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Case No: CH-2025-000082

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12/02/2026

Before :

SIR ANTHONY MANN
Sitting as a Judge of the High Court

Between :

Handy Cross Dev Co Ltd **Appellant**
- and -
Vanni Properties Ltd **Respondent**

Gary Blaker KC and Henry Webb (instructed by **Hemingways Solicitors Limited**) for the **Appellant**

Nathaniel Duckworth KC and Gavin Bennison (instructed by **Charles Russell Speechlys LLP**) for the **Respondent**

Hearing date: Thursday 29th January 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives and other websites.

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SIR ANTHONY MANN SITTING AS A JUDGE OF THE HIGH COURT

Sir Anthony Mann:

Introduction

1. This is an appeal from a judgment and order of HHJ Gerald, sitting in the County Court at Central London, dated 23rd and 24th January 2025 respectively, in relation to a boundary dispute. Just off the M40, to the north, at High Wycombe there are three developments running roughly from west to east. The most westerly is property belonging to the respondent (“Vanni”); next to that to the east is the property of the appellant (“Handy Cross”) on which it has a hotel branded “Hampton by Hilton”; and the third is a branch of Waitrose. This appeal concerns the boundary between Vanni and Handy Cross. The dispute was originally over a strip significantly wider than the ultimate dispute by some feet. By the time of final speeches it had come down significantly, as a result of Handy Cross drawing in its horns. HHJ Gerald decided in favour of the respondent (the defendant in the hearing below), Vanni. It is plain that the judge below was highly critical of the way in which Handy Cross advanced its case, including its extreme position on the boundary from which it retreated (to the extent that he ordered indemnity costs against it). The practical result of the decision below is that Handy Cross had built a small part of an access road on the wrong side of the boundary and the judge ordered that part of the roadway, kerb and planting be removed. Handy Cross now appeals that decision.
2. On this appeal Mr Gary Blaker KC argued the appeal for the appellant, and Mr Nathaniel Duckworth KC did so for the respondent. They both argued with clarity and appropriate economy. It is also right to record that Mr Duckworth’s junior, Mr Gavin Bennison, provided useful information as to what actually happened at the hearing below in one or two areas when it became useful to know that, he being the only one of the four counsel before me who appeared below and a full transcript not being available (though one day of it was).

The terrain, the subject matter and the dispute

3. Both Handy Cross and Vanni acquired their plots from Wycombe District Council (“WDC”), the common vendor. Handy Cross acquired its land pursuant to an Agreement dated 8th November 2018 followed by a transfer dated 14th December 2018. Its land is roughly rectangular with the two shorter eastern and western boundaries running north/south. To the west of the western boundary is Vanni’s land, which it acquired a year later by a transfer from WDC dated 16th December 2019. Both plots were unbuilt-on waste land at the time.

4. Handy Cross's transfer contained two plans. The first is the plan by which the land was described in the conventional way - "identified on the attached plan and shown edged red". Unfortunately that plan ("the transfer plan") was not a large scale plan, and the thickness of the lines, the absence of relevant topographical detail and the scale do not permit one to judge the position of the disputed boundary with any relevant degree of accuracy. Hence the dispute in this case. However, its shape is of relevance. The northern end of the boundary line shows a slight dog-leg to the east, and the southern end shows an even slighter, but still apparent, dog-leg to the west up to where it joins the southern boundary. The existence of those dog-legs in the boundary (wherever it was) was accepted by both parties. It was also common ground that that plan made the position of the boundary ambiguous and difficult to determine by itself.

5. There was another plan annexed to the transfer - the Drainage Plan (the name given to it in these proceedings). As that designation suggests, it was a detailed plan showing a number of drainage features added to a site plan based on final construction which showed various features of the layout of the site, including intended buildings, an access road running north-south adjacent to the disputed boundary on Handy Cross's property, giving access to a carpark round the back, trees and car-parking spaces. It is referred to twice in the body of the transfer in paragraph 12.5.1 where it is used to describe the use of drains which does not require consent and in paragraph 12.7.6 which provides that Handy Cross should not build or plant over or within 1 metre of certain service media shown on the plan. By a dashed red line it showed what it described as the "Hotel Development Boundary". It does this by reference to a key on the right-hand side of the plan which describes the dashed red line in that manner. The western boundary, shown on that plan was shown as a straight line up from the southern boundary with a dog-leg to the east at the northern end but no dog-leg at the southern end where it joined the southern boundary. It is this line, with an added southern dog-leg, which was found by the judge to be the western boundary of Handy Cross's land. This was the boundary line that Vanni contended for.

6. It is worth pointing out at this stage (because it is relevant later) that the Drainage Plan had a note on it which said it was to be read with all relevant architects' and engineers' drawings and specifications, and (a point particularly relied on by the appellants):

" 2. Do not scale this drawing. Any ambiguities, omissions and Errors on Drawings shall be brought to the Engineers attention immediately. All dimensions must be checked/verified on site."

7. At the time of the transfer there was about to be an application for planning permission to make some minor changes and to flesh out the planning permission already granted. In June 2019 that approval was given, and part of the application and approval was a

“Proposed Site Plan” which showed “Hotel Site Boundary” by a dotted red line. This plan, or a version of it, was dated April 2019 and that has become its name for the purposes of this litigation, although it had its origins in a similar or identical plan drawn before then for the purposes of the planning application. Again, this plan shows topographical features such as the hotel building, trees, carpark and an access road running down the west side of the hotel building. It is on a rather bigger scale than the transfer plan. The western boundary is shown as a line running just to the west of that access road (which of course had not yet been constructed) and it shows the northern dog-leg and a slight dog-leg to the west at the southern end, just brushing the apparent shown canopy of a tree at that end. This line, when plotted on the ground, is a little to the west of the Drainage Plan line, and is the line now contended for by Handy Cross. The relatively small difference between that plan and the Drainage Plan (no more than 3 feet) might be thought to be not worth litigating about, and one wonders whether the case would have been brought had that been Handy Cross’s original starting point instead of its more extreme position which took more feet out of Vanni’s land, but the litigation is now where it is.

8. The effect of the judgment is that the judge below determined that the Drainage Plan was the best guide to the position of the boundary and he rejected the relevance or significance of the April 2019 plan as the best evidence of the parties’ intentions. Whether he was right to do so is, in essence one of the two main questions which arise on this appeal, the other being whether he should have paid any attention to the Drainage Plan at all.

9. There is one oddity about how reliance on the 2019 plan came about. It was never actually produced to the court, and the judge never saw it. It became significant only during the closing speech of Handy Cross (which came after the main closing speech of Vanni) as the refined case of Handy Cross when it became apparent that its more extreme case was not going to find favour with HHJ Gerald. The line from that document was shown on a plan presented to the judge on which it was overlaid with other proposed boundaries so that the judge knew what the line projected from that plan would look like on the ground; but never saw the plan itself. Having said all that, it does not appear that this presentational quirk affects the issues on this appeal.

10. To complete the conveyancing story, as appears above Vanni acquired its land in December 2019. Its transfer uses a similar small scale plan to define the property transferred to the transfer plan. The disputed boundary as shown on the plan is a straight line and it is common ground that it is of no help at all in fixing the boundary of the land conveyed by Handy Cross’s 2018 transfer.

The judgment below

11. The judge below regarded the matter before him as a very straightforward one (paragraphs 14 and 21) and deprecated in strong terms the attempts of expert surveyors to make it more difficult than it was. He set out what he saw as the relevant law succinctly in paragraph 20 - the transfer was to be interpreted objectively by reference to what a reasonable person with the document in his/her hand would think it meant in the light of relevant topographical features, and acknowledged that in the event of the transfer being unclear or ambiguous (or unavailable) then extrinsic evidence, including the parties' conduct in relation to the boundary, even if it came after the transfer, could be admissible in determining their intentions so far as probative. His summary of the law is not criticised in this appeal.

12. The essence of the judge's decision is that he decided that (by the time of final submissions - see paragraph 11) he had a choice of two positions for the boundary - either the boundary as determined by the Drainage Plan (adding a southern dog-leg - paragraph 12), or the boundary as determined by the April 2019 plan. To resolve that he started with the transfer with its thick lines and two dog-legs (paragraph 21), concluding that its lines were too thick to fix the boundary with any precision. In paragraph 22 he recorded the intention of the parties to build consistently with the planning permission which had already been granted, which was sufficiently clearly set out in the Drainage Plan, though he observed that the final western flank wall of the hotel as built (abutting the access road along the boundary) was "stepped back" in a different way to that plan (that is because a different planning permission for a differently shaped hotel was granted - in the end little turned on this narrow point and it is unnecessary to complicate this judgment by developing it further at this stage). At paragraph 23 he concluded:

"23. Therefore, a reasonable person would treat what was intended to be built and has been built as having been built. And would have reached the conclusion that it was intended that that which was transferred was to enable that development to take place. From which it would follow, as night follows day, that the boundary intended was the boundary proposed or delineated by the defendant's expert, and in respect of which there is no dispute as to its location, whether it be measured up in the old-fashioned way, or all sorts of complicated mappings on using OS coordinates and so on are used."

The boundary line suggested by the defendant's expert was the line cast by the Drainage Plan.

13. Then in paragraph 25 he referred to “the only question to determine in reality is whether or not the Court should have regard to the April 2019 planning permission, even though there is no reference to it in the transfer document itself.”

14. He rejected the point because the planning permission application to which it related did not require a change of footprint. I was told that he had wondered whether there was a change of footprint which necessitated a shifting of the boundary westwards, but it transpired that there was not (there was a change but it was not material to this point). Then he advanced other reasons for not accepting it:

“27. In my judgment, putting that practical point to one side, it is not admissible for a number of reasons. First and most obvious one is that, had the parties intended – that is, Wycombe District Council and the claimant – intended the boundary to be altered, there is no reason why they could not have stated or redefined the features on the Drainage Plan. But they did not, that remained unaltered. More fundamentally, I accept the defendant’s submission to the effect that there is no sufficient evidence to the effect that at the time of the transfer, the Council anticipated that the footprint, which had already been acceded to and would be required for a Hampton by Hilton, would be built in any way materially different from the Hilton Garden Inn.”

The reference to the two types of hotel is a reference to a change in branding which occurred during the course of the planning proposals.

15. In paragraph 28 he advanced a further reason for rejecting the April 2019 plan:

“28. But in my judgement, this is a very simple and straightforward matter, which is to the effect that the true boundary of the claimants’ land is that set out by Mr French [Vanni’s surveyor expert], albeit for different reasons, in his report. I am unable to accept the claimant’s submission that the boundary should be further to the west, to be consistent with the April 2019 planning permission. The minute that is suggested, one immediately realises that it is, from a property lawyer’s perspective, it is a rather optimistic submission as the practical effect would be that without any variation or otherwise to the

contract or the transfer – even though there was a subsequent deed of variation – the parties are to be treated as enabling the true boundary to change, in line with a subsequent planning permission. That is a fairly novel approach to contracts and transfers relating to property, and it is something which would create such uncertainty as to be quite unreal.”

16. Then in paragraph 31 he pointed out what he said was a consistency between the Drainage Plan boundary and the position of a protected oak tree in the south-western corner, and an apparent white boundary post, with a fence marking, on the southern fence. He relied on this as corroborative evidence of Vanni’s case for the Drainage Plan boundary. In paragraph 32 he said:

“32. That [presumably the white post and white painted fence], broadly is in line with an extension of the middle part of the boundary delineated by the transfer, so that, had there not been a dog-leg and the line just carried on straight – as was intended, but someone forgot to actually change the transfer or Drainage Plan – then that, roughly, is where the boundary would have ended. And that is between 5.25 and 5.55 metres from the oak tree. If the southern dog-leg is drawn in, it is approximately 1.5 metres to the west, which is precisely where Mr French has drawn the defendant’s version of the line. And that, to my mind, is strongly corroborative evidence of that which I have already found.”

17. Thus the judge determined the Drainage Plan boundary line showed the western boundary of Handy Cross’s land, with a dog-leg to the west at the southern end to miss the oak tree. His order reflected that and required the removal of a limited part of the access road on the western side of the property and the payment of damages.

The law

18. As I have indicated, there was no dispute as to the applicable law and I can conveniently take it from the judgment below, which both parties accepted contained an adequate summary of the law:

“20. So far as the law is concerned, it is common ground that the transfer should be interpreted objectively, and that is by

reference to what a reasonable person with the document, as it were, in their hand, and all admissible evidence and information, including material topical features, would understand it to mean, as set out in *Pollock v Oldfield* [2018] EWHC 2743. Occasionally, subsequent conveyances and other extrinsic evidence, including parties' subsequent conduct in relation to the boundary, can be admissible if the originating transfer is not available – which is of course not the case here – or if the information in the original conveyance or transfer is unclear or ambiguous, so only insofar it is probative as to what was intended at the time of the transfer, which of course, is December 2018. As for [presumably per] Carnwath LJ in *Ali v Lane* [2007] 1 P& CR 26. ”

19. One further point of law arises in this matter concerning the dual capacities of a local authority as property owner (or otherwise as local authority) where it is also the planning authority, as is the case here. WDC was both the landowner (vendor) and the planning authority. It had applied to itself for planning permission in 2013 and 2018. As will appear, Vanni relied on this dual capacity in weakening the claimed *Ali v Lane* effect of the April 2019 plan, and in that respect relied on *Maximus Networks Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 1933 at paragraph 39 (Dove J):

“It is a matter of common knowledge, in particular to those concerned with public administration, that a local authority may have a variety of interests in terms of its functions, not all of which can be assumed to be represented by its functions as a local planning authority. A local authority as a landowner may have very different interests and concerns to take account of in exercising its powers to own and control land. It cannot be assumed that when an application of this kind is made to a local planning authority that the element of the local authority exercising its planning functions will automatically or of necessity consult that part of the council concerned with protecting its interests as a landowner or automatically be aware of all matters which the department responsible for safeguarding the council's interests as landowner would wish to draw to their attention. Certainly that assumption is not contained within the statutory framework which, uncontroversially, by implication provides for the separate notification of the landowner when it is a local authority as part and parcel of the formalities for the application itself. Thus in my view the succinct observation made in the penultimate paragraph of the quote from the pre-action protocol letter set out above was apposite. It is a wholly unproved hypothesis that simply because the local planning authority is part of the same organisation as the affected

landowner no prejudice from failing to notify the landowner could conceivably arise. It may be that the local authority as landowner would have different concerns and observations to draw to the attention of the local planning authority exercising its development control functions.”

The grounds of appeal and the issues generally

20. The Grounds of Appeal appear in the Appendix to this judgment. The central issues in the appeal are whether the judge was entitled to use the Drainage Plan at all as an indicator of the boundary, whether it bettered the April 2019 plan if it could be used; and whether the April 2019 plan could be used at all in any event. Mr Blaker’s position was that the Drainage Plan was not an appropriate boundary indicator at all and should have been disregarded for that purpose; the April 2019 plan was, in all the circumstances, an appropriate, if not the only useful, plan; and that if neither could be used then the matter fell to be remitted to the County Court to re-determine the boundary.

21. I will deal with those issues, because once they are determined decisions on the Grounds of Appeal fall into place without more. Before doing so it is necessary to set out some further background facts which do not appear in the judgment but which are said by one party or the other to be relevant to the issues which arise. They are uncontentious as facts, though their impact was sometimes disputed. Some of them relate to documents (plans) which were in the trial bundle but to which the judge was not specifically referred, but insofar as that was the case no objection was made to their being put before me. That course is probably justified by the change of tack in the claimant’s case below.

Further factual background

22. I have referred above to a white post and fence marking. The significance of that is as follows.

23. The only features on the ground at the time the dispute arose which were candidates for historical boundary markers were that post and those markings. The white fence marking was a vertical line an inch or two wide painted on to the horizontal slats of the

southern boundary fence in (to put it neutrally for the moment) the area of the disputed boundary corner. Below that, at ground level, was a white post hammered into the ground. The judge found that it was more likely than not that they were intended to mark something out and that the peg looked like a boundary marker (paragraph 31). If one extended the Drainage Plan line to the southern boundary, without the dog-leg, then the post and markings were “broadly” in line with that extension (paragraph 32). As findings and topographical features those matters are established for the purposes of this appeal.

24. Mr Reyers, a surveyor, was appointed as development manager for Handy Cross for this development and he provided a witness statement. In paragraph 20.6 he refers to the paint marking and post and says that they were “apparently” part of the marking of the boundary marked out by WDC. His witness statement goes on:

“We were informed that the boundary had been marked out but posts marking it were no longer in place, hence this did not provide a complete record and we would need to verify the boundary in accordance with the transfer plan.”

25. Mr Blaker relied on this as being evidence that these two features were not a reliable indicator of the boundary and that Vanni had accepted, or propounded, that. He was thus able to dismiss them as being of any use. I do not accept that submission. The learned judge below treated the features as being capable of being boundary markers as a finding of fact, and Mr Reyers’ evidence is not against that. He seems to be saying that generally speaking boundary features were removed. That is not inconsistent with these two features remaining. The emphasis should probably be treated as being on the word “complete”. I was not shown any cross-examination on this point. The judge’s treatment of these as being boundary features is justifiable, and at the end of day is of some significance.
26. Mr Duckworth relied on some uncontentious matters arising out of the planning history which he submitted were important background which helped to shed light on boundary questions. These are matters not recorded in the judgment, and the plans on which he relied were, as I was told, not specifically drawn to the attention of the judge at the trial, but Mr Blaker did not object to reference being made to them. I will therefore take them into account so far as relevant.
27. In 2013 WDC applied to itself (as planning authority) for outline planning permission for the whole site, and got that permission. Nothing turns on the detail of that (so far

as there was detail). Then in 2018 it applied for detailed planning permission and that permission was granted on 24th July 2018. It was for a hotel and it contained various conditions, including condition 4 relating to trees:

“4. The development shall be undertaken in accordance with the approved Arboricultural Method Statement (AMS) and Tree Protection Plan (TPP) by SJ Stephens Associates indicating trees to be retained and those to be removed; the positions of physical tree protective fencing and ground protection zones. The tree protection works shall be carried out in accordance with the approved details unless otherwise agreed in writing.

Reason:

To ensure that the trees to be retained are not damaged, in the interests of visual amenity.”

28. The tree protection plan shows the canopy of the oak tree near the south-western boundary corner, and a “root protection area” extending slightly beyond it (for the most part). Mr Duckworth proffers this as an explanation of the dog-leg. I will return to this in due course.
29. The transfer in this case was preceded by a contract dated 8th November 2018, in the usual way. The contract described the land to be transferred by reference to the same plan as the transfer, and it contained two extra plans for other purposes showing the land edged in red at a similarly small unhelpful scale (but still showing the dog-leg). It also contained a plan which was the same as the Drainage Plan. The plan was cross-referenced in provisions in the contract relating to drainage matters - to identify the scope of drainage facilities whose use is reserved to the vendor (paragraph 20.13.1), to specify drainage works to be carried out by Handy Cross (paragraph 20.13.5(a)) and for the infilling of an attenuation pond (paragraph 20.15.5(b)). It would appear that this is where the Drainage Plan did its main work and explains the marking of those features on the Drainage Plan used in the transfer.
30. There are other aspects of the documentation relied on by Mr Blaker with which it will be more convenient to deal when dealing with his submissions.

Can the Drainage Plan be relied on at all?

31. This was Mr Blaker's first point. He submitted that the plan could not be relied on at all for determining the boundary for the following reasons:
- (i) The transfer does not refer to it as a boundary-defining plan. It is obviously there for a different purpose.
 - (ii) The plan has the rubric set out above about not scaling. It is in capitals (if that matters).
 - (iii) The boundary line on the Drainage Plan is not the right shape - it has no southern dog-leg.
 - (iv) The plan was superseded by an altered plan in 2019.
 - (v) There is another relevant document at the time which relies on the same plan as the transfer plan and which does not contain the Drainage Plan.

I do not consider that any of these, whether singly or in combination, deprive the Drainage Plan of all its significance for the following reasons.

32. The process of defining a boundary depends on various factors. If the plan which purports to do so is clear enough then that is usually all that is necessary. If it is not then it is permissible to rely on all relevant surrounding factors in order to clarify ambiguity, if they are matters contained in the dispositive documents or if they are extraneous and known to both parties.
33. In the event of an ambiguity in a plan (or otherwise in the description of the property) the first port of call for clarification is likely to be the other terms of the dispositive document. The Drainage Plan qualifies under this head. It is a plan which purports to provide a more detailed indication of the boundary than the transfer plan itself, and on normal principles it would be admissible material (its force depends on the circumstances). Mr Blaker seeks to dismiss it because its purpose is one which does not involve the indication of a boundary. It is true that its purpose is another one, namely to identify an area on which works are not to be carried out by reference to a marking on the Drainage Plan. (Its purpose in this transfer did not reproduce the purpose as set out in the preceding contract - see above.) However, there is no reason why, on basic principles, it should not be used for the purposes of clarification of boundary issues which are otherwise left ambiguous just because it has that specific purpose. That prime purpose may be significant in considering the weight of what it says about other matters, but it is no reason to exclude it completely.

34. Nor is the rubric a reason for excluding it. I was told, without contradiction, that Vanni's expert's boundary line was based upon existing physical features and was not the product of a pure scaling exercise, so the rubric warning did not affect its surveyor's exercise. I am not clear as to how he did that, but accept what I was told. So the rubric was not contravened. However, even absent that point the rubric does not exclude the plan. It is commonplace for plans "for identification purposes only" to be given almost the force of a defining plan because it is the best evidence available. Similarly, while this rubric may be a warning it is not one which excludes the plan from having any use at all in defining the boundary. It was, after all, an agreed plan, and it did contain a (purported) boundary indication which is clearer than the transfer plan. Furthermore, the rubric can be seen to be more in the nature of a warning to engineers constructing the drainage facilities than anything else.
35. The fact that the Drainage Plan does not contain the southern dog-leg is certainly a relevant factor when it comes to weight, but again does not exclude it completely. It is only that southern part where it is the "wrong shape", so again care has to be taken, but this is not an excluding factor. It does not necessarily mean that the rest of the indicated line has no worth.
36. The superseding point arises out of the following facts. On 6th December 2019 (one year after the transfer) WDC and Handy Cross entered into a deed of variation of the 2018 transfer. Paragraph 2.1 provided:
- "2.1 The Drainage Plan as defined and contained within the [2018] Transfer shall be removed and replaced by the plan annexed to this Deed [drawing identified by number]"
37. Paragraph 5 provided for the deed to be registered at HM Land Registry against Handy Cross's title number.
38. The effect of the deed was to provide for the relocation of a cellular attenuation tank to the new position shown on the plan. The actual plan was roughly the left hand third of the 2018 Drainage Plan with the new tank in its new position. Otherwise the plan was the same. It showed precisely the same dotted line boundary line in precisely the same position in relation to other features. The only material omission is that this time the key which had been on the right hand side of the 2018 Drainage Plan is not there because the right hand two-thirds of the plan (where the rubric was) is not reproduced.

39. Mr Blaker's submission is that this substitution effectively robs the 2018 Drainage Plan of any significance relevant to this dispute. From December 2019 there was no Drainage Plan which purported to define the boundary because the dotted red line was not explained as a boundary line. The 2018 plan had effectively been replaced out of existence. That this was so was reinforced by the fact that the new plan was substituted for the old at HM Land Registry, where anyone inspecting the documents there would no longer find the 2018 plan with its boundary defining feature. He/she would find a plan whose dashed red line was of unknown significance.

40. I do not accept this submission. If the Drainage Plan had a significance in helping determine the boundary in 2018, as at the date of the transfer, then one judges the boundary with the assistance of that plan (so far as otherwise appropriate) and determines the boundary as it was at that time. Unless the subsequent deed of variation and plan were, on their true construction, an agreement to fix or alter the boundary fixed by reference to 2018 evidence, then it can have no effect on that determination. The deed of variation plainly did not have that purpose or function. It was just a deed of variation of the position of the tank. (One might observe that in doing so it was varying the wrong document – it ought to have varied the plan annexed to the Agreement which was the one that specified such drainage works, but no-one relied on that point.) It did not have the effect of removing the prior effect of the previous plan so far as it was helpful in determining the boundary. I would have thought it would not have had the effect of removing the obligations about drainage referred to in the contract either, which affected a wider area than the 2019 plan, but did not receive any argument based on that.

41. Point (v) is based principally on an Option granted at the time of the transfer. By an Option Agreement dated 14th December 2018 (the same date as the transfer) Handy Cross granted WDC an option to repurchase within two years if the hotel was not substantially commenced within 1 year. The details do not matter here. What is said to be of significance is that the land is described by reference to the same (inadequate) plan as the transfer plan, and without a Drainage Plan being included. Mr Blaker said that this meant that the Option Agreement would have to be operated in relation to land whose scope was determined without the benefit (if that is what it was) of the Drainage Plan. That meant that the Drainage Plan could not be used to amplify the boundary.

42. This point is hopeless. It amounts to an argument that any clarity introduced into the transfer by the Drainage Plan would be lost in construing the Option Agreement, so that the lack of certainty in the Option Agreement would re-infect the transfer whose terms could otherwise have been made clearer. When analysed in that way the hopelessness of the submission becomes apparent. Furthermore, the Option Agreement refers to both the transfer (transferring the land which is the subject of the option) and the preceding agreement, both of which have the Drainage Plan. The idea that one could not, in those

circumstances, go back to the transfer to see what land was actually transferred, which is the same land as covered by the Option Agreement, is completely misplaced.

43. For those reasons Mr Blaker's submission that the Drainage Plan cannot be used at all to assist in resolving the boundary position fails. The plan is available so far as it is helpful. It is a piece of evidence as to where the parties agreed the boundary to be. It cannot simply be ignored.

Where the Drainage Plan places the boundary

44. At this point it is useful to consider where the Drainage Plan and surrounding evidence would place the boundary. As to this there is, in the end, little dispute. It is essentially the line which the experts have agreed on the ground as being cast by the Drainage Plan line, but with a kink to reflect the dog-leg shown on the transfer plan. On the ground this places a smallish amount of the access road on the wrong (Vanni) side of the boundary. The judge held (paragraph 5) that the kink was there to avoid fouling the oak tree in the south-western corner, and the tree matters in the 2018 planning conditions (see above) make that likely. The kink specified by the judge would avoid fouling the roots. The uninked line coincides more or less with the white post and paint (though not precisely) and adds force to the main part of the line (before the kink) being the Drainage Plan line. All that is in line with the judge's findings.
45. The reason why that is said to be the wrong boundary is because of the April 2019 plan. Mr Blaker's case is that that plan is the best, if not the only, good evidence, with appropriate detail, of the intention of the parties as to where the boundary lies. This boundary lies a small number of feet to the west. I therefore turn to that.

The effect of the 2019 plan

46. It was not disputed that the mere fact of this plan coming into existence after the date of the transfer was not a disqualifying factor in seeking to ascertain the intention of the parties as to the boundary. *Ali v Lane* renders it potentially admissible as a post-transfer fact if it qualifies as a sufficient indication of the intention of the parties (and I would emphasise at this point both parties).

47. The judge below rejected the April 2019 plan as having anything to do with the boundary. He referred to the subsequent planning permission to which it was linked and found that it was not necessitated by a change in the footprint of the hotel for which that planning application applied (paragraph 26). He also found that if the parties had intended a change in the boundary position they could have agreed that formally (paragraph 27) and that it could not have reflected the intention of the parties because there was no reason arising out of the planning application to change the boundaries. It would be a novel proposition to allow a boundary to change via a planning application. I confess that I have found these reasons, as they stand, to be a little hard to follow, but I suspect that the judge's exposition was not assisted by the last minute reliance on this plan and the development (or lack of it) of argument based on and against it.

48. Be that as it may, the argument before me on this appeal was more focused in its nature. It went to the unilateral or bilateral (as the case may be) nature of this plan. A post-transfer event or matter, admissible as a result of the clarification of the law in *Ali v Lane*, must be sufficiently probative of the intention of both parties. That means that there must be an element of bilateralism about it - for example, a demonstration of a joint activity, or actual agreement, or acquiescence. The act of one party by itself is unlikely to be sufficiently probative of the intention of both parties.

49. It is here that reliance on the April 2019 plan runs into potential difficulties, which the argument before me sought to expound and to address. The plan had its genesis as being a plan submitted in support of a planning application made on 21st December 2018 (ie after the transfer, albeit after pre-application discussions which took place before the transfer) in respect of various reserved matters from the 2018 permission granted to WDC by itself. What became the April 2019 plan was originally provided by Handy Cross in the context of that application as a "Proposed Site Plan", being one of a suite of documents intended to replace the original approved drawings. It then emerged (with the April 2019 date) as one of the plans in accordance with which planning permission was granted in June 2019.

50. That outline of the essential facts demonstrates where reliance on the plan would, without more, break down. The plan was presented as a unilateral act on the part of Handy Cross. The plan was a general indication of where Handy Cross considered its boundaries to be. It would not normally be necessary or appropriate for a planning authority to express a view on the boundaries of the site unless the position of boundaries went to a particular issue in the process, and there is no finding, and no evidence of which I was made aware, that it did. Furthermore, WDC wore two hats in this matter - its property owning hat and its planning hat. Those are generally two different capacities, as recognised in *Maximus Networks* (above). It was also explicitly recognised in the agreement to purchase. Paragraph 48 ("Miscellaneous") said:

“ 48.1 Nothing herein contained or implied shall prejudice or affect the rights powers duties and obligations of the Seller in the exercise of their functions as a local or planning authority and the rights powers duties and obligations of the Seller under all public and private statutes byelaws order and regulations may be as fully and effectively exercised in relation to the Property as if Wycombe District Council were not the Seller or the owner of the Property, and as if this Agreement had not been executed by Wycombe District Council.

48.2 Any approval or consent given or granted by Wycombe District Council as the Seller (and as owner of the Property) in pursuance of the provisions of this Agreement shall not be deemed to be given or granted by Wycombe District Council in any other capacity than as the owner of the Property.

48.3 Any approval or consent given or granted by Wycombe District Council in any other capacity than that of owner of the Property shall not be deemed to be or constitute an approval or consent by Wycombe District Council as the Seller (and as owner of the Property) nor shall the Buyer be excused from making application to the Seller for its approval or consent pursuant to the terms of this Agreement by reason only of the Buyer having previously made application to Wycombe District Council in any other capacity.”

51. That provision would seem to reinforce the normal position and to make it clear that the council was operating in two capacities and they were to be kept separate. True it is that that was in the context of the then existing planning permissions, which were referred to in paragraph 20.11 of the purchase agreement:

“20.11 Until the Development has been practically completed, the Buyer shall not use the Property or permit or suffer the Property to be used for any purpose other than (i) the carrying out of the Development; and (ii) in accordance with the Outline Planning Permission and the Reserved Matters Planning Permission.”

However, that piece of contractual context does not gainsay what the contract explicitly says about two capacities. It is a bilateral recognition of those two capacities. If the matter stopped there it would be the case that even if the council as planners had somehow agreed the April 2019 plan as denoting boundaries (as to which there was no finding and no evidence), that consent would be confined to WDC wearing its planning hat and would not cross the boundary to WDC wearing its property-owning hat.

52. Mr Blaker seeks to overcome that conclusion by trying to establish that at the time of the transfer the parties (with WDC wearing its property hat) anticipated the planning application which was made, and which was supported by the April 2019 plan, thus creating a bilateral environment for that plan when it formed part of the ultimate approval. His submissions depend on understanding two potential brands for the hotel - Hilton Garden Inn and Hampton by Hilton. He starts from the proposition that the outline planning permission and then the 2018 permission were for a generic hotel or a Hampton Garden Inn hotel, and then establishing that by the time of the contract the parties (WDC wearing its property hat) anticipated that a Hampton by Hilton branded hotel would be built instead. That, submitted Mr Blaker, required a further application for planning permission (which was ultimately made, albeit on an “immaterial alteration” basis) and that provided the necessary bilateral environment for the April 2019 plan to acquire its boundary-defining character. There was what he described as an ongoing planning process, of which WDC the property owner was aware, and which involved a change from the former proposed branding to Hampton by Hilton.
53. I find it unnecessary to reproduce the fuller analysis of the documents carried out before me by the parties to establish the extent to which there was a relevant change of branding. It is sufficient to say this. The agreement for sale contains a covenant that until practical completion Handy Cross would not use the property for any purpose other than the carrying out of the “Development” (as defined) in accordance with the two extant planning permissions. The “Development” was defined as being the construction of a 150 bedroom “Hampton by Hilton” hotel. There was a dispute as to whether the previous planning permissions would have required an amendment to allow a “Hampton by Hilton” hotel. Mr Blaker said they would, and that that amendment was anticipated by WDC the property owner, thus creating the necessary bilateral environment to bring in the April 2019 plan.
54. It is unnecessary for me to decide the extent to which that is correct or to go further into that area. Even if WDC the property owner knew that a new planning application would be required, whether to accommodate the branding or otherwise, there was no reason to suppose that it knew that the precise western (or indeed any other) boundary would be material in that planning process. It may or may not have known or appreciated that some sort of site boundary plan would be submitted but it had no reason to suppose that it would be material in defining the boundary. Nor has it been demonstrated that somehow the re-branding required a difference of construction which would somehow

affect the boundaries at all. The judge made an unappealed finding (paragraph 27 of his judgment) that there was no sufficient evidence that at the time of the Transfer the council anticipated that the footprint of intended building, which appeared on the previous plans and the Drainage Plan, would be any different, so that is not something which would affect boundaries. All in all, there is nothing in the planning and conveyancing background which ties in the council wearing its property hat into the planning process sufficiently to make the April 2019 plan, apparently not challenged by the planning department, a bilateral act to a relevant extent for the purposes of giving the plan probative effect in determining the intention of the parties in line with the law in *Ali v Lane*.

55. For the sake of completeness I should deal with one submission of Mr Blaker which actually itself relied on subsequent evidence. He said that the December 2019 substitution of the Drainage Plan was a piece of evidence demonstrating that the parties never intended that the Drainage Plan should delineate the boundary. I assume that he relied on the absence of a key denoting the dashed red line as a boundary line. There is nothing in this point. The 2019 Deed of Variation shows that the parties intended to vary the drainage provisions, and that they sought to do so in an economical and effective fashion. The removal of the key cannot sensibly be attributed to a desire to make it clear that the plan was not a boundary plan. It was almost certainly attributable to the fact that they wished to have a more blown-up plan of the relevant area, and reproducing the key was not necessary and would have required a larger piece of paper.

The Grounds of Appeal - findings

56. The previous determinations result in the following findings in relation to the Grounds of Appeal:

Ground 1. While the judge did not set out the background referred to in this Ground, this was not a material omission because when that background is considered, as it was before me, it does not reveal any basis for getting in the April 2019 plan, which is what this evidence goes to.

Ground 2 - The judge did not err in placing reliance on the Drainage Plan. He was entitled to rely on it.

Ground 3 - The judge did not err in failing to find that the April 2019 plan

represented admissible subsequent conduct which assisted in ascertaining the intention of the parties to the transfer. It did not amount to conduct of both parties.

Ground 4 - As accepted by Mr Blaker, this Ground raises matters which are consequential on the previous Grounds succeeding. As they do not succeed, neither does this Ground.

The Respondent's Notice

57. There is a respondent's notice in this appeal but in the light of my determinations on the appeal I do not need to deal with it.

Conclusion

58. It follows that I dismiss this appeal.

Appendix - Grounds of Appeal

Ground 1

1 The Judge erred in law in failing to have sufficient regard to the admissible background to the transfer of the land registered under the title number BM297292 dated 14 December 2018 (“C’s 2018 Transfer”) to the Appellant/Claimant by Wycombe District Council (“WDC”), particularly (1) the terms of the Agreement for Sale dated 8 November 2018, and (2) the then extant planning permission and proposed amendment thereto for the development of a Hampton by Hilton Hotel (pre-application advice for which was provided by WDC on 6 December 2018, ie prior to C’s 2018 Transfer).

Ground 2

2. The Judge erred in law in placing any or too much reliance on the Drainage Plan attached to C’s 2018 Transfer as (a) it was not a plan that was intended by the draftsman of the 2018 Transfer to delineate the boundary and (b) the General Notes on the said plan warned (amongst other matters) that it should not be scaled from.

Ground 3

3. Despite the Judge holding that the location of the boundary was not clear on C’s 2018 Transfer plan, the Judge failed to admit in evidence and have regard to the proposed development of the Hampton by Hilton Hotel as shown on the April 2019 planning permission drawing, despite the fact that the Agreement for Sale defines the term ‘Development’ as a Hampton by Hilton Hotel. The Judge should have held that such evidence should be treated as admissible subsequent conduct that was probative of the parties’ intentions to C’s 2018 Transfer.

Ground 4

4. The Judge erred in law in his interpretation of C’s 2018 Transfer and wrongly held that part of C’s Access Road and kerb was a trespass on the Defendant’s land, as the overlay of the

April 2019 planning permission drawing on the topographical survey shows that the Access Road and the kerb do not trespass on D's land.