat and the nib on the plan is marked with a tadpole to show that it is sloping. On the other hand the expert evidence is to the effect that if the lease plan is scaled up and laid on a modern plan the nib overlaps the Application Land and the nib of the nib extends beneath the Shanks building.

43. Paras 129 and 130 formed a central part of Mr Stoner's argument and it is therefore convenient to set them out in full:

> 129. It will be recalled that the lease plan is the Binnie plan drawn up in 1985 before the causeway and embankment were built, The eventual construction did not match the proposal on the Binnie plan; yet the plan was used for the infill lease. The causeway was built further south than is shown on the lease plan, according to the dimensions derived from the scale of the plan. So although scaling up the plan has the effect of demonstrating an overlap with the Application Land when overlaid upon the modern layout of the area, it also has the effect of showing the north eastern boundary of the demise some 25m further north-east than the foot of the embankment on the inland side of the causeway.
>
> 130 So topography and expert evidence have only revealed, rather than resolved, ambiguity. Does the lease plan tell us that the demise ends at the north-east edge of the

> causeway embankment as the drawing on the plan would appear to say? If so, then the demise ends south of Frog 1 and does not overlap with the Application Land. Or is its scale to prevail with the effect that the demise ends approximately 25m further north, at least in the centre of the embankment? If the latter, then indeed the nib is part of the Application Land, but also the demise includes part of the post closure Ingrebourne River; the experts agree that this is what the scaled-up plan shows.

44. In para 131 she held that the parties did not intend to include in the lease any part of the river bed north of the embankment as there was no point in leasing the south-western end of the Ingrebourne River. The intention was to lease the causeway and the embankment and nothing to the north of that.

45. In paras 132 – 137 she considered the question of conduct. She was careful to remind herself of the limited relevance of conduct and made the point that it was by no means conclusive and that she would not have made a finding based on conduct alone. She found (in para 137) that none of the PLA's employees had any idea that the Application Land might have belonged to the PLA until the summer of 2012 when a joint survey was carried out. She thought that lent some support to her construction because if the PLA had intended in 1988 to demise the Application Land she would have expected the PLA's then employees to have passed their awareness to its successors.

46. Judge Cooke accordingly found that the land demised by the infill lease extended to the foot of the embankment to the north of the causeway and thus did not include any part of the Application Land.

The whole of the Application Land was included in the lease.

47. Mr Stoner's argument was based on the definition of premises in the parcels clause in the infill lease.

> The land at Rainham Creek, Essex shown edged red on the plan which has been filled in and reclaimed from the Creek bed by the Tenant in accordance with an Agreement dated 23 June 1988

48. Mr Stoner submitted that this must refer to the whole of the infill laid down by Phoenix. As it is common ground that the Application Land is part of the infill it must be within the premises demised by the infill lease.

49. Judge Cooke rejected this argument in paras 143 – 145. She pointed out in para 143 that it ignored the red edging on lease plan altogether. In para 144 she drew attention to the provisions of the Agreement for lease and made the point that the approved plans do not authorise infilling north of what became the causeway. In para 145 she rejected the argument in trenchant terms:

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

The Law

50. There was no dispute between Counsel as to the relevant law. Neither Counsel suggested that Judge Cooke had misdirected herself. Mr Stoner, however, referred me to Mummery LJ's statement of the relevant principles of construction in paras 7 – 13 of the

judgment of Mummery LJ in the recent case of *Pennock v Hodson* [2010] EWCA Civ 873 which includes:

10. The long standing general principles of how to construe a [conveyance underpin those points. In *Eastwood v. Ashton* [1915] AC 900 at 906 Earl Loreburn said in a dispute about title to a small strip of land:-

> "We must look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties."

11. Lord Parker said much the same thing in different words (see p913.) He also said:-

> "There is nothing on the face of the indenture to show that any one of these descriptions in any way conflicts with any other. In order, however, to identify the parcels in a conveyance resort can always be had to extrinsic evidence…" (p. 909)
>
> It appears to me that of the three descriptions in question the only certain and unambiguous description is that by reference to the map. With this map in his hand any competent person could identify on the spot the various parcels of land therein coloured red. The other descriptions could only be rendered certain by extrinsic evidence…" (p. 912)

12. Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction. The rejection of extrinsic evidence which contradicts the clear terms of a conveyance is consistent with this approach: *Partridge v. Lawrence* [2003] EWCA Civ 1121; [2004] 1 P. & C.R. 176 at 187; cf *Beale v. Harvey* [2003] EWCA Civ 1883;[2004] 2P. & C.R. 318 where the court related the conveyance plan to the features on the ground and concluded that, on the facts of that case, the dominant description of the boundary of the property conveyed was red edging in a single straight line on the plan; and *Horn v. Phillips* [2003] EWCA Civ 1877 at paragraphs 9 to 13 where extrinsic evidence was not admissible to contradict the transfer with an annexed plan, which clearly showed the boundary as a straight line and even contained a precise measurement of distance. *Neilson v. Poole* (1969) 20 P. &C.R 909; *Wigginton & Milner v. Winster Engineering Ltd* [1978] 1WLR 1462; *Scarfe v.* Adams [1981] 1 All ER 843*; Woolls v. Powling* [1999] All ER (D) 125; *Chadwick v. Abbotswood Properties* [2004] All ER (D) 213 and *Ali v. Lane* [2006] EWCA Civ 1532 were also cited on the construction points.

13. Before the judge and in this court it was agreed that the parties' subjective beliefs about the position of the disputed boundary in this case and about who owned the bed of the stream were extrinsic evidence that was inadmissible in the construction of the relevant conveyance: *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 1 WLR 896 at 913. The effect of the conveyance is not determined by evidence of what the parties to it believed it means, but what, against the relevant objective factual background, they would reasonably have understood it to mean.

51. Mr Stoner also referred me to the judgment of Carnwath LJ in *Ali v Lane* [2006] EWCA Civ 1532 at paras 36 and 37 which included:

> 36. …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 the 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 stated of the disputed land during that period."

Mr Stoner's submissions.

52. In this Tribunal Mr Stoner accepted that the lease plan was ambiguous and that extrinsic evidence was admissible. He submitted hat Judge Cooke asked herself the wrong question. She asked whether the nib was within the demised area and did not seek to determine what was demised in 1988. In so doing she did not carry out the exercise suggested by Mummery LJ in para 12 of *Pennock*. He criticised paras 129 and 130 of Judge Cooke's decision. In particular he submitted that the reference in the final sentence of para 129 to the scaled up plan *"showing the north-eastern boundary of the demise some 25m further north-east [than] the foot of the embankment on the inland side of the causeway."* must be wrong and should have meant 25m further south. He criticised para 130 on the basis that it is impossible to determine how Judge Cooke determined that the demise ends south of Frog 1 unless she has moved the entire demise 25m to the south. If she has done this it is inconsistent with the expert plans, her conclusion of the intention of the parties and the topography.

53. He submitted that Judge Cooke failed to have regard to the causeway as built. In particular, after crossing Rainham Creek it sweeps to the west and north crossing the path of the route of the causeway as shown on the infill lease plan.

54. He criticised the finding that the demise ended at the gates. He pointed out that the gates were not installed until 2004 at the earliest when the Shanks building was erected.

55. He submitted that Judge Cooke should have adopted a *Pennock* approach he submitted that the parties' objective intention must have been to demise the infill comprising the storage area and the accessway and the embankment to the accessway to the base of that embankment.

56. According to Mr Stoner this leads to the conclusions expressed in paras 58 to 63 of his skeleton argument:

58. they intended to demise as built in the middle and on the eastern side of the former creek bed (near Ferry Lane) only to the base of the embankment, namely some 25m short of what was shown on the 1988 Lease Plan, despite that area being within the red lines of the 1988 Lease Plan.

59. However, when turning their attention to the Frog Island side and the sweep as built, they, unlike the Judge, would have adopted a consistent approach: namely their intention was to demise the road as built and the embankment supporting that road.

60. Just as they (and the Learned Judge) overrode the red lines on the 1988 Lease Plan in the middle and on the eastern side of the former Rainham Creek, then they would also override the red lines on the 1988 Lease Plan on the western/north-western side of the former Rainham Creek.

61. If, however, they were constrained by the extent of the red lines, then the 'Nib' as it was referred to was still land:

    a) Within the red lines; and

    b) Forming part of the accessway which they intended to demise (together with the supporting embankment).

These comments are made in the context of the land to the east of the 'Nib' (at least for a approaching 50% of its eastern flank) being adjacent to land which it is not disputed is the PLA's ownership.

62. Far more realistically and likely, however, if they are not trammelled by the strictures of a plan that everyone agrees is incorrect and does not reflect the topography as built, they would have intended to demise all of the infill land forming the road and the embankment to that road, which it was agreed before the FTT includes all of the Application Land.

63. It is plainly wrong, and unrealistic, to expect of the foregoing exercise that the parties would intend to demise a part of the infill, but recognise that there was additional infill (which included part of the accessway and the embankment to that accessway, in respect of which covenants were being granted) that was unauthorised "and outside of the terms of the demise.

57. Mr Stoner submitted that Judge Cooke failed to have regard to the words of the lease which support an intention to demise the accessway on the edge of the infill even if not in accordance with the plans. He referred to the terms of the lease including the covenants as to maintenance of the causeway.

58. He criticised Judge Cooke's reliance on the tadpoles and in particular the tadpole at the north-west tip of the demise as "*a slavish adoption of a point shown on the 1988 Lease Plan which is admitted to be wrong but in circumstances where the Judge is purporting to be looking outside of the terms of the 1998 Lease and the 1988 Lease plan to determine the extent to the demise*".

59. He submitted that Judge Cooke's construction did not properly define the boundaries of the demise and was fuzzy.

60. He submitted that little if any weight could be attached to conduct. He accepted that Judge Cooke herself recognised its limited probative value and expressly stated that it was corroborative of her decision rather than decisive.

Mr Kynoch's submissions.

61. Mr Kynoch's main submission was that Judge Cooke gave a carefully considered decision after hearing 6 days of evidence and a view. She had a site view. He accordingly supported her decision for the reasons she gave.

62. Mr Kynoch pointed out that the main problem confronted Judge Cooke was that the infill lease plan was hopelessly inaccurate. As he pointed out the lease plan was created before the reclamation works were carried out, had no dimensions, no area sizes, poor colouring and was based on an ordinance survey map which did not fix precise boundaries.

63. He pointed out that the PLA's position in this Tribunal was quite different from what it had been before Judge Cooke where it argued that the lease plan was unambiguous and that the scaling-up could be relied on.

64. He submitted that there are 3 main problems with reliance on the scaled plan:

1. The encroachment of the nib – especially the nib of the nib under what is now the Shanks building.
2. It leads to the conclusion that the infill lease included part of the Ingrebourne River to the north of the causeway.
3. It places the causeway and the supporting embankment in the wrong place some 25m to the north of where it was actually constructed.

65. In those circumstances he submitted that Judge Cooke was fully entitled to reject the scaled-up plan as a reliable indication of whether any part of the Application Land was included within the demise.

66. He submitted that Judge Cooke was entitled to conclude that the infill lease was delineated by what the parties must have intended to demise – i.e a demise the infill and the causeway and its embankment [including its foot] but nothing to the north of that.

67. Whilst he accepted that the Application Land was constructed on infilled land he submitted that it was "unplanned" in the sense that it was not in accordance with the plans in the Agreement for Lease. He supported this by reference to the expert evidence at trial.

68. He submitted that Judge Cooke was entitled to rely on the tadpoles and, in particular, the north-west tadpole in support of her construction. This showed the boundary to be on sloping land that is to say the embankment. It is common ground that the Application Land is flat and thus it would follow that it is not within the demise.

69. Mr Kynoch accepted that after the causeway as built crosses Rainham Creek the old estate road sweeps to the north-west crossing the path of the end of the proposed accessway as shown on the infill lease plan. [This can be seen on Mr Atkinson's scaled-up plan.] He submitted that Judge Cooke was correct not to treat the whole of the sweep as part of the Application Land. He pointed out that such a finding would have been inconsistent with her view that no part of the demise was to the north of the causeway and that the infill to the north was not in accordance with the Approved Plans. A comparison between the title plan and the scaled-up plan shows that the proposed position of the causeway would have ended at the approximate position of the dog leg in Frog 2's title; in fact the causeway crossed Rainham Creek 25m further south.

Discussion and Conclusions

70. I should like first of all to express my gratitude to both Counsel for their full and careful submissions in a by no means straightforward case which they each explained with great clarity. I also acknowledge with gratitude the preparation of the case by the respective solicitors. I was particularly grateful to be provided by the PLA's solicitor with electronic copies of all of the documents in the case in such a comprehensible form. The use of a Dropbox link was particularly helpful. It enabled me to pre-read almost all the documents without any difficulty. It has also made it possible for me to incorporate two of the plans in Appendix. The plan attached to the infill lease was, as I have indicated, scanned from the copy given to me by Mr Stoner during the course of the hearing.

71. Judge Cooke's primary task in order to resolve the question of whether the occupation of the Application Land adverse was to determine if it was consensual. The PLA's case was that it was consensual because the Application Land or part of it was within the premises demised in the infill lease. In para 116 Judge Cooke formulated the question in this way:

> "The question I have to decide is whether the nib … falls within the application land"

72. As the nib was the only part of the Application Land shown on the scaled-up plan to be within the infill lease, this was, in my view, the correct question. Thus, I do not accept Mr Stoner's submission (para 37 of his skeleton argument) that Judge Cooke asked herself the wrong question. Nor do I accept that she necessarily had to define the precise boundaries of the infill lease in order to answer that question. This was not a boundary dispute in the true sense of the expression and the observations of Megarry J in *Neilson v Poole* (1969) 20 P & CR 909 at 916 about leaving the plot fuzzy at the edges are distinguishable.

73. Equally, I do not accept Mr Stoner's criticisms of paras 129 and 130 of Judge Cooke's judgment. In para 129 Judge Cooke is explaining one of the problems with the scaled-up plan. The scaled-up plan shows the north-east boundary just beyond the proposed position of the causeway. However, the actual position of the causeway is some 25m further south. Thus, as Judge Cooke pointed out, the scaled-up plan has the effect of showing the north-east boundary some 25m further north east than the foot of the embankment on the inland side of the causeway. It is true that the Application Land is on the north-western side of the causeway and Judge Cooke could equally well have made the same point about the north-western side. However, the point is just as valid for the north-eastern boundary and is correct.

74. In para 130 Judge Cooke is contrasting the apparent position of the boundary as shown by other features of the infill lease plan with the apparent position as shown in the scaled-up plan. She points out that the infill lease plan apparently shows the boundary at the north-east edge of the causeway embankment. There is in my view nothing wrong with this statement. The tadpoles do indeed indicate that that is where the north-east boundary is. She could have made a similar comment about the north-west boundary. On one view this might have been more relevant as that is where the Application Land is. It does not, however, mean that Judge Cooke was wrong. The important point she is making (in my view correctly) is that the infill lease plan appears to show the northern boundary at the foot of the embankment. She contrasts this with the evidence of the scaled-up plan which shows the boundary some 25m further north and (as she points out) incorporating part of the Ingrebourne River.

75. In para 131 Judge Cooke concludes that the intention was to lease the causeway and the embankment and nothing to the north of that.

76. In my view Judge Cooke's conclusion is supported by a number of factors. First, the definition of the accessway in the infill lease refers to the roadway as being constructed "at the north-western edge of the premises". It is true that the causeway as built is not in the position shown in the infill lease plan. However, the definition of accessway provides that the position of the accessway is shown "for the purpose of identification".

77. Second, the definition of premises (which incorporates the plan) refers to the land "which has been filled in and reclaimed from the Creek bed …in accordance with [the Agreement for Lease]". It is plain from the plan attached to the Agreement for Lease, the expert evidence at the hearing before Judge Cooke, and the finding of Judge Cooke that the Approved Plan did not provide for any infill to the north of the causeway. Thus, any infill to the north was not in accordance with the Approved Plans. Furthermore, as Mr Kynoch pointed out, there is no agreement in writing evidenced any variation to the Approved Plan.

78. Third, in agreement with Judge Cooke, there was no point in leasing to Phoenix the river bed extending north of the embankment to an arbitrary line and no point in leasing the south-western end of the Ingrebourne River.

79. Mr Stoner seeks to avoid Judge Cooke's conclusion by submitting that the northern boundary is delimited by the foot of the embankment at the middle and east of the creek but that on the western side it would include the whole of the estate road as built. There are a number of reasons why I cannot accept that argument. First it would mean that the accessway was a totally different shape from that shown on the plan. The infill lease plan simply shows it crossing Rainham Creek. It does not show it sweeping to the north west. Second a substantial part of the road as built is to the north of the embankment and would therefore not be in accordance with the Approved Plans. Third, part of the estate road was, in any event, within the boundary of Frog 1 and Frog 2. I agree with Mr Kynoch's submission that when Phoenix was carrying out the work it took the opportunity to carry out a small amount of unauthorised

infilling to widen the estate road to the north. That does not mean, to my mind, that the unauthorised infilling was incorporated into the subsequent demise.

80. Equally it does not mean that one can or should ignore the infill lease plan. Mr Stoner accuses Judge Cooke of "slavish" adherence to the lease plan. I do not accept that criticism. The fact that there are the identified scaling problems does not mean Judge Cooke was not entitled to rely on other features of the infill lease plan especially as the tadpoles are consistent with the definition of the accessway to which I have referred.

81. I also reject Mr Stoner's second option. To my mind Judge Cooke's analysis in paras 143 – 145 of her decision is convincing and I have nothing to add to it.`-

82. In the circumstances it is not necessary for me to consider "conduct" in any detail. Whilst it is right that the failure of the PLA's employees to realise that they owned the Application Land until 2012 may provide some support for Judge Cooke's construction it seems to me that the support is extremely limited. First the Application Land is very small. Second there is no evidence at all of what happened between 1988 when the infill lease was granted and 2004. If, as Mr Kynoch suggests there was unauthorised infilling to the north of the causeway it may never have been seen by the PLA's employees. However, Judge Cooke made it clear that she reached her decision independently of the evidence of conduct. In my view she was right to do so.

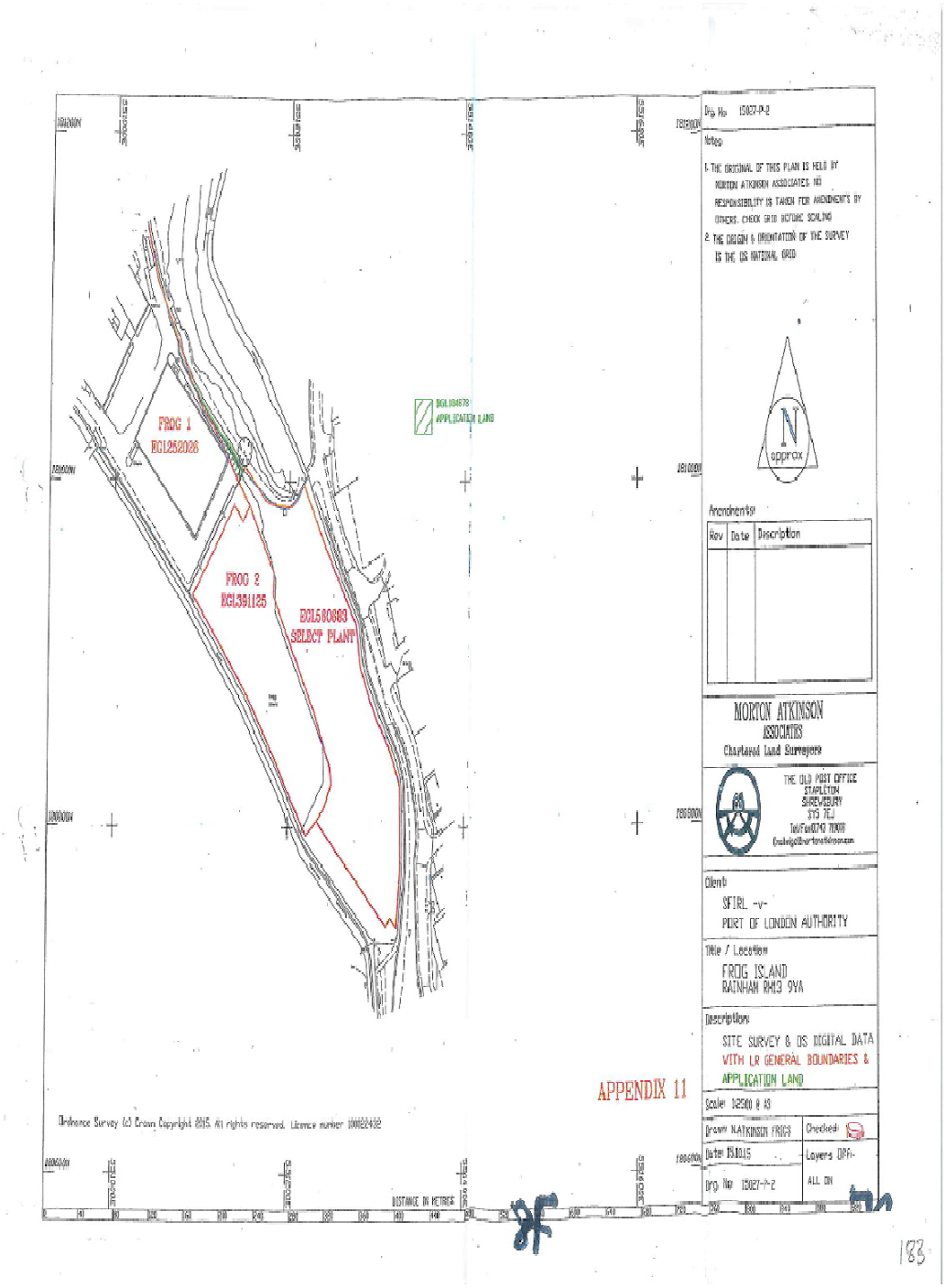
83. For all these reasons, which are essentially the reasons given by Judge Cooke, I would dismiss this appeal.

His Honour John Behrens

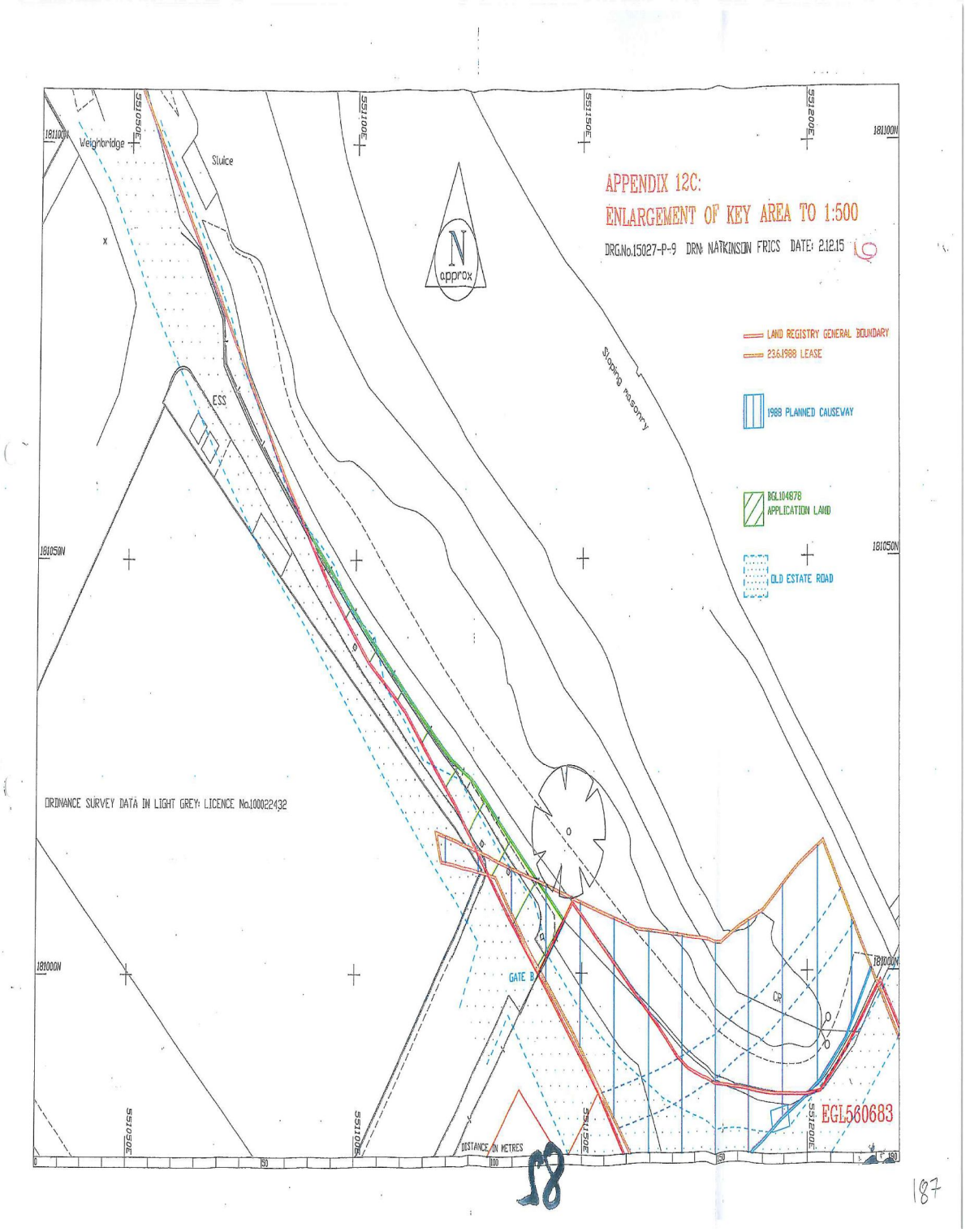
Release Date: 21 November 2017

Appendix

Infill Lease plan



Plan showing registered titles of Frog 1, Frog 2 and Select Plant lease



Plan by Mr Atkinson showing scaled-up lease plan (orange), Application Land (green), Select Plant lease (red), position of road (in accordance with lease plan- blue dash), old estate road with actual road (blue dash with dots)