[2017] UKUT 0146 (TCC)

Appeal number UT/2016/0029

Adverse possession - mooring a boat - intention to possess - ambiguous conduct as evidence of intention to possess - public rights of navigation

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PORT OF LONDON AUTHORITY **Appellant**

- and -

PAUL MENDOZA **Respondent**

TRIBUNAL: JUDGE ELIZABETH COOKE

Sitting in public at The Royal Courts of Justice on 24 November 2016

DECISION

Introduction

1. On 16 November 2009 the Appellant, the Port of London Authority ("the PLA"), applied to HM Land Registry for first registration of its title to part of the bed and foreshore of the River Thames between Kew Bridge and Brentford Ait.
2. A number of people objected to that application. In due course HM Land Registry referred the objections to the Land Registration Division of the First-tier Tribunal ("the FTT"). All those references to the FTT have now been determined except for that which is the subject of the present appeal. Mr Mendoza has accepted all along that the PLA had a paper title to the land it claimed – dating back to an indenture of 1857 and then the Thames Conservancy Act 1857 – but he says that by the time the PLA made its application he had acquired title to an area of the river bed by adverse possession and that therefore the PLA's application must fail in respect of his land.
3. In a decision of the FTT dated 7 January 2016 Judge Michael Mark found that Mr Mendoza had indeed acquired title by limitation – or "squatter's title" – to a part, not the whole, of the area that he claimed. He directed the Chief Land Registrar in giving effect to the PLA's application to exclude from its title an area of land the general boundaries of which he described as follows in paragraph 67 of his decision:

> For the purposes of the general boundary in giving effect to the PLA's application, the land to be excluded should be shown as about 26 metres in length along the river bank starting from about 7 metres to the east of the post to which I have referred.

4. Mr Mendoza lives on a houseboat, the Wight Queen. It is moored on the north bank of the Thames. So the land in respect of which Mr Mendoza was successful was a rectangle of river bed big enough to contain his boat.
5. The PLA has appealed the FTT's decision. Its grounds of appeal state that the judge erred in finding that the Respondent had the requisite intention to possess the land in dispute. Permission to appeal was granted by Judge Edward Cousins, who said in granting leave:

> … it is apparent that an important legal point arises for consideration, namely whether the "mere" act of mooring a vessel is in itself an act of such equivocal nature that it is insufficient to establish the requisite intention for the purposes of a claim for adverse possession. There are also issues, in my judgment, as to factual possession by the Wight Queen of the disputed land.

6. I heard the Appeal in the Royal Court of Justice on 24 November 2016. The Appellant was represented by Mr Christopher Stonor QC and the Respondent

by Mr Christopher Jacobs of counsel; I am grateful to both for their very helpful arguments. In the course of writing my decision I asked the parties for written submissions on a point that had not been fully explored at the hearing (see paragraph 70 below), and the parties agreed a timetable for those submissions; that is why the decision is given so long after the hearing.

7. In the paragraphs that follow I provide some factual background and then summarise the law. In the light of the basis on which Judge Cousins gave permission to appeal I must examine the judge's decision on the fact of possession – which I can do very briefly – and on the intention to possess, which will take rather longer. Finally I discuss a further point raised in argument about the whether it is possible to acquire title by adverse possession to the bed of a river that is subject to public rights of navigation.

The factual background

8. The central character in the story is a boat, the Wight Queen. It was built in 1908 and, according to one of the witnesses in the FTT, sailed on the Gosport to Portsmouth ferry service until 1956. Today the Wight Queen is without engine or wheelhouse, moored on the north bank of the Thames not far from Kew Bridge. Judge Mark found that it had been there since 1996, albeit turned around now and then, and moved from its moorings occasionally. For the most part however it has been moored to a post and concrete piers standing in the river. It is not known when the boat was moved to its present moorings. The river is tidal where the Wight Queen is moored. Twice a day at low tide it rests on the river bed, moving back and forth a little with the wind and the tide, and the moorings have to be adjusted for safety.

9. It is not in dispute that Mr Peter McCrudden bought the Wight Queen early in 1997. His evidence was that he bought the boat "including the mooring to the extent of her ropes" and Judge Mark accepted (his paragraph 6) that he bought such mooring rights as the previous owner may have had, and that Mr McCrudden lived there as his home (Judge Mark's paragraph 44). Mr McCrudden said that he agreed his boundaries with the boat owners on either side of the Wight Queen.

10. From summer 1997 Mr Mendoza lived there with him, and in January 1998 Mr Mendoza bought the Wight Queen. It has been his home ever since. He said that he paid £2,000 for the Wight Queen, which he said was a lot for "such an old ship badly in need of repair", because it was the land (meaning the river bed) that he was more interested in, and that he treated the land as his own "from day one". On buying the boat and the moorings he agreed with the owners of neighbouring boats where his boundaries were. He said "we shook hands and agreed, as Peter [Mr McCrudden] had, to keep to our own land but also to make sure no-one else tried to moor on any of the three properties."

11. Mr Mendoza also said that on buying the Wight Queen he dropped anchor, threw out additional ropes to define his boundaries, and piled up rocks to mark the extent of his property; again, these were the boundaries of the larger area that he claimed. Judge Mark did not make any finding of fact about his claim

to have defined his boundaries in this way, and did not accept that he had thereby established adverse possession.

12. Judge Mark accepted that Mr McCrudden and Mr Mendoza agreed their boundaries with their neighbours but did not accept (his paragraph 68) that this would have made it clear to the PLA that they were in possession of "any greater area than that indicated". I take that to mean any greater area than the smaller area in respect of which Mr Mendoza was successful, which Judge Mark had described in his previous paragraph (67).

13. The trial bundle, at the hearing before the FTT, included a great many photographs, taken at various dates from 1999 onwards. Judge Mark conducted a site visit, and so saw the Wight Queen as it is today – a very nice-looking boat with a pagoda and plants. In older pictures it looks very different, consistent with what Mr Mendoza says about its condition when he bought it. The Wight Queen's paintwork has changed over the years. Its name has never been displayed.

14. In 1999 the London Borough of Hounslow (as owners of the river bank) and the PLA took possession proceedings against some identified boat owners and "persons unknown" being the owners of a number of boats on this stretch of the river including the Wight Queen. Mr Mendoza was not identified but the Wight Queen was among the boats served with papers, which Mr Mendoza said he did not receive. An interim injunction was obtained requiring the owners to leave, but was not enforced and the action did not proceed to trial. Further proceedings were taken in 2006, which Judge Mark found did not involve Mr Mendoza, and again were discontinued.

15. From time to time Mr Mendoza moored other boats alongside the Wight Queen, and later rented out moorings, because the larger area he claimed was big enough to contain other boats.

16. Mr Mendoza's objection to the PLA's application to register title to the bed and foreshore of the river was made on the basis that he had acquired title by adverse possession to an area of the river bed around the moorings of the boat. The water of the river cannot be the subject of ownership, but of course the river bed can. Judge Mark in his decision went through the evidence and then introduced conclusions at his paragraph 58 by saying that Mr McCrudden was in adverse possession in November 1997 of a much smaller area than that claimed by Mr Mendoza. He said that he accepted the evidence of both Mr McCrudden and Mr Mendoza as to their intention to keep possession of that smaller area, and then went on to explain why the claim in respect of the larger area did not succeed. I do not have dimensions of that larger area, but it was large enough to provide moorings for other boats from time to time.

17. The PLA's appeal therefore relates just to the smaller area, described at Judge Mark's paragraph 67, quoted at my paragraph 3 above.

The law

18. I can summarise the law very briefly as it is not in dispute.

19. In order to succeed, Mr Mendoza must establish that by the date on which the PLA applied to register its title, 16 November 2009, he and his predecessor in title had for twelve years been in adverse possession of the land he claimed. The actions and intentions of Mr McCrudden, from whom he bought the boat, are vital ingredients of his claim because he did not buy the boat until January 1998, and adverse possession must be established from 15 November 1997.
20. Adverse possession has two ingredients: factual possession (what the squatter did), and the intention to possess (what the squatter intended).
21. So far as factual possession is concerned, the words of Slade J in *Powell v McFarlane and anr* (1979) 38 P & CR 452 at 470 set out what is required:

> Factual possession signifies an appropriate degree of physical control. It must be a single and exclusive control … I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

22. As to the intention to possess (referred to in the older cases in Latin as the *animus possidendi*), Slade J said in *Powell v McFarlane* at pp 471-2 that what is meant is:

> … the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with paper title if he be not himself the possessor, so far as is reasonably practicable…

23. In many cases (unlike this one) intention is not a big issue once factual possession has been established. The squatter who fences a field and locks the gate is obviously intending to keep people out. But in this case the principal ground of appeal is that the judge erred in finding an intention to possess. In support of that argument two legal principles are invoked, relating to evidence of intention.
24. The first of those principles is about the evidence of the squatter himself. Slade J in *Powell v McFarlane* at p 476 said this:

> Though past or present declarations as to his intentions, made by a person claiming that he had possession of land on a particular date, may provide compelling evidence that he did not have the requisite *animus possidendi*, in my judgment statements made by such a person, on giving oral evidence in court, to the effect that at a particular time he intended to take exclusive possession of the land, are of very little evidential value, because they are obviously easily capable of being merely self-serving, while at the same time they may be very difficult for the paper owner positively to refute. … As Sachs LJ said in *Tecbild v Chamberlain* 'In general, intent has to be inferred from the acts themselves.'

25. I take this to mean that the evidence of the adverse possessor by itself is unlikely to support a finding of intention to possess in the absence of anything else. Intention to possess is often demonstrated by the factual possession and,

as I said above, where that possession takes the form of fencing a field or similar, the message to the world is clear. But the second legal principle invoked by the PLA in this appeal is that possession which gives an ambiguous message will not establish intention to possess.

26. As Slade J put it in *Powell v McFarlane* at p 471-2:

> … the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired adverse possession, not only has the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner.

27. Similarly, in *Wretham v Ross* [2005] EWHC 1259 at paragraph 24 David Richards J said:

> The second element of legal possession, the requisite intention, is to be deduced from the squatter's acts, unless either those acts are explicable in some other way (see *Pye v Graham* at para 40) or the acts are equivocal in which case some other compelling evidence is required (*ibid* para 77).

28. The reference there is to *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

29. What the PLA says in this case is that the possession of the land by Mr McCrudden and then Mr Mendoza was explicable in several other ways and therefore was so equivocal that it cannot establish adverse possession. I examine that ground of appeal – which I find to be successful – below.

30. Before I do so I have to discuss the decision of the High Court in *Port of London Authority v Ashmore* [2009] EWHC 954 (Ch), which was subsequently overturned on appeal by the Court of Appeal, but which has been regarded as persuasive authority to the effect that the mooring of a boat can establish the requisite factual possession and intention to possess so as to amount to adverse possession. Mr Stonor's position on this in the FTT was that he accepted that the case was an authority on that point and bound the FTT, whilst reserving his position should the matter go further. It has done so and *Ashmore* now has to be given proper consideration.

31. What happened in *Ashmore* was that the parties, wishing to save costs, asked the judge to decide, on a set of agreed and hypothetical facts, whether it was possible for the owner of a vessel moored on tidal water to acquire title to the sea or river bed or the foreshore. Stephen Smith QC sitting as a Deputy Judge of the Chancery Division, expressed doubt as to the usefulness of proceeding in that way, but made a declaration in these terms:

> It is possible for the owner of a vessel that is moored in a particular place on a tidal river to acquire title by adverse possession to the river bed or the foreshore for the footprint of that vessel where:

(a) the title to the river bed or the foreshore has not been registered; and

(b) the vessel rests on the bed or the foreshore at low tide.

32. That declaration referred only to rivers and not to the sea. Moreover, it made no reference to the agreed facts, extending to several paragraphs, that the parties had asked the judge to consider, and it was overturned for that reason by the Court of Appeal: *Port of London Authority v Ashmore* [2010] EWCA Civ 30. The Appellants sought an alternative declaration but the Court of Appeal refused; Sir John Chadwick at paragraph 21 said:

> … the Court is invited by the appellant to lay down an arbitrary test … which may have no application, on the facts when they are known, to the present case. For my part, I do not think it appropriate to accede to that invitation. Convenient as it may be to have a "rule of thumb" test which can be applied in cases of this nature, I am not persuaded that it is for the courts to prescribe what that test should be. The task of the courts, as it seems to me, is to decide cases on their facts in accordance with principle.

33. The matter was then remitted to the High Court for Mr Ashmore's claim to be determined on the pleaded facts and not on a hypothetical basis.

34. It is therefore very difficult to see the first instance decision in *Port of London Authority v Ashmore* as authority for any proposition about the acquisition of title by means of the mooring of a boat. It is true that in *Moore v British Waterways Board* [2013] EWCA Civ 713 Lewison LJ referred to the decision in *Ashmore* and said "it seemed that possession could be taken of the river bed by activities amounting to mooring and that title by adverse possession could be achieved in this way." But the citation he gave was to the Court of Appeal decision, which is not authority for that proposition; and in any event it was not a point that the Court of Appeal was deciding in *Moore v British Waterways Board*. Stephen Jourdan QC and Oliver Radley-Gardner, the learned authors of *Adverse Possession* (2011) are suitably cautious in their reference to Ashmore, saying only that:

> … the status of Stephen Smith QC's decision … is somewhat uncertain. However, given that his decision was not said to have been wrong, it may be right to treat it as persuasive authority.

35. The Court of Appeal did not say that the decision of Stephen Smith QC was wrong, but it was equally very careful not to say that it was right. At paragraph 25 of his decision Sir John Chadwick said:

> the Court is satisfied that it would serve no useful purpose to decide whether the judge was correct to reach the conclusion that he did on assumed facts and expresses no view on that question.

36. Therefore I do not regard the decision at first instance in *Ashmore* as an authority on the question whether the mooring of a boat, without more, can amount to adverse possession.

37. Nor do I agree with the Respondent that there is other authority to the same effect. Lawrence J in *Denaby and Cadeby Main Collieries Ltd v* Anson [1911] 1 KB 171 said that there was no reason "in principle" why the owners of a permanently moored steamship operated as a coal hulk should not acquire title to the river bed by adverse possession; but the remark was obiter (the case was not about adverse possession; the remark was made as part of the judge's reasons why the owners of the ship could not get an injunction to prevent the harbourmaster from removing it). The coal hulk was a very different structure from the Wight Queen and with very different functions. It was a "fixed floating shop". I do not think that Fletcher Moulton LJ was intending to lay down a general rule about moored boats.

38. In *Fowler v Gafford* [1968] 2 QB 618 Wilmer LJ referred to possession of a tidal creek by the "laying of permanent moorings" (p 632 and following); but the plaintiff whose possession was in issue was not the owner of a single boat but he claimed to own (and indeed to have a paper title to) the whole of a tidal creek and to have kept numerous boats there for which they laid permanent moorings, so it cannot be regarded as a precedent for the position of a single boat moored to existing posts or other features, as in this case and as in *Ashmore*.

39. There is a discussion in *Roberts v Swangrove Estates Ltd* [2007] 2 P & CR 17, by Lindsay J, of the possibility of adverse possession of areas covered with water in the absence of visible boundaries, but that is not a ground on which the appeal is brought, and in any event that was a case where the act of possession was dredging on the foreshore, so it is not helpful on the matter of moored boats..

40. Accordingly I take the view that there is no authority to the effect that the mooring of a boat on a tidal river, without more, is a sufficient condition for adverse possession. That is not to say that the mooring of a boat in this way cannot ever amount to adverse possession, and the PLA does not seek to argue that as a principle; but Mr Stonor QC argues, and I agree, that the matter cannot be regarded as settled and that in any such case the question must turn on the facts.

The appeal on the finding of factual possession

41. As I observed above, the Appellants in their application for permission to appeal did not seek to challenge Judge Mark's findings of fact. Nevertheless Judge Cousins appeared to give permission for such a challenge (see paragraph 5 above).

42. At the hearing of the Appeal Mr Stonor QC made two points about factual possession. First, he argued that Judge Mark's findings of fact with regard to the very early period of adverse possession, before 1998, should not have been made. There are some discrepancies about dates and some uncertainty as to when the Wight Queen was first moored in her present position. However, Judge Mark did make clear findings that the Wight Queen was in position before Mr McCrudden bought the boat early in 1997, and that Mr McCrudden

was living there as his home. Other remarks about whether the boat was there in 1996 or earlier are not material to the finding of factual possession for the relevant period, which is from 15 November 1997. So there is no basis for a successful appeal on that point.

43. Second Mr Stonor QC focused on paragraph 68 of the decision of the FTT, where Judge Mark said that the PLA, in 1997, "had no reason to know that Mr McCrudden or Mr Mendoza was doing anything more than using that area to enable him to secure his boat." If that finding referred to the smaller area in respect of which Mr Mendoza was successful then it would contradict a finding that adverse possession was made out; but as I said in my paragraph 12 above I am satisfied from the context of that paragraph that "that area" refers to the larger area that Mr Mendoza claimed and in respect of which he was unsuccessful. Therefore that finding cannot cast doubt on the learned judge's finding of fact about the possession of the much smaller area in respect of which the Respondent was successful.

44. So the appeal fails insofar as the Appellants challenge Judge Mark's finding of factual possession.

The appeal on intention to possess

45. It is established, therefore, that Mr McCrudden and then Mr Mendoza were in possession of the area, roughly 26 by 7 metres, in which the Wight Queen was moored, from at least 15 November 1997, and that their possession was the sort of thing that an owner of the river bed might well do with his land (see the words of Slade J in *Powell v McFarlane and anr* (1979) 38 P & CR 452 at 470 quoted above at paragraph 21). But did they have the requisite intention to possess? The Appellants say that the findings of fact made by Judge Mark and the evidence available to him could not support a finding of intention to possess.

46. In the paragraphs that follow I look at Judge Mark's findings on intention to possess, and then – because Judge Mark did not explore the problem of ambiguity – at whether possession in this case gave sufficient evidence of intention

Judge Mark's finding of intention to possess

47. Judge Mark had two sources of evidence of intention to possess. First there was the evidence of Mr McCrudden and Mr Mendoza themselves. Each said that he intended to possess the land to the exclusion of the world at large including the paper owner. Mr Mendoza pointed out that he was aware of the law relating to adverse possession and his evidence, in his witness statement, recalls the language of the law reports:

> Since I bought it I have always considered it to be my land; I don't just occupy it, I control it and I say who can and can't come onto it, my intention was and is to possess the land, my land, Mendoza's land.

48. Such evidence must be treated with caution; see the words of Slade J in *Powell v McFarlane* quoted at my paragraph 24 above relating to the weight to be

attributed to self-serving evidence. Judge Mark referred to those words at his paragraph 59, but said:

> There is nothing in the evidence here, however, to suggest any reason why either [Mr Mendoza or Mr McCrudden] should have bought the Wight Queen without the benefit such as it was of the mooring and I accept the evidence of both that they intended to stay there as long as they could.

49. That by itself is not a finding of intention to possess, but it is clear from other passages in his decision that Judge Mark accepted the evidence of both Mr McCrudden and Mr Mendoza that each intended to exclude others from their section of river bed. However, although the learned judge referred to the words of Slade J about self-serving declarations, it is not clear how he followed the principle Slade J set out when he decided that the evidence of the two boat owners was sufficiently reliable evidence of intention, by itself, to found a finding of adverse possession. In my judgment something more was needed.

50. The only other basis for a finding of intention to possess, in this case, is the factual possession itself, and of course in most cases of adverse possession that is exactly what demonstrates intention. The squatter fences the field and from his manifest taking of exclusive possession he can be seen to intend to occupy the land to the exclusion of the world at large. But that conclusion does not follow if the acts of possession are equivocal and do not demonstrate to the world an intention to possess the land and to exclude everyone else because they are open to more than one interpretation. The words of Slade J in *Powell v McFarlane*, and of David Richards J in *Wretham v Ross*, quoted at my paragraphs 26 and 27 above, make this clear.

51. Judge Mark at his paragraph 55 quoted the words of the Court of Appeal in *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1987] 2 EGLR 85, at p 87:

> For a claimant to establish the necessary intention by his conduct, that conduct must be unequivocal in the sense that his intention to possess has been made plain to the world. If his conduct is equivocal and that intention has not been made plain, his claim will fail… It would plainly be unjust for the paper owner to be deprived of his land where the claimant had not by his conduct made clear to the world, including the paper owner, if present at the land, for the requisite period that he was intending to possess the land.

52. However, he did not discuss the possibility that the conduct of Mr McCrudden and of Mr Mendoza might have been equivocal, despite having had written closing submissions on the point from the PLA. So I cannot point to the reason why the learned judge decided that possession was not equivocal in this case, and there is no indication that he actually formed that view. Accordingly I have to look afresh at whether possession was so equivocal that it could not amount to evidence of intention.

Could factual possession, in this case, have amounted to evidence of intention to possess?

53. Mr Mendoza's objection to the PLA's application to register its title can only succeed if he can show that Mr McCrudden had the requisite intention to possess from 15 November 1997. He must persuade the tribunal on the balance of probabilities that it was apparent to the world at large that first Mr McCrudden and then he himself was in possession of the river bed and was there to stay, with the intention of keeping everyone else off that land.
54. Could Judge Mark have properly reached that conclusion, if he had looked at the issue of ambiguity, from the facts that he found?
55. The PLA says not because the Wight Queen could have been moored for any number of reasons. It could have been there
    - because its owner had an easement to moor or
    - with permission from the London Borough of Hounslow or
    - in exercise of the public right of navigation on this stretch of the Thames, which includes the right to moor for a short period or
    - simply as an act of persistent trespass without any intention on the part of the owner to take adverse possession.
56. The relevance of permission from the London Borough of Hounslow is that the post and concrete piers to which the Wight Queen was moored were the subject of a River Works licence granted by the PLA to the London Borough of Hounslow, pursuant to section 66 of the Port of London Authority Act 1968. The London Borough was entitled to maintain and retain these fixtures pursuant to the licence and could have allowed the Wight Queen's owners to moor there.
57. These four potential explanations for the presence of the Wight Queen were set out in the PLA's written closing submissions in the FTT; in the Upper Tribunal in its skeleton argument a further possible explanation was added, namely that mooring is a necessary element of the use of the boat as a chattel, and that the boat was moored just to keep it safe. I do not think that adds anything to the "persistent trespasser" idea and I will not deal with it separately, since if the boat was moored for longer than public navigation rights would allow then the mooring was an act of trespass.
58. The first three of those four potential explanations were considered by Stephen Smith QC in *Port of London Authority v Ashmore* [2009] EWHC 954 (Ch) and rejected as sources of ambiguity in that case. That decision was overturned on appeal; in any event, the facts in *Ashmore* were very different from those in this case. The boat owner had been there for many years and so the exercise of public rights could easily be discounted, and there was no third party with a river works licence. By contrast on the facts here, particularly during Mr McCrudden's ownership, all four potential explanations would have been plausible.

59. In the light of those reasons why the Wight Queen might have been moored, how was anyone to know that its owner intended to possess and control a rectangle of river bed and to exclude everyone else?

60. The Respondent says that possession was not equivocal in this case for two reasons.

61. First, it was stressed at the hearing before me that this was not just an act of mooring. The judge accepted that the boat was occupied as a home.

62. Judge Mark at his paragraph 62 said that a schedule used in the 1999 proceedings described the Wight Queen as a converted lighter/houseboat, "indicating that it was probably known then to be somebody's home." He went on to say:

> I see no reason why a careful owner checking its property could not have discovered this early in 1997.

63. I do not regard that as a solution to the ambiguity problem. A boat occupied as a home does not always stay in the same place, as anyone who walks regularly by the River Thames is aware. Moreover, there was no finding of fact to the effect that it was obvious to anyone looking at the boat that it was being used as a home. Even if it was, that would not have indicated to anyone that Mr McCrudden, a recent arrival in 1997, intended to stay for ever and to exclude others from an area, small or large, of the river bed.

64. Second, it is said that the PLA knew or could have found out that there was no easement or licence. The Respondent's written closing submissions to the FTT said:

> The [PLA] must – or should, as a reasonable landowner – have appreciated that London Borough of Hounslow had not granted an easement or a licence.

65. Whether a reasonable landowner in these circumstances would have checked is a question I do not have to resolve because the short answer here is even if the PLA had checked with the London Borough of Hounslow the ambiguity would not have been resolved. The absence of an easement or licence would not rule out the exercise of public rights of navigation, nor the simple case of persistent trespass. The act of mooring simply does not give anyone an insight into the boat owner's intentions.

66. The presence of a moored boat is as equivocal an act of possession as can be imagined. The casual observer, and likewise the paper owner, can know nothing of the boat owner's intention from the boat's presence. It is not possible to tell how long it has been there, how long the owner intends to stay, whether it is moored in exercise of an easement or of a public right, whether it is acquiring an easement, whether it has a licence to moor, or whether it is just trespassing, for a few days or a few months. As Mr Stonor QC put it in his skeleton argument, "it cannot be that, without more, every person who moors their vessel up and down the River Thames is to be taken to have the intention to possess the land under and around the vessel."

67. Turning to the Wight Queen, so far as Mr McCrudden's occupation is concerned it seems to me clear that there is nowhere near sufficient evidence to reach the conclusion, aside from his own assertions, that he had the requisite intention to possess the land. His possession was ambiguous, in that it was open to several interpretations. Whatever discussions he held with the two neighbouring boat owners, he did not make his intention manifest to the world, including the PLA.

68. That is sufficient to dispose of Mr Mendoza's objection to the PLA's application, but for the avoidance of doubt I go on to say that at least in the early years of his occupation of the Wight Queen the same ambiguity was present and is fatal to his claim. Certainly it became clear over time that Mr Mendoza was intending to stay, and the improvements he made to the boat in later years will have reinforced that message. But in the early years – whatever the neighbours thought, and whatever the PLA could have discovered if it had sorted out which boat was which and who owned which boat – its presence was ambiguous. The possession proceedings taken in 1999 and 2006 prove nothing beyond the PLA's awareness, at least from 1999 onwards, that there were houseboats persistently trespassing and that those boats, including the Wight Queen, did not have permission to be there from the London Borough of Hounslow. That does not resolve the ambiguity and I find that there was insufficient evidence for Judge Mark to have been able to make a finding of intention to possess.

69. It may be that it is in general very difficult for someone who intends to take adverse possession of the river bed by mooring a boat there to make that intention clear to the world. Mr Stonor QC suggested ways in which it might be done for example by putting up a sign saying "private land and mooring" or by putting a construction on the river bed to support the boat when moored. I make no comment on the ways in which it might be done; but it has to be done and it was not done here.

70. That disposes of the grounds of appeal on the basis of which permission to appeal was given; the appeal must succeed because of the absence of a proper finding of intention to possess. However, in argument at the hearing it became clear that there was another issue in the background. One of the possible explanations of the Wight Queen's presence was the exercise of public rights of navigation, and Mr Stonor QC suggested in argument that it was not possible for there to be adverse possession of the river bed because of those public rights. That point was not fully explored at the appeal hearing but I have subsequently received written submission from the parties about it, and although the appeal succeeds in any event I now discuss those submissions.

Public rights of navigation

71. The River Thames is subject to public navigation rights. We can all take a boat on it. Does that prevent the acquisition of title to some or all of the river bed by adverse possession? In *Ashmore* it was conceded for the PLA that it was possible to acquire title to the bed of a tidal river by adverse possession when

the river was subject to public rights of navigation. That concession is not made in this appeal.

72. In *R (Smith) v Land Registry* [2011[QB 413 the Court of Appeal held that it was not possible to acquire title by adverse possession to a public highway vested by section 263 of the Highways Act 1980 in the local authority.

73. That decision is not directly applicable here, of course. The Highways Act 1980 does not apply to the River Thames. But Mr Stonor QC says that the decision in *R (Smith) v Land Registry* is applicable by analogy, so that no part of the bed of a river subject to public navigation rights can be acquired by adverse possession.

74. In *Max Couper and the Trustees of the Couper Collection Charitable Trust v Albion Properties Ltd, the Port of London Authority and Hutchison Whampoa Properties (Europe) Ltd* [2013] EWHC 2993 Arnold J accepted that analogy. He noted that the river bed is vested in the PLA by statute for the purposes of, among other things, regulating public navigation (referring to Lord Cairns' description of the functions of the PLA's predecessors the Thames Conservators in *Cory v Bristow* (1877) 2 APP Cas 262)). He referred to *R (Smith) v Land Registry* and said, at paragraph 613, "In my judgment the PLA's position is analogous to that of a highway authority in this respect". But what he said was obiter, and was put very briefly without full exploration of the point.

75. A week later in the High Court in *Port of London Auhority v Tower Bridge Yacht and Boat Company Ltd* [2-13] EWHC 3084 (Ch) Mann J accepted – again *obiter* because exclusive possession was not established – that adverse possession of the bed of the River Thames was legally possible (paragraph 278(a)). He relied upon *PLA v Ashmore* – but as we have seen, the point was conceded in that case; and he had not been referred to the analogy with *R (Smith) v Land Registry*. Mann J explained at his paragraph 289 that he and Arnold J had each been aware of the other case and of each other's views and, where they conflicted, had not been persuaded to change them. Accordingly the two decisions conflict on this point.

76. In the present case at first instance the PLA did not seek to argue that it was impossible to acquire title by adverse possession where there are public rights of navigation. But it now takes that point. It says that the position as regards highways applies by analogy, as Arnold J said. Section 66 of the Port of London Act 1968 specifically authorises the PLA to place 'river works' which will interefere with public navigation; accordingly, Mr Stonor QC argues, it is clear that explicit statutory authority is needed to authorise any interference with those rights. He points out also that there is no authority for public navigation rights being extinguished by adverse possession.

77. Mr Jacobs by contrast points to Mann J's decision, and of course to the imprecision of the analogy with a public highway.

78. I take the view that there can be no absolute rule that adverse possession is impossible on the bed of a river that is subject to public rights of navigation.

Equally, those rights cannot be extinguished by adverse possession. In this case the Wight Queen is moored on an arm of a river that is little used; public navigation happens in the wider channel on the other side of the long island in the midst of the river. Realistically the Wight Queen's presence has no effect upon the public in its exercise of its right to navigate. It is not necessary to adapt the law of adverse possession to cater for the case where a member of the public perversely insisted on taking a boat or a canoe, not along the open water, but across the very place where this boat is moored. That does not happen and there is no need for the law to bend to allow it to happen. At the other extreme it is not clear to me how it would be possible to take adverse possession of the whole width of a publicly navigable river, because the public rights of navigation would prevent factual possession.

79. Mr Jacobs points out that in his decision in *Couper*, on the question of whether Mr Couper's boats constituted a public nuisance, Arnold J referred at paragraph 533 to *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* [1979] SC 156, a decision of the Scottish Court of Sessions, where it was said:

> … the right of navigation is not to be regarded as a right to sail in every square inch of the surface of the sea or to use for casting anchor in every square inch of the sea bed. The public right is undoubtedly wide but it should not be regarded as having been infringed save in circumstances in which what is done … constitute or is likely to constitute a material interference with its exercise by members of the public exercising their right reasonably."

80. That case was about the sea, and it was referred to by Arnold J in the context of nuisance; I mention it only as an illustration of what I am saying about public navigation rights on the River Thames.

81. In this case, therefore, had Mr Mendoza been able to establish not only factual possession but also intention to possess I would not have found that the public's right of navigation – undisturbed in fact by the Wight Queen's presence – would have made any difference to that. The analogy with the public highway breaks down because highways – which have to be completely open to traffic and pedestrians – are so very different from rivers. A closer analogy is perhaps to the adverse possession of land through which a public footpath runs (as in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419); adverse possession does not extinguish the footpath and the public's rights continue unabated on the path. Here the public's rights would have continued unabated over a wide stretch of river, unaffected by what amounts in effect to a very slight narrowing of the river so far as public navigation is concerned.

Conclusion

82. There is no authority to the effect that simply mooring a boat is, without more, both factual possession and sufficient evidence of intention to possess that a finding of adverse possession can be made.

83. On the other hand there is clear authority that the self-serving evidence of an adverse possessor as to his or her intention is to be treated with caution, which

means it must be reinforced by other evidence. And for intention to be evident from the fact of possession, the authorities are clear that that possession must be unambiguous. Possession was very far from unambiguous in this case.

84. Accordingly I find that the appeal succeeds. Mr Mendoza's objection to the PLA's application for registration is not substantiated, and the registrar is directed to respond to the PLA's application as if that objection had not been made.

85. The PLA is in principle entitled to its costs of the appeal and any application should be made within 14 days of the date of this decision; directions will then be given.

JUDGE ELIZABETH COOKE

TRIBUNAL JUDGE
RELEASE DATE: 12 April 2017