FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
LAND REGISTRATION

[2023] UKFTT 00580 (PC)

Case Number: **REF/2022/0336**

IN THE MATTER OF SECTION 60 OF THE LAND REGISTRATION ACT 2002

BETWEEN:

SYED FAISAL ALI

Applicant

-and-

(1) OXANA IVANOVNA KAMARA-ABU and (2) ARTUS NAVARSKIS

Respondents

Title Numbers: **(1) EGL2586 and (2) EGL124043**

Properties: **(1) 90 Monmouth Road, Dagenham (RM9 5DB) (2) 88 Monmouth Road, Dagenham (RM9 5DB)**

For the Applicant: Mr. Joseph Meethan (counsel, instructed by Palmers Solicitors, Basildon)

For the Respondents: Mr. Harley Ronan (counsel, instructed by Dillex Solicitors, East Ham)

Before Judge Ewan Paton

Sitting at Room AP5, 10 Alfred Place, London WC1E 7LR

On 23rd May 2023 (site visit 22nd May)

DECISION

Key words: *determined boundary application – section 60 Land Registration Act 2002 – construction of conveyance – evidence – location of boundary - limits of Tribunal jurisdiction*

Cases referred to:-

Murdoch v. Amesbury [2016] UKUT 3 (TCC)
Bean v. Katz [2016] UKUT 168 (TCC) (Judge Cooke)
Lowe v. William Davis Ltd [2018] UKUT 206 (TCC) (Morgan J.)
Pennock v Hodgson [2010] EWCA Civ 873
Alan Wibberley Building Ltd v Insley [1999] 1 WLR 894
Early v. Johnson REF 2018/0258, [2021] UKFTT 0179 (PC) (5/3/2019)

Introduction

1. By an application on form DB made on 24th December 2021 (received on and dated by the Land Registry 7th January 2022), the Applicant applied under section 60 Land Registration Act 2002 for determination of the exact line boundary between i) his registered title EGL124043 to 88 Monmouth Road, Dagenham; and ii) the Respondents' registered title EGL2586 to the neighbouring property 90 Monmouth Road.

2. The precise line of the boundary contended for by the Applicant was depicted as the red line A-B-C-D on the application plan prepared by Mr. Adrian Singleton BSc. (Hons) MRICS, an extract from which is attached below as Figure 1.

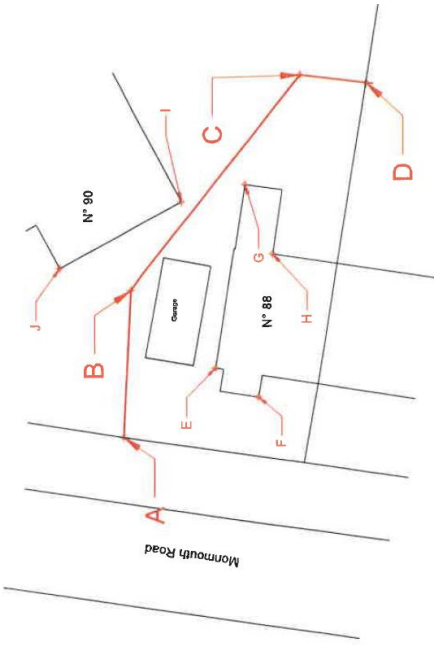

Figure 1: DB application plan

Title history

3. The two properties are former Council houses. I find that they were probably built in the 1930s and were originally in the common ownership of the London County Council then the Greater London Council (GLC). The first private conveyance of either of them was a conveyance dated 15th May 1972 of number 90, made between the GLC and a Mr. and Mrs. Russell. That recited that the property being conveyed was part of the GLC's title to a larger area of land conveyed to its predecessor the London County Council in 1923. The 1972 conveyance was made pursuant to the GLC's powers under the then Housing Act 1957, and conveyed to the Russells for £4390:-

   "the property (hereinafter called 'the property') described above and hatched black on the accompanying plan being part of the land …[comprised in the original 1923 conveyance]"

   The only description of the property was its address. The relevant part of the "accompanying plan" is below as Figure 2.

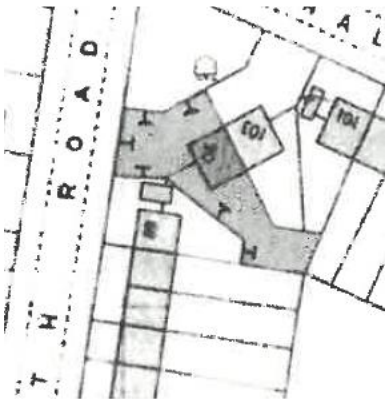

Figure 2: 1972 conveyance plan

4. The conveyance contained various covenants by the purchasers, made with the GLC for the benefit of its retained "Becontree Estate". Most of those were commonplace restrictive covenants as to use and other matters, or else statutory covenants reflecting the provisions of the 1957 Act. There were also, at "(C)", two positive covenants made. Putting aside the legal question of whether the burden of these covenants could bind successors in title to the original purchasers (to which the answer is almost certainly 'no'), they are of some significance in construing and understanding the conveyance as a whole. The first imposed an obligation to contribute a "fair proportion" of the expenses of repair and maintenance of (amongst other things) "the party walls between the property and adjoining houses" and "footpaths..access ways..sewers drains pipes cables or other apparatus serving the property and any other property forming or formerly forming part of the said Estate…". I take this as confirmation that at that time, adjoining houses and properties formed part of the retained estate then owned by the GLC.

5. The second positive covenant explained certain markings on the above plan:-

   "(ii) To maintain and as often as occasion may require renew the fences situate along the boundary/ies of the property shown marked "T" on the plan hereunto annexed."

   "T" markings are clearly visible on all boundaries of number 90 shown in the plan, including its southern boundary with number 88. It can be seen that this boundary was a 'dog leg', since number 90 is a corner plot. It can also be seen that the garage of number 88, a rectangular structure, was in existence at this date; and that the boundary line depicted on the plan was not exactly contiguous with its flank wall. A slight gap is visible between the two.

   Number 90 was then subject to first registration under title number EGL 2586 with effect from 1st June 1972. An extract from the filed plan of that title is Figure 3 below.

Figure 3: Number 90 filed plan

6. Number 88 was not conveyed into private ownership until 25th October 1982. By a conveyance of that date it was conveyed by the London Borough of Barking and Dagenham to a Mr. and Mrs. Howard, under the provisions of the Housing Act 1980, for £10,250. It is likely, and in any event I find on the balance of probabilities, that between 1972 and 1982, there was a transfer of housing on the Becontree Estate, including this property, from the GLC to the London Borough of Barking and Dagenham; which did not itself induce first registration.

7. The 1982 conveyance was in a similar, if slightly updated form to that of the 1972 conveyance. It described the property conveyed as follows:

   "(v) 'the property' means ALL THAT piece or parcel of land TOGETHER WITH the dwellinghouse erected thereon as the same is described in the heading of this deed [again, the only description was its address] and is shown for the purpose of identification only edged in red on the plan annexed hereto."

   An extract from the plan to that conveyance is below as Figure 4. The conveyance also included a fencing repair covenant made with reference to "T" markings shown on the plan:

   "Not to permit to fall into disrepair and as occasion may require to renew the fences

and/or wall situate along the boundaries of the property marked "T" on the plan hereunto annexed."

The fences marked with "T" were along the western and southern boundaries of number 88, not its northern boundary with number 90.

Figure 4: 1982 conveyance plan of number 88

8. Number 88 was registered under a new title EGL 124043 with effect from 15th November 1982. An extract from the filed plan of its title is below as Figure 5.

Figure 5: filed plan of title EGL 124043 to number 88

Section 60 LRA 2002 applications: jurisdiction and general principles

9. An Applicant who applies under section 60 Land Registration Act 2002 for determination of the exact line of the boundary between two registered titles is obliged by the accompanying rules (rules 118 to 120 Land Registration Rules 2003) to identify the "exact line of the boundary claimed", and provide "evidence to establish the exact line of the boundary". The plan on which this is depicted must also comply with the technical requirements of Land Registry Practice Guide 40. If the registrar is satisfied that the application lodged shows an "arguable case that the exact line of the boundary is in the position shown on the plan", the application may proceed to the next stage of notice being given to potential objectors. Any person may object to any application made to the Land Registry, including a determined boundary application, but in practice the most likely objector will be the owner of the adjacent property. If the objection is maintained and the dispute is not resolved, the matter is referred to this Tribunal for determination.

10. It is important to understand, in particular as a result of relatively recent cases, what that "matter" is, and therefore what this Tribunal is and is not doing when it considers

a disputed determined boundary application.

11. Following a series of cases including *Murdoch v. Amesbury* [2016] UKUT 3 (TCC), then *Bean v. Katz* [2016] UKUT 168 (TCC) (Judge Cooke) and culminating in *Lowe v. William Davis Ltd* [2018] UKUT 206 (TCC) (Morgan J.), and as later considered by the Law Commission in their 2018 Report *Updating the Land Registration Act 2002* (Law Comm No. 380), I take the current understanding of this Tribunal's jurisdiction under section 60 LRA 2002 to be as follows:-

    i) the Tribunal's essential jurisdiction is to consider the actual section 60 application before it, to which it may give effect or cancel, either in whole or in part. under rule 40 of the Tribunal rules.

    ii) its primary jurisdiction on such an application is *not*, therefore, a general and free ranging jurisdiction to make a declaration or determination of the location of the boundary, wherever it might be and on whatever basis, or to grant any other relief. The "location of the boundary" *may*, however, be determined by the Tribunal within its jurisdiction to resolve the "matter" consisting of the specific disputed determined boundary application before it, having regard to the Applicant's and Respondent's respective cases on that issue. That 'location' issue may be part of its reasoning in either giving effect to or rejecting the application: see *Lowe*, above.

    iii) the Tribunal may take the view that the application for exact determination before it is not made out – for example on 'plan precision' or similar technical grounds (as in *Lowe* itself) - and so should be cancelled. It may however make a decision in those same proceedings as to the "location of the boundary" otherwise in favour of the technically 'unsuccessful' Applicant (as in *Lowe*). This Tribunal has also on occasion made such a finding in favour of the Respondent, as in e.g. a decision of my own in *Early v. Johnson* REF 2018/0258, [2021] UKFTT 0179 (PC) (5/3/2019)

    iv) This would, however, technically leave the boundary between the two registered titles in question as a general boundary only. There also remains, after *Lowe* (in which despite the invitation of Morgan J., this point was not argued and determined), an uncertainty as to the legal status of the Tribunal's decision on "the location of the boundary" in such a case, in particular whether it gives rise to an issue estoppel between the parties against litigating that issue in further proceedings. It seems implicit and clear from *Lowe* that such a decision at least gave rise to something which was capable of being appealed against, even in the absence of any actual order giving effect to that part of the decision.

    v) in some case the Tribunal may be able to give effect to the application in part, and add a condition to the direction given to the Chief Land Registrar, under rule 40 of the Tribunal rules, by way of imposition of a slight variation as to part of the application plan originally submitted (as in *Bean v. Katz*, where such a condition and variation was imposed as to a "small" curved section of the boundary line claimed, but the application was otherwise given effect to.).

    It is doubtful, however, that this provision could be used to direct determination of a precise boundary substantially or wholly different from that depicted in the application

plan.

vi) the Law Commission, in its 2018 report, noted that even after *Lowe*:

"..it is not without doubt whether the Tribunal has jurisdiction to decide that the exact line of a boundary is substantially or wholly different from the one on the application plan…" and that:

"..doubt remains as to the Tribunal's jurisdiction to determine the line of a boundary where the application fails based because of the technical inaccuracy of the plan. It is not clear whether the Tribunal can direct the registrar to reflect an entirely different boundary than contended in the application; and if the Tribunal cannot, it is not clear whether an issue estoppel would arise in respect of the Tribunal's determination of where the boundary lies." (21.19 and 21.20)

vii) the Law Commission therefore recommended (21.38) that "the LRA 2002 should make it clear, beyond doubt, that the Tribunal may make a decision in a determined boundaries application about where the boundary lies. This jurisdiction should not just include a determination of where the boundary is not situated but, if the Tribunal has the relevant evidence before it, where precisely the boundary should be drawn."

The Government accepted this recommendation in its response to the Report on 25th March 2021 (at point 51), but no legislation has yet been drafted to implement it.

The correct legal approach to construction of a conveyance and determination of a legal boundary; generally and in this case

i) relevant originating conveyance

12. These two properties were in common freehold ownership until 15th May 1972. The conveyance of number 90 on that date is therefore the date on which the legal boundary between them was first created. Until then, the GLC owned the freehold of both properties. I consider it immaterial that, as is likely, the properties were before then let on social or statutory tenancies (as to whose parcels, terms or parties there was in any event no evidence before the Tribunal). Any physical boundaries there may have been between the parcels of adjacent leases from a common freehold owner did not create any legal boundary between those properties until the freehold title was divided.

13. It is therefore the 1972 conveyance of number 90 which is the key and "originating" conveyance in determining the boundary between these properties. After that conveyance, the GLC then the Dagenham and Barking LBC could only convey, in 1980 then 1982, whatever land they retained as number 88. The 1982 conveyance could not therefore create any new or different legal boundary, or give land back to the Council or the 1982 purchasers which had already been conveyed away in 1972.

ii) construction of 1972 conveyance

14. I consider that the principles to be applied when construing this conveyance are straightforward, as is their application to the particular words and plan of the 1972 conveyance.

15. The classic modern distillation of the principles to be applied is that of Mummery LJ in *Pennock v Hodgson* [2010] EWCA Civ 873, drawing on the decision of the House of Lords in *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894, at paragraph 9:

"From [*Alan Wibberley*] the following points can be distilled as pronouncements at the highest judicial level :-

(1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land, in this case the conveyance to the defendant being first in time.

(2) An attached plan stated to be "for the purposes of identification" does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land.

(3) Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the time of the conveyance.

(4) In principle there is no reason for preferring a line drawn on a plan based on the Ordnance Survey as evidence of the boundary to other relevant evidence that may lead the court to reject the plan as evidence of the boundary."

He added at paragraph 12 that:

"Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction."

16. In *Alan Wibberley Building Limited v. Insley*, at p896A-B Lord Hoffmann observed , in relation to attempting to derive an exact boundary from the plan alone, that:-

"..the scale is often so small and the lines marking the boundaries so thick as to be useless for any purpose except general identification. It follows that if it becomes necessary to establish the exact boundary, the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features which

existed, or may be supposed to have existed, when the conveyances were drawn."

17. The short point is that if there is clear evidence from the conveyance, and the known circumstances at its date, that a particular physical feature existed in the vicinity of the boundary, then by far the more likely inference is that it is the feature itself which was intended to mark the legal boundary; rather than an arbitrary line which might be produced by a scaling exercise from the plan or other plans. By way of the simplest example, a plan might show a straight line boundary feature, but the evidence might be that there was then a long standing hedge in existence in that location, whose course was not perfectly straight. In the absence of any other factors, the clear inference and presumption in that case would be that the midpoint of the hedge as it then existed was the intended legal boundary, rather than e.g. a perfectly straight line which might have 'sliced' through it in various places.

18. There is clear documentary evidence in this case that a physical feature – a fence – existed in the boundary area between numbers 88 and 90 on 15th May 1972. It would have been a reasonable inference from the fact of the solid line on the conveyance plan that some physical feature existed there, but the wording of the covenant puts it beyond doubt:

    "(ii) To maintain and as often as occasion may require renew **the fences situate along the boundary/ies of the property shown marked "T" on the plan hereunto annexed.**"

    That is a reference to "maintaining" existing fences, not a covenant to build new ones. They were stated to lie "along the boundary/ies", which I consider to be wholly synonymous with "on" the boundary. The covenant and the "T" markings give rise to the inference that these fences were to be the sole responsibility, and so (I would infer) in the sole ownership of, the owners of number 90.

19. The general answer to the question of where the precise legal boundary was created between these properties on 15th May 1972 is therefore:

    "on the line of that fence, wherever it was."

    It cannot reasonably be inferred, in such a case, that the boundary was intended to be on some different line, so that – for example – there might be a thin strip of land on the number 90 side of that fence which belonged to number 88; or vice versa.

The Applicant's application and the exact boundary line contended for

20. For the above reasons, and the basis upon which the Applicant's present DB application has actually been made, I do not consider that it can possibly succeed and be given effect to.

21. The precise line A-B-C-D contended for by the Applicant is entirely based on the report, opinions and drawings of a building surveyor, Mr. Singleton. It is *not*, for

example, based on any specific evidence as to the historic location of any boundary feature such as a fence, or e.g. evidence of possession or other legal principles.

22. Mr. Singleton begins his report of 31st August 2022 with what I regard as the somewhat surprising statement that he has been "instructed to supply my professional opinion on the exact line of the legal boundary between [the properties]", while also noting that the Applicant's section 60 application was "based on a report and plan I previously prepared for him". Much later in his report (at paragraph 7.8.7) he appears to accept that surveyors do not have the "authority to determine a legal boundary", but since this comes at the end of an entire chapter purporting to set out the law and procedure in relation to determining legal boundaries, it appears that he used the word "authority" in the sense of "binding authority". He clearly believes that his opinions on the law, and citations of case law, carry some weight.

23. With the greatest of respect to Mr. Singleton and other members of his profession, the opinions of surveyors, whether they are chartered, building or even specialist "boundary" surveyors, on the "exact line of legal boundaries" are of no relevance. This is not a purpose for which expert opinion evidence is required or even permitted. It is a question of law and construction for the court or tribunal determining that issue. Despite this somewhat obvious point, reports are frequently produced to this Tribunal which contain such legal opinion and argument, often at length and with citation of authority. This report is a prime example of this.

24. The proper role and expertise of surveyors is in surveying and measuring, and in producing scale plans displaying those measurements. It is then for the parties, armed with such measurements and plans, to make their legal and evidential arguments to the court or tribunal, which will then decide upon them. Any detailed scale plan produced may then prove extremely useful in reflecting and depicting the decision made.

25. Too often, parties and surveyors appear to misunderstand this, and so 'put the cart before the horse' by basing their legal arguments as to the precise boundary on nothing more than a surveying and scaling exercise (from conveyance, registered title filed plans and/or OS plans) first conducted by a surveyor.

    In my judgement, this is exactly what has happened in this case.

26. Mr. Singleton's report, and the line produced as a result of it, can essentially be summarised as follows:-

    i) it is not possible to plot the exact location of the boundary feature shown on the 1972 conveyance plan simply by scaling from that plan itself, due to the limitations of its 1:1250 scale (4.6.1); however

    ii) it *is* possible to plot an exact line using underlying data from the more recent Ordnance Survey Master Map data, supplemented by his own topographical survey on the ground;

    iii) the line A-B-C-D is therefore an "absolute" line produced on this basis alone.

iv) this is encapsulated in his paragraph 3.3.3, where he states:

"My opinion is that the true position of the legal boundary must be as OS have plotted it and this can be ascertained by reference to the OS data."

27. In particular, and for the avoidance of doubt, Mr. Singleton emphasises that this line is produced *without regard* to any physical features existing at the time of the relevant conveyance. See for example the following passages from his report:-

(i) "… the boundary is at the centre of the feature line depicted by that map. The key task then is to establish precisely where that line is on the ground" (3.2.6).

Pausing there, I agree. He then, however, continues:

(ii) "The exact position of the line as measured and recorded by OS is the legal boundary **regardless of the position of any physical feature near to or upon it**" [para. 3.3.2]

(iii) "…for the purpose of interpretation of a conveyance or transfer plan deed plan using the OS map as its definition, **it is the exact position on the map that is significant, not the position of any real-world object it is intended to represent**" [para. 4.6.3].

(iv) "The use of a line on the OS map when used as a definitive conveyance plan, [sic] relies upon its inherent accuracy. **The line may not exactly pick out the feature it represents but the exact position of the line as measured and recorded by OS must become the exact legal boundary**" [para. 8.2.3].

(v) "The plan attached to the 1972 Conveyance is an extract from the OS 1:1250 scale map. **As such it is, in the absence of any words to the contrary in the transfer deed, definitive in respect of the absolute position of the legal boundary**" [para. 2.1.3a)].

(vi) "What is important is the precise location of the legal boundary, **not the apparent position of individual fences. M's [the Respondent's expert] logic fails if he is unable to prove that a fence was erected specifically as a boundary fence in 1972 to specifically affirm the new title being created at that time.** The transfer deed states that the existing fences are 'situate along the boundaries of the property' not that the fences are the legal boundary itself" [para. 5.3.3]

28. For the reasons set out above, and in the submissions of counsel for the Respondent (Mr. Ronan), I consider that all of those contentions are utterly wrong. Points (i) to (v) are wrong as general principles of construction. Point (vi) is wrong as to the specific circumstances of this conveyance. Contrary to what he states, it is *not* for the Respondents to "prove that a fence was erected specifically as a boundary fence in 1972"; and the "existing fences situate along the boundaries of the property" *did* generate the inference that they were on and so formed the boundary. Proof of the

position of this fence *is* the key to determining where the exact boundary was.

29. This approach, accompanied by a lengthy but selective purported recitation of legal principles and authorities in chapters 3 and 7 of the report, illustrates the dangers of surveyors usurping the function of lawyers (and ultimately the court or tribunal) and producing for a client a purported exact boundary line based on an incorrect application of legal principles.

30. Since there is no suggestion or argument on behalf of the Applicant that the line A-B-C-D corresponds, even by coincidence, to the line of any 1972 fence; and no evidence was adduced by the Applicant to support any such proposition; the first decision I reach is that the DB application as made simply cannot be given effect to.

31. It is, however, necessary to consider certain further aspects of this matter. In particular, rather than simply rejecting the Applicant's application on the above basis alone, it is necessary to consider whether the Tribunal can do anything else, and in particular make any alternative finding as to the "location of the boundary".

The Respondents' case

32. This is the Applicant's DB application, not that of the Respondents. The Respondents do not have to prove or establish anything. They have made no application, nor have they brought any court proceedings. They are not therefore required to establish an alternative case for where the exact boundary lies. In one sense it would be enough for them simply if the Applicant fails to establish his case on the exact boundary- in effect, if the answer to the Applicant's application was simply "Not there"; as I have already found above.

33. In practice and reality, however, Respondents who oppose determined boundary applications do usually have such an alternative theory and case. This will frequently have informed their actions and conduct in opposing the application and consequent proceedings. The Respondents have such a case here.

What else this Tribunal can do

34. Through Mr. Ronan, the Respondents do further ask me not just to dismiss the Applicant's application, but make findings in favour of their own positive case on the "location of the boundary" in doing so, in accordance with the approach in *Lowe* and the principles discussed above; but of course subject to the uncertainty identified by the Law Commission as to the status of such findings. Any such findings, lacking the precision required for a determined boundary, would, in effect, be a decision and ruling as to a more accurate general boundary.

35. If, however, I am not satisfied on the balance of probabilities as to the Respondent's alternative case, then it appears to me that it would not be possible to make any *other* finding as to the location of the boundary, not argued or pursued by either party. In other words, if the answer to the Applicant's application was "not there", the answer

to the Respondents' alternative case might be "not there either".

Further argument not open to the Applicant in these proceedings: adverse possession under LRA 2002

36. I also deal here with an issue on which I gave a brief oral decision at the outset of the hearing. By his skeleton argument filed for the hearing, Mr. Meethan for the Applicant sought for the first time to raise a new argument. No application to amend the Statement of Case had been made to this end. The attempted argument was that even if his specific case on the exact boundary was rejected, the Applicant had been in "adverse possession" of the disputed land from at least 2004 or 2006 until the Respondents' erection of their new fence in November 2021, by reason of the presence of the previous physical boundary features (although as a matter of fact this appears to ignore the Respondents' 2015 removal of the former fence – see below). This alleged possession was then said to fall within Schedule 6 paragraph 5(4) Land Registration Act 2002, as the Applicant has reasonably believed the disputed land to belonged to him.

37. Not just because it would have required a very late amendment, raising a number of new legal and factual issues, I refused to deal with this argument. This was on the grounds that I had no jurisdiction to do so. An application for title by adverse possession to any area of registered land under Schedule 6 Land Registration Act 2002 is a separate and specific statutory application, with its own procedure and forms (forms ADV1 and NAP). Such an application has to be properly made, and a registered proprietor has to be given an opportunity to object to it or require it to be dealt with under Schedule 6 paragraph 5. It cannot therefore be introduced into other proceedings, including that party's own determined boundary application, by a 'sidewind'.

38. There is crucial distinction of principle in this respect between Land Registration Act 2002 adverse possession and the pre-2002 Act variety. Prior to the 2002 Act, adverse possession had the potential *automatically* to bar registered titles by limitation. It is therefore potentially relevant, when considering a determined boundary application, to consider arguments based on historic adverse possession (i.e. accruing pre-2002 Act, under the Limitation Act 1980 and section 75 LRA 1925); since the exact boundary may have been shifted and therefore fixed automatically by such historic adverse possession (e.g. if, whatever boundary the original deeds created, a fence or hedge had been in place for over 12 years prior to 13/10/03 when the 2002 Act came into force).

39. While an LRA 2002 Act application might have been open to the Applicant, it is not the one he in fact pursued. Further, on his own case he has been dispossessed of the disputed land by the Respondents' new fence since November 2021 (see below), so would now be well out of time to make any such application under Schedule 6 paragraph 1(2).

The dispute between the present parties

40. This is, as are many determined boundary applications, a dispute between neighbours – the current owners of the two registered titles. The Applicant was registered as proprietor of number 88 with effect from 19th July 2004, and has lived there since. The Respondents, or one of them, have been registered as proprietors of number 90 since 27th April 2007.

41. I accept the evidence of a number of witnesses who provided statements for the Applicant that the position 'on the ground' at the front of the two properties at the time the Respondents purchased their property in 2007, and at all times until about April 2015, was as depicted in the Google Street View image below at Figure 5, dated August 2014 (I ignore for present purposes the annotations or markings on this and other photographs).

Figure 5: front physical boundary between properties 2007-2015

42. It can be seen from Figure 5 that there was a 'double' concrete post immediately abutting Monmouth Road, from which a close boarded panel fence ran north. That fence was hard up against the edge of the driveway of number 90. There was then a strip of foliage, looking relatively uncultivated at that date, between the fence and the garage and driveway of number 88.

43. In about April 2015, the Respondents removed the above wooden panel fence, but left its posts in place. Their evidence was that it was dilapidated in places. They instead planted a hedge in that location. Although the Applicant has since said, in his

statement, that he was unhappy about this and considered that it had moved the physical boundary closer towards his property, no dispute appears to have arisen about the hedge at that time. The hedge as it was by April 2018 can be seen in the further Google Street View images below in Figures 6 and 7. The concrete post/s at the front remained in place.

Figure 6: Respondents' hedge by 2018

Figure 7: Respondents' hedge prior to removal

44. The present dispute arose in 2021. On 12th June 2021, the Applicant, assisted by his friend Syed Hussain, cut the hedge down. He said that by that date it was some 6 feet in height and 5 feet wide. I am not concerned with, and make no findings on, precisely what was said between the parties prior to and after this event. In particular I am not concerned with whatever words were spoken or subjective opinions expressed in a conversation of that date captured on video by the Applicant. The resulting position was captured on a photograph taken by the Respondents' surveyor on 23rd June 2021, at Figure 8; and also in a video made by the Applicant on 9th July 2021 (whose "commentary" and verbal exchanges I also disregard), a screenshot from which is at Figure 9. The former fence posts remained in place, as did the shrubs on the Applicant's side next to his driveway, but the taller hedge of the Respondents had been removed, leaving bare earth in between.

Figures 8 and 9 : after Respondents' hedge removed

45. The Respondents first removed the remaining former fence posts, then, in November 2021, erected a new and higher close boarded fence. It remains there today, and was present on my site visit on 22nd May 2023, as photographed below at Figure 10 (with the parties' permission). It is not in dispute that this new fence is further south from the edge of the Respondents' driveway than the posts of the previous fence removed in 2015 (Figure 5 above). They have since planted some new shrubs in that gap.

Figure 10: present position and Respondents' new fence

The Respondents' case: the metal posts

46. The Respondents' case and position is that their new fence (in Figure 10 above) is in the correct place and on their land, even though it is further east than the fence which was in place when they first acquired their property in 2007 (Figure 5 above).

    They argue this on the basis that this is in fact well within the true line of the 1972 fence, and so the legal boundary created at that time.

47. They say that this boundary line was represented on the ground by a series of metal posts. The red arrows were added to Figures 7 and 8 above by the Respondents' surveyor Mr. Bradley Mackenzie ("BA(Hons) MSc MCIOB MRICS MCIArb MCABE; RICS Accredited Mediator; RICS Registered Valuer") in a report he compiled on 28th June 2021, to denote to the position of what he called a "partially removed and what appeared to be a historic fence post" at the front and in the ground at that point. By his measurement this was some 68cm to the right (south) of the front concrete post. A photograph of him pointing to this item is at Figure 11 below.

Figure 11: metal item in ground at front

48. Mr. Mackenzie went on, in his report, to identify some other metal posts or poles elsewhere in the vicinity of the boundary, although they were all located significantly further east – in the rear boundary area between the properties, approximately between the points B and C on the Applicant's application plan (Figure 1). He photographed some of them too, then sketched them on a plan, showing their proximity to the rear fence: see Figures 12 and 13 below.

Figure 12: a metal pole

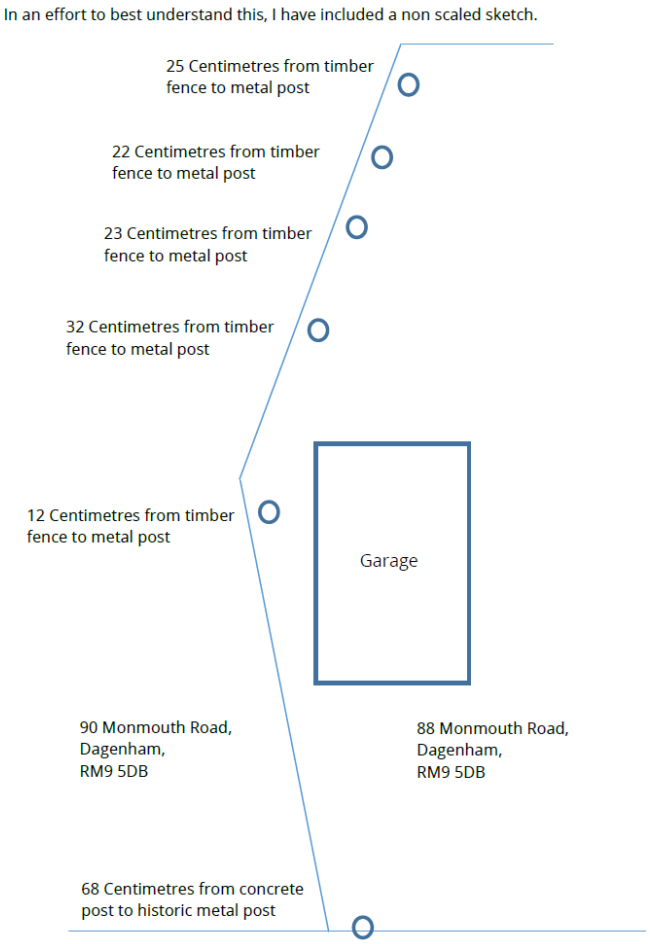

Figure 13: Mr. Mackenzie's drawing of posts

49. On this basis, however, Mr. Mackenzie then entered the realm of pure evidential speculation. Just as (in Mr. Singleton's case) surveyors' opinions on the law and the legal determination of boundaries are irrelevant and inadmissible; so are their speculations and opinions on what are essentially historical matters of fact. Mr. Mackenzie drew, from the presence of these metal posts or poles on a June 2021 inspection, the following conclusions and opinions:-

    i) that the metal object in the ground at the front "..would have been set out at the time of the original construction and [is] in my opinion an unparalleled indicator as to where the original boundary line between the two properties rested." (p15)

    ii) that the other posts were "..historic and in my opinion original" because "..they are actually set into the concrete which separates 86 Monmouth Road and 88 Monmouth Road and therefore in my indication are a very good indicator as to have been being originally at the likely time of construction around the 1940s" [sic; p17]

    iii) based in part on the location of what he described as an "historic screw" on the garage wall, he then speculated that "it is therefore my belief that at some stage historically the fence would have been tied into the rear corner of the garage, with it then continuing from the front part of the rear corner and tying to that front metal post

that I have set out above." (p19)

iv) "in my opinion there is no other reason why this metal post would be set into the concrete in this manner, as it would serve no other purpose other than to form a boundary demarcation and separation…" (p21)

v) "the historic metal posts are the correct boundary line", so that the Respondents' current fence is actually set some 22-32 cm *inside* the boundary, and on their land.

50. I consider this to be pure speculation, and that none of the above statements follow simply from the presence of the metal item in Figure 11 or the poles/posts shown above in Figure 12 and 13. Mr. Mackenzie is not an expert on 1930s/40s Council house construction or architecture, in Dagenham or elsewhere, and was not instructed as such. His opinion or conjecture on what these items were has no more value than that of anyone else. Nor does he have any personal knowledge of the site from prior to his inspection in June 2021. As I suggested during oral argument, not (I hope) facetiously, these items could be anything – including the remnants of a washing line, supports or props for another fence, or something else entirely, erected for a different purpose; by whom it is not known.

    I observe that if Mr. Mackenzie's confident opinion on what these items were, based on such lay speculation, is what has prompted this dispute on the part of the Respondents, then that is extremely unfortunate.

    Mr. Bernard Hewitt

51. The Respondents did, however, appear to have some witness evidence of fact which might potentially support their 'metal posts' theory of the boundary. Mr. Bernard Hewitt provided a brief witness statement dated 23rd August 2022 which stated as follows:

    "2. When I purchased 90 Monmouth Road, approximately 30 years ago, the boundary between number 90 and number 88 consisted of a row of conifers on the right side of the front driveway and low metal posts with wires around them which I believe was an original legal boundary.

    3. In 2007 before I sold the property on 90 Monmouth Road I did replace the conifers to concrete posts and small fence panels. As it looked tidier and ultimately would be more attractive to the prospective buyers.

    4. I spoke to the owner of 88 Monmouth Road before I replaced the fence. I made it clear that I will not remove the original metal post, and it shall remain there for the purpose of determination of the original legal boundary. They were quite happy for the replacement and no objections were raised.

    5. I never intended to move the original boundary, nor I agreed to pass part of the land to the owner of 88 Monmouth Road. I also confirmed this to the successors in the

title."

52. So looking at that statement, Mr. Hewitt was saying that:-

    i) the fence shown in Figure 5 above was erected by him, in about 2007
    ii) it replaced, but was *closer* to his property than, a former line of conifers and a low metal post and wire fence; which he "believe[d]" was the original legal boundary (although his ownership only dated from about 1992); however
    iii) this was preceded by some sort of discussion with "the owner of 88 Monmouth Road", not named but who in 2007 would have had to have been the Applicant (Mr. Ali) himself; which was tantamount to an informal boundary agreement (i.e. that a sawn off metal post left in place at the front marked the boundary).

53. Mr. Ronan, in his skeleton argument filed in advance of the hearing, identified Mr. Hewitt's evidence as "the only reliable evidence before the Tribunal which addresses the historic boundary feature", and then said (perhaps somewhat presumptuously) "A has not sought to challenge any of this evidence".

54. Mr. Hewitt, however, did not then appear at the hearing to give oral evidence and be challenged by cross-examination on his statement. No real explanation was provided for his absence. He appears to still be alive and well, and living in Colchester. It appeared to me that his absence was somewhat unexpected, by both sides.

55. This being so, I can only attached limited if any weight to his statement. This is particularly so given that some of the matters in that statement were clearly disputed by witnesses who provided witness statements and did attend to give oral evidence. In particular:-

    i) the Applicant, Mr. Ali, was clear and categorical that the position on the ground (with the fence) as shown in Figure 5 above was the position when he purchased his property in 2004. He was therefore clear that this was not something erected by his neighbour Mr. Hewitt during his own (Mr. Ali's) time of ownership.

    ii) he was equally clear that he did not have a conversation, or make some form of informal boundary agreement, with Mr. Hewitt; as alleged or at all. He did not discuss the replacement of a conifer hedge and low wire fence (of which he had no recollection or knowledge) with Mr. Hewitt, or therefore acknowledge that the metal object in the ground at the front was a boundary marker.

    iii) Mrs. Jacqueline Rogers has lived at number 79 (directly opposite) for "over 35 years". Her witness statement evidence was that the fence boundary visible in Figure 5 had been the position prior to the Applicant and Respondents moving to their properties, and for the 35 years in which she had lived at number 79. In oral evidence, she appeared however to accept that Mr. Hewitt may have erected that fence, but could not say whether it was the same place as what was there before.

    iv) Mr. Keith Rogers (the husband of Mrs. Rogers) gave similar evidence, save that he did seem to recall a "privet" hedge and an "oldish" fence in this location, and thought that the fence put up by Mr. Hewitt was in "roughly the same place".

v) a Mrs. Rita Claxton, who had lived at number 81 opposite for some "35 years", also provided a statement to the effect that the boundary had been the same (as per the fence in Figure 5) in all that time, but she did not give oral evidence.

56. Faced with this somewhat confused evidential picture, and in the absence of oral evidence from Mr. Hewitt upon which the above matters could have been explored further, I am not satisfied on the balance of probabilities as to:-

    i) whether the metal item and posts photographed by Mr. Mackenzie were indeed the remnants of a fence;

    ii) even if there was any fence there, who put it there, when and what for purpose;

    iii) whether any such fence was, or was in the same location as, the fence referred to in the 1972 conveyance, as to which there is no evidence at all.

    iv) the circumstances of the erection of a fence by Mr. Hewitt, including whether (and if so why) he erected such a fence closer to his own property than a previous physical feature.

57. Further, having heard and considered the oral evidence of the Applicant Mr. Ali, I accept his evidence that he did not have any conversation with Mr. Hewitt about the erection of the fence visible in Figure 5, which was there when he purchased number 88 in 2004. It is possible that when Mr. Hewitt referred to having a conversation with an unnamed owner of number 88, he was referring to someone else, prior to Mr. Ali (and so prior to 2004) but since he did not attend to give oral evidence, we cannot know.

Conclusion on Respondent's alternative case on location of boundary

58. I am <u>not</u> therefore able, in these proceedings, to make a decision as to the "location of the boundary" on the basis of the Respondent's case, which I do not consider to have been established on the balance of probabilities.

59. The single greatest omission from the evidence adduced on behalf of either party was any real historical evidence as to the position on the ground in 1972, and where the fence was at that time. Even Mr. Hewitt, had he attended, could only have said that he "believed" the features from his time of ownership to be the same, or in the same position as, that original feature.

Conclusion: where does this leave the parties?

60. I realise that both parties, not just the Applicant whose application I shall direct to be cancelled, may be disappointed with the outcome of these proceedings. That, however, is an outcome which flows from:-

    i) the Applicant's specific DB application being made on a misconceived legal basis;

ii) there being insufficient evidence to make a finding in favour of the Respondent's alternative case on the location of the boundary; and

iii) neither party having provided evidence on, or directly addressed their efforts and minds to, the key determinant of the original legal boundary between these properties; namely the position on the ground in 1972.

61. Where does that leave the parties, and their dispute? It seems to me that they may have the following possible options, none of which would be matters for this Tribunal unless a later disputed application were referred to it.

62. First, either of them could potentially make a fresh section 60 application to the Land Registry, on a basis different from that previously rejected. In the order I am making, I am *not* imposing a condition on either party under rule 40(3)(b) of the Tribunal rules directing the Chief Land Registrar to reject any such further application either unconditionally or subject to specific conditions.

63. Second, either of them could bring proceedings in the County Court, for alleged trespass, and seek such declaratory or other relief as they saw fit. As between themselves, to the extent that the exact boundary between their properties has not been determined, so that there is still a strip of land in dispute (of perhaps some 70-80cm in width), they could make such arguments as they saw fit as to which of them had the *better* title (e.g. based on prior possession) to it.

    In that regard, my findings above as to the position on the ground from 2004 to the present, as set out above, should be noted.

64. Third, they could potentially, if so advised and supported by sufficient evidence, attempt to bring an application to the Land Registry for title to the disputed land on some other basis, such as historic adverse possession prior to 2003. It does not appear to me that an application under Schedule 6 LRA 2002 is open to either party – not to the Respondents, who although currently in possession via their 2021 fence, cannot on the above findings have been in such possession before 2015 (by their hedge) at the earliest; and not now to the Applicant, for the reason already stated.

65. Finally, and given both i) the outcome of these proceedings and ii) the prospect of further time consuming and costly applications or proceedings on any of the above bases, they could instead make a serious attempt to resolve their differences as neighbours and reach an agreement with which they can both live.

66. Which if any of these or other options the parties pursue is a matter for them on their own independent advice. The only substantive order I will make in these proceedings is one directing cancellation of the Applicant's DB application. I have invited representations on liability for the costs of these Tribunal proceedings by the date stated in the order. After that date, if any applications are made, I will issue a further decision as to costs liability, and give directions for the assessment of any costs ordered to be paid.

Judge Ewan Paton

Dated this 9th day of June 2023

BY ORDER OF THE TRIBUNAL