REF/2017/0993

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Morlandia Limited

APPLICANT

and

London Borough of Hounslow

RESPONDENT

Property Address: Land at the Hollows, Kew Bridge, Brentford
Title Number: AGL360805

ORDER

IT IS ORDERED as follows:

1. The Chief Land Registrar is to give effect the Applicant's application dated 24 November 2015 for first registration of title as if the Respondent's objection had not been made.

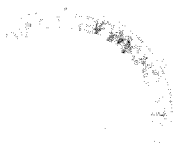
2. This order is stayed until 21 February 2019. It shall take effect without further order on that date unless by then the Respondent has applied for permission to appeal, in which case this order is stayed until that application has been determined or until further order.

Dated this 24 January 2019

BY ORDER OF THE TRIBUNAL

Elizabeth Cooke

PROPERTY CHAMBER LAND REGISTRATION



[2019] UKFT 0108 (PC)

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Property Address: Land at the Hollows, Kew Bridge, Brentford
Title Number: AGL360805

Before Judge Elizabeth Cooke
Sitting at Alfred Place on 20 and 21 January

Applicant Representation:	Mr Christopher Jacobs instructed on a direct access basis
Respondent Representation:	Mr Ranjit Bhose QC instructed by HB Public Law

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DECISION

KEYWORDS: adverse possession, public highway, river bank, title to wharves, boats, Port of London Authority

Cases referred to:

AG v Antrobus [1905] 2 Ch 188 at 193
Arnold v National Westminster bank plc [1991] 2 A.C. 93
Goodes v East Sussex County Council [2000] 1 WLR 1356
J A Pye (Oxford) Ltd v Graham [2002] UKHL 30
Powell v MacFarlane (1979) 38 P & CR
R (Smith) v Land Registry (Peterborough) [2010] EWCA Civ 200

1. If you approach Kew Bridge on foot from the north, and walk down to the river to the right (west) of the bridge, you will see the "On the Ait" pub on your right and then reach a path running parallel to the river. The path is a public highway and you can walk eastwards under the bridge or westwards away from the bridge. But you cannot see the river from the path because the owners of the boats moored on the north bank of the river have put up a fence on the south boundary of the path. The land beside the river here has been known for many years as The Hollows.
2. The Applicant is a company formed in 1989; its directors and members are the owners of boats moored at The Hollows. It has applied for first registration of its title to a strip of land 354 feet long, comprising both (1) land between the path and river and (2) the sub-soil of the path. I refer to the whole area claimed as "the disputed land", and to the land between the path and the river as "the green land" because it is coloured green on one of the plans to be discussed below. The Applicant claims to own only the sub-soil of the path because it acknowledges that the path is a public highway. It claims to have purchased the disputed land by a conveyance dated 9 February 1989 ("the 1989 conveyance"). Moreover, it says that if it does not have a paper title to the disputed land it has acquired title by adverse possession.
3. The Respondent, the London Borough of Hounslow, has objected to the application for registration. It says that the whole of the disputed land is public highway and therefore is vested in it as the highway authority, and that therefore the most the Applicant can own is the subsoil of the disputed land.
4. I visited the disputed land on 19 November 2018 with the directors and some of the shareholders of the Applicant, representatives of the Respondent, and counsel for both parties. I heard the reference on 20 and 21 November at Alfred Place. The Applicant was represented Mr Christopher Jacobs of counsel and the Respondent by Mr Ranjit Bhose QC; I am grateful to both for their assistance in the course of a most interesting hearing.
5. I heard evidence from Mr Peter Banks and Mr Jake Oliver for the Applicant and from Ms Sabrina Martin for the Respondent. I have no doubt that each gave evidence honestly according to their recollection and understanding.
6. I find that the Applicant has a paper title to the disputed land; if I am wrong about that, it has acquired title by long possession. And I find that the green land is not a public

highway. I have therefore directed the registrar to give effect to the application as if the Respondent's objection had not been made.

7. In the paragraphs that follow I give the reasons for my decision. I describe the disputed land, and then mention the previous litigation relating to it in this Tribunal; I then explain the Applicant's title to the disputed land; finally I consider the extent of the public highway.

The disputed land

8. The disputed land is a narrow strip on the north bank of the river. Its northern boundary is the northern edge of the metalled footpath; its southern boundary is the river. Between footpath and river is the green land, a strip of varying width, in places as wide as the footpath or a little wider. For a short distance there is no green land, and a ten foot drop from path to river. Along that short stretch the Applicant has put up a fence, which is embedded in the path itself; the Respondent says that this is a trespass, but if the fence were removed it would have swiftly to be replaced so as to protect the public from the steep drop into the river.
9. The Hollows (an area that includes and extends to the west, north and east of the disputed land) was occupied from at least the mid-nineteenth century by wharves, by which I mean warehouses built along the river bank with access to the river for loading and unloading boats.
10. Today the wharves are no more; land has been acquired by various parties from the wharfingers, over the years, and the buildings that now occupy The Hollows, to the north of the footpath, are typical of a modern town centre.
11. To the south of the footpath boats are moored; Herons, Legend, Wren, Jacana, and Vertrouen each belong to shareholders in the Applicant. All of the disputed land is embanked, as is much of the river bank for some way to the east and west. That embankment has been constructed at different times over many years and by a number of different parties. Embankment of course involves construction both on the bank and on the river bed, and so inevitably involves the Port of London Authority ("the PLA") which has a statutory title to the bed and banks of the River Thames up to the Mean High Water Mark of 1857. A person who wishes to construct an embankment must obtain a licence for that purpose from the PLA; once built, the embankment vests in the PLA unless the licence is then endorsed pursuant to section 55 of the Thames Conservancy Act 1857 in which case it vests in the person who made it. The Respondent had a licence dated 5

October 1959 to embank an area of land just west of the disputed land, although it was never endorsed.

12. The position of the 1857 Mean High Water Mark has not been clear, and the PLA acted for a long time on the basis that it owned some or all of the river bank in this area. In the 1980s and 1990s it sold eleven plots of land just to the west of the disputed land (the Applicant has produced a list of the relevant registered title numbers), and the land sold has been protected by its purchasers by the construction of a wall along the southern edge of the footpath.

The 2011 reference

13. This is not the first time that this Tribunal has had to make a decision about title to the disputed land. In 2009 the PLA applied to register its title to land between Kew Bridge and Brentford Ait which included the disputed land. A number of persons objected, some of whom claimed to own parts of the land that the PLA sought to register. Among the objectors were Morlandia Ltd and Ms Susan Penhaligon, who has a boat moored between the disputed and Kew Bridge, although neither claimed claim title to the land themselves.

14. The disputes arising from those objections was referred by HM Land Registry to this Tribunal, and I refer to the Tribunal proceedings arising from that reference as "the 2011 reference". A hearing took place in December 2015 in relation to land comprising the disputed land and Ms Penhaligon's mooring between the disputed land and Kew Bridge, and the Tribunal's decision was given on 28 January 2016. Shortly before the hearing both objectors sought permission to amend their pleaded case so as to add a claim to have acquired title by adverse possession, and permission was refused because of the lateness of the application. However, the objectors were successful; the judge held that the PLA did not have title either to the disputed land or to Ms Penhaligon's mooring because those areas lay above the 1857 Mean High Water Mark; nor was there any part of that land that might have passed to the PLA either by virtue of an unlawful embankment, or because there had been a licence for embankment that had not been endorsed (see paragraph 11 above).

15. The 2011 reference is important in two respects. First, it disposes of the question whether the PLA might own the disputed land. Second, the Respondent in the present reference took no part in the tribunal proceedings. It had objected to the PLA's application, but withdrew that objection (in a letter to HM Land Registry dated 28 October 2009) so far as the green land was concerned, asking only that the status of the path as a public highway be noted on the register if the PLA were to be successful. At that stage, therefore, the

Respondent took the view that the green land was not highway; I shall come back to that later.

The Applicant's title

(1) Does the Applicant have a paper title?

16. The Applicant says that the disputed land was conveyed to it on 9 February 1989 by Higgs and Hill Developments Ltd ("Higgs and Hill"). The history of the title it purchased is recounted in a statutory declaration made by Gordon Day, who was Higgs and Hill's solicitor and acted on the sale to the Applicant; the purpose of his declaration was to prove Higgs and Hill's title to the disputed land. The title is also summarised in the recitals to the conveyance.

17. Mr Day's statutory declaration states, and it is not in dispute, that on 3 January 1984 Higgs and Hill was registered as proprietor of land known as "Kew Campus", registered under title number 229374. The registered title plan shows the land extending from the northern edge of the disputed land (i.e. the northern edge of the footpath) to the High Street; it is roughly square in shape.

18. The boundaries shown on the title plan are of course general boundaries (Land Registration Act 2002 s. 60); the disputed land is so narrow that it is a matter of construction as to whether title number 229374 included the disputed land. It did not, of course, include the surface of the footpath, which is agreed to be vested in the Respondent as public highway. But there is nothing to suggest that it did not include the green land, and the sub-soil of the footpath.

19. The way the Applicant puts it is that Higgs and Hill acquired the disputed land as part of that registered title (and it has no pre-registration deeds), but that there were other contenders whom Higgs and Hill then took steps either to fend off or to buy out. Mr Day's statutory declaration says that "exhaustive enquiries were made to confirm ownership of the footpath and lands lying to the south thereof adjoining the river." Mr Oliver, who was involved in the 1989 purchase, says that when he made enquiries about buying the moorings the director of Higgs and Hill had been "consolidating this asset through negotiating with previous occupants of the moorings".

20. So in 1984, as Mr Day explained, Higgs and Hill defended a High Court action brought by Riviera Global Productions Ltd ("Riviera"), in which Riviera claimed title by adverse possession to that section of the green land where the boat known as the Brian Boru was moored. On 14 August 1987 Riviera conveyed to Higgs and Hill "all (if any)" of its rights

in the land where the Brian Boru was moored, as well as the Brian Boru itself, in consideration of the sum of £27,000.

21. Similarly on 5th August 1988 Higgs and Hill purchased from Struan Wallace, another person claiming title by adverse possession, "all (if any)" of his interest in the section of the green land where his boat the Atlantis was moored, along with the boat itself, for a payment of £3,000.
22. Mr Day also notes that Higgs and Hill had been granted river works licences by the PLA for operations along the bank and for the use of an outfall, which it had used and maintained, as well as giving permission to a Mr Gastell to moor a boat.
23. Meanwhile Higgs and Hill built the Thameside Centre on the land comprised in title number NGL229374, north of the footpath, and on 13th May 1988 sold the land registered under that title number to The Prudential Assurance Company Ltd, expressly excluding:
    i. "any interest in the Land lying to the South of the Southern boundary of the Land in Title No. NGL 229374 as shown on the filed plan therefore and
    ii. All rights including riparian rights in respect of the river and river bank [save for a licence dated 3 August 1984 granted by the PLA in respect of surface water drainage outfall]".
24. So the Applicants say that by the end of 1988 Higgs and Hill had parted with the registered title numbered NGL 229374 save that they had kept their title, whatever it was, to the land south of the northern boundary of the footpath (and therefore such title ceased to be registered at that point).
25. The disputed land was no use to Higgs and Hill, but I infer that the reason why they took pains to consolidate their title to it, and then retained it when they sold the Thameside Centre, was that the owners of boats moored alongside the green land were interested in buying it.
26. Mr Oliver's evidence was that he was hired to break up and dispose of the Brian Boru in 1988 and then rented the berth from Higgs and Hill for his own boat Legend (still moored there today). He negotiated with the then director of Higgs and Hill with a view to buying the disputed land. I will come back to his evidence later when I discuss whether the green land is highway. For now, I can summarise by saying that the Applicant was formed in 1989, and Mr Oliver was and remains a director of the Applicant; on 9 February 1989 the Applicant purchased from Higgs and Hill all its interest in the disputed land.
27. The conveyance recites (1) the purchase from Riviera, (2) the purchase from Struan Wallace, (3) sale of title NGL 229374 with its exclusions and then

"(4) The land lying to the south of the Thameside Centre aforesaid comprising the footpath and other land shown for identification purposes only coloured red on the said plan were dedicated as a public footpath (with associated land) by the Brentford & Chiswick UDC and the Vendor claims that the subsoil under the footpath and other land as aforesaid is vested in the Vendor in fee simple absolute in possession (as the Vendor hereby admits)."

28. The operative part of the conveyance then sells to the Applicant for £30,000 all the Vendor's estate and interest in the land where the Brian Boru and the Atlantis were moored, and:

> "All right estate or interest in the Vendor (if any) in the footpath and other land shown for identification purposes only coloured red on the said plan.
> All other right estate or interest of the Vendor (if any) including riparian rights in respect of the river bed and riverbank."

29. The land coloured red was the disputed land. Whatever interest Higgs and Hill had in the disputed land, it conveyed to the Applicant.
30. Leaving aside for the moment the question whether all (as the Respondent says) or only some (as the Applicant says) of the disputed land is public highway, did the 1989 conveyance convey the disputed land to the Applicant? I find that it did.
31. So far as concerns the land conveyed by Riviera and by Struan Wallace it is clear that Higgs and Hill bought whatever title to the land alongside the Brian Boru and the Atlantis had been acquired by the boat owners by adverse possession. The statutory declarations of successive owners of both boats have been produced by the Applicant, and there has never been any challenge to that evidence of possession which amounted to far more than twelve years.[1]
32. As to the rest of the land, the question is whether it was included in title number NGL 299374 which Higgs and Hill purchased. There no direct evidence, because the conveyance or conveyances that led to registration cannot be found. What the Applicant

[1] I cannot ascertain, and do not need to decide, whether the possessory titles to these two small areas were acquired before or after the land comprised in title number NGL 299734 was registered. Either it was acquired before registration, in which case the boundary of the registered title did not include the disputed land in these two areas, or it was acquired later in which case the registered proprietor held on trust for the boat owners pursuant to section 75of the Land Registration Act 1925. The end result is the same in any event.

says is that title to the land in this area derives from the titles of the owners of the wharves, and they owned their land all the way down to the river. It refers to a number of items of evidence, of which I regard the following as significant:

a. A licence granted by the Thames Conservators of 1883 to Alfred Aldin, whose plan shows that he owned a wharf within the disputed land, and which states that he owns owns "Land and hereditaments *fronting and immediately adjoining the River Thames* on the north side thereof" (my emphasis).
b. An indenture of 1840 by which the public house known as the Waggon and Horses at The Hollows, on the disputed land, was let to Douglas Thompson and John Fuller, which describes the land as "extending .. to the River Thames".
c. A number of historical photographs of the disputed land, some from the nineteenth century, some from the 1950s and 1970s, and a drawing from 1920, showing that the green land is physically distinct from the footpath and has been used by the wharf owners for mooring, loading etc.
d. An indenture of 1703 showing land at The Hollows owned to the river's edge.
e. The registered title of Regatta Point, MX447210 immediately to the west of the disputed land, whose title plan indicates an area of land to the north of the footpath very similar to that comprised in NGL 299734, but on which there is a note saying that the boundary of the land is the mean high water mark from time to time. This is not part of the disputed land but it is said to indicate that historically, land ownership went down to the water's edge.
f. A letter of 24 November 1978 from the PLA's River Rents Manager indicates that the PLA, which has been heavily involved in this area and has had extensive knowledge of it, took the view that the wharf owners owned the subsoil of the footpath and the land in front of it (which I take it means on the river side of it).

33. All the items listed above indicate that historically land was in common ownership on both sides of the footpath. I have omitted a couple of the items listed by the Applicant under this head, namely conveyances by the PLA (in 1983 and 1986) of land which had vested in it after unlawful embankment, as they do not seem to me to provide evidence either way. The items I have listed a to f above all point the same way.
34. Common sense says the same. The only point of having the wharfs by the river was so as to have access to the river.

35. Moreover there are no other candidates (subject to the highways issue) to be owners of the disputed land. The obvious one, the PLA, did not own it (as we now know from the 2011 reference).
36. Therefore I find, on the balance of probabilities, that the various wharf owners who conveyed the land that eventually formed title number NGL 299734 each owned a strip of land bounded by the High St to the north, passing under the footpath, and then extending to the water's edge, and that the southern boundary of that title – despite the general boundary shown on the register, was the river's edge.
37. It is therefore likely that the registered title acquired by Higgs and Hill in 1984 (directly or indirectly from the owners of wharves) extended to the water's edge on the south side except insofar as the owners of the Brian Boru and the Atlantis had acquired title by adverse possession to their moorings. Insofar as those owners had acquired title by possession they conveyed it to Higgs and Hill. The 1989 conveyance – subject to the highways question – conveyed to the Applicant all the interest that Higgs and Hill held, and on the basis of the reasoning above that included the whole of the disputed land save insofar as it was public highway.
38. Against that the Respondent says that the 1989 conveyance purported to convey only the subsoil in the disputed land. That is a puzzling assertion in view of the operative words (quoted above at paragraph 28), but it is made because of the recital quoted above (paragraph 27) which states that the land conveyed has been dedicated as a public footpath.
39. I shall have to revert to that recital when I discuss, below, whether the green land is public highway. That recital cannot be determinative of that question, because it cannot make the green land highway if it was not already, although it may be evidence on the issue. The crucial point is that Higgs and Hill owned the land down to the water's edge insofar as it was not highway. Recital number (4) quoted above does not say unambiguously how much of the land is highway, because it refers to a plan for identification purposes only; so it is consistent with only part of the land coloured red actually being highway. More importantly, the recital does not purport to limit the operative words of the conveyance. The operative words do not say that only the subsoil is conveyed. Clearly Higgs and Hill was being cautious in what it said about the public highway; but it carefully did not limit what it actually conveyed.
40. Accordingly I find that the 1989 conveyance gave the Applicant title to all of the disputed land except to the extent that it is public highway.

Has the Applicant acquired title by adverse possession?

41. If I am wrong about that, did the Applicant acquire title to the disputed land, other than the footpath itself, by adverse possession? It is of course not in dispute that it is not possible to acquire title to a public highway by adverse possession (*R (Smith) v Land Registry (Peterborough)* [2010] EWCA Civ 200), and the footpath is agreed to be a public highway.
42. The Applicant says that if it does not have a paper title it has a possessory title to the green land and to the subsoil of the footpath.
43. Mr Oliver's evidence is that after the purchase of the disputed land in 1989 he built brick enclosures for the electricity and gas supplies at the western end of the green land; ramps were cast in concrete at each mooring to allow the wheels of gangways to roll safely; fences were put up alongside all the moorings by their occupants. There was fencing alongside his boat, Legend, when he first occupied the mooring. It fell into disrepair. There was then a hedge, which was dug up to enable services to be laid. The fence was replaced recently; the fence is substantial because this is the section of the disputed land where there is nothing between the path and the river, so that the fencing is essential for safety. These points in Mr Oliver's evidence were not challenged in cross-examination.
44. Mr Banks has been a director of the Applicant since 1993, and lived on the boat known as Jacana 1 from 1993 to 1998 and on Jacana 2 from 1998 to 2007. He has planning permission and a supplemental River Works licence for a new boat known as Griffin to be moored beside the disputed land.
45. So Mr Banks was not involved in the 1989 purchase but has extensive knowledge of the land from 1993 onwards. His mooring was already fenced when he acquired it in 1993, and he renewed the fence; he says that other houseboat owners had similar fencing; he states that all the land has been fenced at all times since 1993 except for the land opposite Legend (and this is consistent with what Mr Oliver says). Mr Banks says that he as paid rates and taxes for the land and run utilities across it. Not until the current litigation has the Respondent made any complaint about the boat owners' use of the disputed land, nor has it suggested until now that the installation of the fencing is a trespass. In re-examination at the hearing he explained that the fencing which stands today was designed by an architect; a photograph taken in 1994 shows Mrs Banks beside the fence. Mr Banks confirms that the Applicant installed an electricity meter building, a gas meter cupboard and a coal bunker. It has planted trees, maintained fences and pollarded trees when necessary.

46. Very little challenge was made to this evidence in cross-examination. Mr Banks was asked about the fencing opposite Legend and said that that stretch of land had not been fenced until the last two or three years, but that there was a gate and a gangway for the boat and a big willow tree.

47. At the site visit I walked the length of the footpath on the disputed land. The fencing is continuous and sturdy – and indeed essential where there is no land between the path and the 10 foot drop to the river. The boat owners have gates in the fences, which are locked; I was shown inside a couple.

48. To characterise the possession of the boatowners, on behalf of the Applicant, as "slight and equivocal", as does Mr Bhose QC in his skeleton argument, is unrealistic. All of the green land is fenced and secured; most of it has been so since the early 1990s and before; the green land is used by the boat owners as an occupying owner would use it, for the passage of utilities, as garden, and for security. Possession is exclusive and the intention to exclude is clear from the fencing; the company's representatives believed that it owned the land by virtue of the 1989 conveyance, and dealt with it on that basis.

49. As to the footpath itself, of course, there can be no adverse possession of the surface, and the subsoil is inaccessible. However, if the Applicant has title to the green land by adverse possession it claims the subsoil of the footpath by virtue of the *ad medium filum viae* presumption – that is, the presumption that it owns the subsoil of the path at least up to its middle point. That must be correct.

50. Accordingly if I am wrong about the Applicant's paper title I have no hesitation in finding that from at least 1989 the Applicant has had exclusive possession of the disputed land and has used it as an occupying owner would have used it (*Powell v MacFarlane* (1979) 38 P & CR 452 at 470-1, approved by the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30). Throughout that period the boat owners, as the company's representatives, intended so to possess and use it and to exclude others from it. The Applicant has therefore acquired title to the disputed land by adverse possession.

The Respondent's case: is all the disputed land public highway?

51. It is common ground that the path is public highway. The dispute is about the green land. In response to the PLA's application for registration in 2009 the Respondent initially communicated an objection to HM Land Registry, but withdrew that objection in return for an assurance that the status of the footpath would be noted on the register. No mention was made of the green land. The Applicant says that the Respondent is estopped from arguing now that the green land is public highway.

52. In the paragraphs that follow I discuss estoppel, and then consider whether the green land is highway.

Is the Respondent estopped from saying that the green land is highway?

53. It is argued for the Applicant that there is an issue estoppel arising from the 2011 reference. That is at first sight surprising, since no decision was made by the First-tier Tribunal in 2016 as to whether the green land is highway. However, Mr Jacobs argues that it is not open to the Respondent to withdraw its objection to the PLA's application in 2009 and then make the same objection in later proceedings in the same tribunal.

54. Mr Jacobs refers me to *Arnold v National Westminster bank plc* [1991] 2 A.C. 93, at 106 where Lord Keith explained:

> "Issue estoppel ... has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlir proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but not raised earlier."

55. I do not think that that principle can be extended to a case where the party who failed to raise a particular point was not a party to the litigation in question. The Respondent withdrew its objection to the PLA's application by letter to HM Land Registry on 28 October 2009. The reference to the Tribunal (which is entirely separate from and independent of HM Land Registry) was not made until 2011 and the Respondent was not a party to the 2011 reference.

56. Could it be said that the First-tier Tribunal relied upon the Respondent's position, as expressed by that withdrawal, so that the Respondent is now asking the Tribunal to re-visit the basis on which its earlier decision was made? I think not. The decision made in the 2011 reference was that the PLA had no title to what is now the disputed land because it was above the Mean High Water Mark of 1857. The fact that the Respondent was not asserting that the green land was highway made no difference to that finding. If the First-tier Tribunal in 2016 had found that the land then claimed by the PLA was above the 1857 Mean High Water Mark, it would have made a different decision; again the status of the green land would have made no difference to that, save that if it had been highway then the PLA would have been entitled only to the subsoil.

57. If the Respondent had been party to the 2011 reference proceedings and had not withdrawn its objection, and the PLA had chosen to dispute the status of the green land as highway then there might well be an issue estoppel, but that is not what happened.

58. Even if I am wrong about that, it does not seem to me that the Respondent can be estopped from asserting the existence of a public right, in circumstances where there is no judicial decision to that effect.

59. So I find that there is no estoppel and it remains open to me to decide whether the green land is public highway or not.

Is the green land highway? The Respondent's case

60. Mr Bhose QC has helpfully summarised the development of the law relating to public highways, which is relevant to what I have to decide. At common law the inhabitants of a parish were obliged to repair the highways within their area. Section 6 of the Highways Act 1835 required every parish to appoint a surveyor to meet that obligation. In the course of the nineteenth century, statutory highway authorities were set up on a piecemeal basis, as is explained by Lord Hoffmann in *Goodes v East Sussex County Council* [2000] 1 WLR 1356 at 1361. Finally section 38 of the Highways Act 1959 abolished all remaining liabilities of the inhabitants of parishes and transferred responsibility for public highways to the highway authorities constituted under that Act.

61. Section 38 defined the highways maintainable at public expense to include "a highway which immediately before commencement was maintainable by the inhabitants at large or maintainable by a highway authority". And Section 38(6) required borough councils to make a maintain "a list of the streets within their area which are highways maintainable at public expense", commonly referred to as a Highways Register.

62. By section 226(1) of the Highways Act 1938 every highway maintainable at public expense vested in the local highway authority.

63. The above provisions of the Highways Act 1938 have been re-enacted in the Highways Act 1980.

64. The local authority's Highways Register is not conclusive as to the status of highways identified in it, but it is "strong evidence that the ways included within them are regarded as being both highways and maintainable at the public expense" (*Sauvain, Highway Law* at para 2.110; see also Sara, *Boundaries and Easements (6th edn)* para 7.018.

65. In the light of that background I can consider the Respondent's case that the green land is highway. It raises a number of matters which I address under separate headings

The Highways Register

66. First, the Highways Register itself.

67. The local highway authority in relation to the disputed land in 1959 was the Borough of Brentford and Chiswick, the Respondent's statutory predecessor. The relevant highway

card (as the individual entries are known), from the manual records of 1959, shows the footpath coloured yellow and the green land coloured green. A handwritten note on the plan states "Coloured Areas (Yellow and green) repairable by the Inhabitants at large, Taken from the Brentford & Chiswick Boro. Council records."

68. Another handwritten note on that plan indicates the position of the river works licence granted to the Respondent's predecessor by the PLA in 1959, but does so incorrectly, with an arrow pointing to part of the disputed land rather than to the area to the west of that land.

69. The current, electronic version of the Highways Register again shows the footpath yellow and the green land green, and it has a key. Yellow land is described as "Adopted area footway" and green is "Adopted verge amenity area".

70. There is no reference in the Highways Act 1959 or 1980 to "adopted amenity verge"; Mr Jacobs therefore says that the green area is not highway. Section 96(1) of the Highways Act 1980 provides that a highway authority may lay out verges on highways; but there is no statutory provision to the effect that a verge can be adopted by the authority and made into a highway.

71. The evidence of Sabina Martin, a senior project manager with the Respondent's department for Regeneration, Economic Development and Environment, is that green shading does denote highway, because the Respondent has always shown different types of highway in different colours. She said she "would have been told" by her Head of Highways that that is how highways are recorded. "As far as Hounslow are concerned it's all highway", she said.

72. Mr Jacobs did not accept that, and suggested that the Head of Highways should have given evidence of the Respondent's practice. However, it seems to me that the only point in colouring anything on the register was to indicate that it was highway. There are certainly different kinds of highway – footpaths, roadways, verges and so on – and the designation "amenity verge amenity area" might indicate a grassy area over which the public had, historically, had the right to pass. The natural reading of the Highways Register here, both the earlier and later versions, is that the yellow and green land were both public highway.

73. So that, I find, is what the register says; and that is strong evidence that the green land is a public highway.

74. Moreover, registration would not have been undertaken lightly, because with registration as a public highway came not only the vesting of title in the highway authority but also

the liability to maintain it. It is not that an authority in 1959 would use registration to grab land it wanted; registration meant liability. So I approach the evidence provided by the register on the basis that it is likely to be correct and that circumstances in which it is wrong will be unusual.

75. The following further matters are said by the Respondent to be evidence that the green land is highway.

The Tithe Map

76. The 1839 Ealing Tithe Map was published in 1841. It is well-established that a tithe map may be used as evidence on this point (*AG v Antrobus* [1905] 2 Ch 188 at 193). However in this case I do not regard the tithe map as being of any assistance either way, because it does not show the green land at all. It shows the footpath, numbered 122, which is listed under "roads" with no tithe payable. But it does not depict the green land between the footpath and the river. It appears that the person who drew the map was unaware of land there; the map cannot therefore be relied upon to show that the green land was or was not highway. So I cannot derive any assistance from the Tithe Map.

The terms of the 1989 conveyance

77. Recital number (4) to the 1989 conveyance, which appears to indicate that the green land was regarded by Higgs and Hill as public highway. I quoted the recital at paragraph 28 above. The Respondent says therefore that Higgs and Hill did not purport to convey anything other than the subsoil in the whole of the disputed land.

78. As I said above, that is not what the operative part of the conveyance says; it says that it conveys whatever interest Higgs and Hill held in that land, without exclusion. Mr Jacobs, for the Applicant, argues that the recital was included out of an abundance of caution on the part of Higgs and Hill; it was covering its back in view of a possible adverse claim to the land, as well as indicating uncertainty (in the description of the property conveyed, which I quoted at paragraph 27 above) as to the extent of the interest it was conveying.

79. The origins of that recital lie in correspondence that took place before the date of the 1989 conveyance.

80. Higgs and Hill's solicitor, Mr Day, wrote to the Respondent to ask about the status of the disputed land. In his letter of 15th November 1983 he asked whether the land adopted and maintained at public expense was just the footpath or was also the green land. He asked for details of the adoption or dedication of that land by the Respondent's predecessors. The Respondent's reply, in its letter dated 26 November 1984, said this:

"1) I attach a plan showing, shaded in pink, the adopted footpath known as The Hollows, which commences between 1/3 High Street, Brentford to the slip road alongside Kew Bridge.

2) I also attach copy documents relating to formal resolution by the Bretford and Chiswick Urban District Council to the adoption, also the record cards giving specific measurements of adoption."

81. Unfortunately the enclosures to that letter cannot be found. There is no way to tell whether the enclosures showed both the footpath and the green land as public highway or, as the text of the letter implies, just the footpath. Nor does the Respondent hold any "record cards giving specific measurements of adoption" or any record of the adoption of the green land or indeed of the footpath itself.

82. Mr Day's statutory declaration is dated 10 February 1989. So it does not follow immediately upon his correspondence with the Respondent in 1983 and 1984, and it is not known whether he had the missing enclosures to hand when he prepared his declaration and its plan. The declaration at paragraph 6 reads as follows:

"The Council claim that the footpath shown hatched red on the plan GCD1 is an adopted footpath known as 'The Hollows'"

83. The plan GCD1 shows the whole of the disputed land hatched red, and it may be that Mr Day replicated the plan sent with the letter of 26 November 1984. And it may be therefore that the recital to the 1989 conveyance, which likewise indicates that the whole of the disputed land was "dedicated as a public footpath" reflected not just Mr Day's declaration, but also the view of the Respondent as expressed in its letter of 26 November 1984.

84. The recital to the 1989 conveyance cannot transform land into a public highway if it was not public highway already. But that recital may be evidence that the local authority at the time regarded the green land as highway. It is at best very ambiguous evidence given the absence of the enclosures to the letter of 26 November 1984 and the clear reference in that letter to "footpath" and not to "verge" (and, as will be clear from the material I consider below, it would not have been possible on inspection of the disputed land to mistake the green land for footpath).

Support for the footpath

85. It is suggested that the green land is highway by virtue of its being needed for the support of the footpath. No evidence is produced to that effect, and it seems clearly incorrect by virtue of the fact that where the footpath abuts the river it is supported not by any part of the green land but directly by the embankment. So I am not assisted by that point.

Use of the green land by the public

86. It is said that the green land "was historically de facto enjoyed by members of the public so as to form part of the highway" (I quote from Mr Bhose's skeleton argument). I do not understand what is meant by that as there is no evidence of use of the green land by the public; indeed, the historical evidence of the state of the land, seen in photographs and drawings, points to its not being used by the public but by the wharf owners (see below).

The 1959 licence

87. In 1959 the PLA granted to the Respondent a licence to make an embankment just west of the disputed land. It is said that this is evidence that the land between the footpath and the river, generally, and therefore the green land itself, was regarded by the Respondent as highway and that the Respondent took responsibility for its maintenance.

88. On the first day of the hearing the Respondent produced minutes relating to its decision to carry out this work, showing that the work was clearly regarded as highway maintenance, and that the frontagers were asked to contribute to it. It is argued therefore that the Respondent owned the surface of the land south of the footpath and the wharf owners owned the subsoil, and that those owners made no objection to the Respondent doing this work as highway authority.

89. This evidence is too ambiguous to be of assistance, because it is not clear whether or not there was land between the footpath and the river at the point where this embankment was made. The Respondent says there was. The Applicant argues that there was none and that this was work done to support the footpath where a tunnel collapsed, beneath the path. The minutes refer to a sewer so that may be consistent with what the Applicant says.

90. There is insufficient evidence for me to resolve that disagreement. I note that the land that was the subject of the 1959 licence was within the area in which land was sold by the PLA to boat owners (paragraph 12 above), without any objection being made by the Respondent.

91. So the 1959 licence is of no assistance to the Respondent.

Concluding comments about the Respondent's case

92. The Highways Register, then, remains the only evidence that the green land is a public highway. Other matters are ambiguous and of little or no assistance.

Is the green land highway? The Applicant's case.

93. Against the strong evidence of the Highways Register, the Applicant relies on a number of matters which can be put into two groups. First, there is no evidence that the green land was highway before 1959, and considerable evidence that it was not. Second, at no points

other than (a) 1959 and (b) the present litigation does the Respondent itself appear to have regarded the green land as public highway.

(1) The pre-1959 evidence

94. When one looks at the green land today it certainly does not appear to be a public highway, and would not appear so even if the fencing were removed. It slopes, steeply in places (as do the gangways of the boats). In places there is no green land and the bank falls away directly at the edge of the footpath. So it would be impossible, and unsafe, to traverse the disputed land from west to east on the green land, or to approach the river bank on the green land or to use it for recreation.

95. It appears that that has been the case since long before 1959. The Applicant, through the diligence of Mr Banks, Mr Oliver and others, has collected a great deal of historical photographic evidence about the physical condition of the green land. My attention was drawn to:

    a. A drawing from around 1920, featured in a local history journal, looking towards Kew Bridge and showing the wharf buildings abutting the north edge of the footpath, the path itself, and then the green land covered in grass and plants and mooring posts.
    b. Photographs said to be from 1865, which show that the green land is vegetated whereas the path is not, and showing that the green land is on a distinctly lower level than the path.
    c. Two aerial photographs from the 1959s which show the green land very distinct from the footpath, and obstructed by gangplanks and other equipment, with boats moored alongside and the wharfs on the other side of the path.
    d. A photograph from 1971, when the wharfs were still in place. Again the green land is very different in appearance from the footpath, in commercial use as in the earlier pictures, vegetated, and obstructed by gangplanks and mooring posts.

96. What we see in these pictures before and after 1959 is that the green land is physically distinct from the footpath, being unmetalled and in places vegetated, and is in commercial use in connection with the wharves beyond the footpath. It is impassable in an east-west direction – there is too much in the way, and in places there is no green land at all. The green land has been consistently used by the owners of the wharves for their business of mooring, loading and unloading, so that it would not be a convenient or safe place for the public to walk or sit, or to approach the river. And the commercial use is so obvious that it

is hard to see why it should have been maintainable by the inhabitants at large" as the Highways Register puts it.

97. It is therefore extremely unlikely that the green land was part of the public highway before 1959. The physical evidence points to the Highways Register being incorrect.

98. *(2) The Respondent's position since 1959*

99. The conclusion I have drawn from the physical condition of the green land is consistent with the way that the Respondent has always treated it, aside from the creation of the Highways Register in 1959 and its position in litigation.

100. First, the Respondent has never maintained the green land. Ms Martin says that the green land is part of the Respondent's PFI maintenance contract, and that the Respondent pays for land by area under that contract. But no copy of that contract has been produced and no evidence has been given as to whether the green land is specifically included in that contract by a description that distinguishes it from the footpath. An internal email chain between the Respondent's Highways Network Manager, Satbir Gill, and Sabeel Khan the PFI contracts manager, in February 2018 confirms that the green land is within the PFI contract but that it is not possible to access the green land because of the fencing. Safety inspection reports made by the Respondent make no reference to the green land.

101. It has certainly not been suggested that the contractor has actually done any work on the green land. Mr Oliver and Mr Banks gave evidence that the Respondent has never carried out any maintenance there.

102. Moreover, as recently as May 2018 the Respondent's Highways Department has insisted, in email correspondence with the concierge of the St George development at Kew Bridge, who complained about trees overhanging the footpath, that the trees behind the fencing belong to the boat owners and that the highways department has never maintained this area.

103. I find as a fact that the green land has never been maintained by the Respondent. The whole point of the vesting of public highways in local highway authorities, and their obligation to keep a register, was the maintenance of those highways. The fact that the green land has never been maintained by the Respondent indicates that it has not regarded the green land as highway, despite what the Highways Register says.

104. Furthermore the Respondent made no objection when the PLA sold land west of the disputed land, to boat owners – that land now being walled off from the public footpath. So at the time of those sales in the 1980s and 1990s the Respondent clearly did not regard

the land between the path and the river, immediately adjacent to the disputed land, as highway.

105. The Respondent has only recently made any objection to the Applicant's fencing. In 1986 the solicitor for the PLA wrote to the boat owners, including the owners of the Brian Boru and the Atlantis, asking them to remove the fencing, consistent with the PLA's claim that it owned the green land.

106. In the 2011 reference the Respondent withdrew its objection to the PLA's application by letter dated 28 October 2009, in terms that appear to refer to a note being entered on the register in connection with the footpath only. It did so after correspondence with HM Land Registry and with the PLA, and after having expressly stated that the green land was subject to public rights (letter to HM Land Registry 14 September 2009, letter from the PLA to HM Land Registry 27 August 2009); so this was an explicit change of position after correspondence and, presumably, proper consideration.

107. The Respondent's view is of course not determinative of the matter; but the Highways Register is not determinative either, for the same reason – it simply represents the Respondent's view at a particular time, and the view of the highways authority is persuasive. In this case, despite the view expressed in the Highways Register, the authority's view goes, for the most part, the other way.

Conclusion: is the green land public highway?

108. Why the green land was designated as highway in the 1989 register cannot be known. It is probably a simple error, as was the positioning of the PLA licence on the same plan. It may have happened because the person who coloured the plan did not know the land. Anyone who knew it would know that it was not highway. It was a working area full of hazards and obstructions, of the kind that are not permitted on the highway itself. It was vital to the wharfingers precisely because it was not highway. Its use for decades, by 1959, had been for the placing of gangplanks and other tackle, the securing of boats and the unloading of goods.

109. In the light of that it is not surprising that the green land has not been treated by the Respondent as highway, and the Respondent's view of the matter – expressed in its behaviour over the years – is highly persuasive.

110. I find that the green land is not and never has been public highway.

111. That disposes of the Respondent's objection to the Applicant's registration as proprietor and I have directed the registrar accordingly.

112. In this Tribunal costs follow the event. If the Applicant wishes to make a claim for costs it may do so within 28 days of the date of this decision, accompanied by a detailed Bill of Costs; the Respondent if so advised may serve points of dispute within a further 28 days and the Applicant will have a further 21 days to respond. I will then make a decision about liability and, if I make an order for costs, as to whether there should be summary or detailed assessment.

Dated this 24 January 2019

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL