**[2016] UKUT 0003 (TCC)**

Case No: UT/2014/0022

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

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

Date: 31/12/2015

**Before** :

**HIS HONOUR JUDGE DIGHT**

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**Between :**

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| **(1) GORDON MURDOCH** | |
| **(2) SANDRA MURDOCH** | **Appellants** |
| **- and -** | |
| **(1) DEAN PETER AMESBURY** | **Respondents** |
| **(2) RACHEL LOUISE AMESBURY** | |

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**Mr Nathaniel Duckworth** (**Battens Solicitors** Ltd) appeared for the **Appellants**
**Mr Philip Glen** (instructed by **Insley & Partners**) appeared for the **Respondents**
Hearing dates: 15, 16 & 19/12/14

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# Decision Approved by the court for handing down

**His Honour Judge Dight:**

1. This is an appeal against two decisions of Judge Sarah Hargreaves sitting in the First Tier Tribunal (Property Chamber) in which the learned Judge, on a reference from HM Land Registry, (1) dismissed the Appellant's application for determination of the exact line of the boundary between the Appellants' land and the Respondents' land pursuant to section 60(3) of the Land Registration Act 2002 ("the LRA 2002") and (2) ordered the Appellants to pay 80% of the Respondents' costs of the proceedings before the Adjudicator to HM Land Registry ("the Adjudicator") and before the First-tier Tribunal (Property Chamber) ("the Tribunal"), which the former became in the course of the proceedings below. It is agreed that the transformation of the Adjudicator to the Tribunal, and the learned Judge from a Deputy Adjudicator to a Judge of the First-Tier Tribunal has no bearing on the matters which I have to decide, the relevant provisions and rules remaining, so far as material, the same.

2. Notwithstanding her dismissal of the Appellant's application for determination of the exact line of the boundary between the Appellants' land and the Respondents' land the learned Judge went on to make findings as to the position of the legal boundary between the two properties even though there had been no formal application by either party to HM Land Registry relating to the position of the legal or general boundary and no reference of such an issue to the Adjudicator by the Registrar. The Appellants do not suggest that the learned Judge was wrong to dismiss the application to determine the exact line of the boundary, for the technical reasons which she gave in her written judgment, but they submit that she was wrong to go on to find the position of the legal boundary, because she lacked jurisdiction to do so, and wrong in her conclusions as to the position of the legal boundary and they seek to challenge her decision in that regard. They also challenge her decision on costs.

3. The Respondents agree that the learned Judge was correct to dismiss the application for a determined boundary but they say (1) that the learned Judge was correct in her findings as to the position of the legal boundary and had jurisdiction to make those findings, (2) that since the Appellants do not seek to set aside the dismissal of the application for the determined boundary, and the direction made by the learned Judge to cancel their application, the Appellants have no locus to challenge the findings as to the position of the legal boundary, but they nevertheless assert (3) that in any subsequent proceedings (whether on a relevant application to HM Land Registry or a reference to the Tribunal or elsewhere) an issue estoppel would arise which would prevent the Appellants from challenging the learned judge's findings as to the legal boundary notwithstanding the fact that, in their submission, they are not open to challenge by way of appeal to the Upper Tribunal. I am told that the Respondents have applied to HM Land Registry to register the boundary as found by the learned Judge.

4. The difference between the parties as to the true position of the boundary has always been a matter of inches. In paragraph 36 of her written decision the learned Judge, in commenting on the Appellants' expert's evidence, said:

> *"He concluded his evidence in chief by stating that the difference between the experts was probably the equivalent of the thickness of the lines on the [original] conveyances – which absolutely demonstrates the difficulties in this case, bearing in mind the scale of 1:1250."*

The issues before me

5. The appeal therefore raises four main issues:

   i) whether it is open to the Appellants to challenge the learned Judge's findings as to the position of the general boundary notwithstanding the fact that success on the appeal would not result in the direction by the Tribunal to HM Land Registry to cancel the determined boundary application being set aside;

   ii) whether the learned Judge had jurisdiction to decide where the legal boundary lay;

   iii) whether the learned Judge was wrong in her conclusions as to the position of the general boundary; and

   iv) costs

   There had been an issue as to whether the Appellants, who had raised the question of the true position of the legal boundary before the learned Judge, were estopped from challenging her decision to do so on this appeal, but the Respondents did not pursue that point before me. They were right to do so bearing in mind the comments of Lord Reid in the *Essex County Council* case which I refer to below. The parties have effectively reversed their positions in relation to the jurisdiction of the learned Judge to decide the position of the legal boundary because before her it was the Appellants who encouraged her to find the boundary and the Respondents who sought to persuade her simply to dismiss the Appellants' application.

The factual background and context

6. The Appellants and Respondents are neighbours in Coombe Valley Road, Preston, Weymouth, Dorset. The Appellants have been the joint registered proprietors of 73 Coombe Valley Road ("No.73"), under Title Number DT389402 since 23 November 2011 following an application by them for voluntary first registration made on 17 October 2011. The Respondents have been the joint registered proprietors of 75 Coombe Valley Road ("No.75"), under Title Number DT148185 since 11 August 2010, that Title having been first registered on an application by a predecessor in title on 16 June 1987.

7. To enable me to understand the layout of the two parcels of land and the lengthy and sometimes complex chronology I have been provided with the original trial bundles,

chronologies, skeleton arguments and a number of helpful plans and colour photographs and the reports of the experts who have been engaged from time to time to try to resolve the dispute between the parties or advance their respective contentions. I have considered all of that material but in the course of this judgment will only refer to such parts of it as are necessary for me to address the contentions of the parties on this appeal.

8. Coombe Valley Road runs in a north-westerly direction. No 75 lies to the north of No.73 and on each parcel there is a detached house in a similar central position just under half way along the parcel as one looks west from the road. The northern boundary of No.73 is the southern boundary of No.75. It is to be noted that the land comprising the two properties slopes away from the road, ie as one looks west. Between the two properties there are (or have been), at various points, hedges, shrubs, remains of concrete holes which may formerly have held fence posts, fence panels supported by timber uprights and other items the origin and significance of which have been a matter of some considerable debate between the parties and their predecessors in title.

9. The following fuller description of the physical layout and features is taken from paragraph 3 of the Decision of the learned Judge who had the benefit of visiting the site, which I have not:

> *"These properties are on the west side of the road, the houses well set back from the road, and face east. The road is narrow and on the west side, marked by a grass verge and ditch, which rises up to the frontage of the properties, across which there is another grass verge…The houses, which are detached dormer bungalows, share a concrete bridge over the ditch to gain access. The gap between the Applicants' garage and the south wall of the Respondents' house is narrow by any standards. The Applicants' property is on the left, the Respondents' on the right, as you look at them from the road…Most of the properties on the west side of the road were built in the 60's after the building plots had been sold off. They were carved out of a large plot of agricultural land, and therein lies one of the many underlying problems and issues in this case. In general terms the houses sit in the middle of the plots, which are narrower at the west end than they are at the east/road end, another source of difficulty, as is the fact that the rear gardens rise steeply to the west. In addition the plots are not rectangular, as the rear field boundary and road curve. No.73 lacks a defined frontage boundary feature such as a fence or wall. There is a telegraph pole and stop cock at the top of the ditch on its south east corner…close to what is referred to as point A. Along the frontage is a laurel hedge planted by the Applicants. Some of these features, as to general location, can be better understood by reference to aerial photographs, which were introduced by the Respondents after the first two days of the hearing in January, just before the adjourned hearing in May. Although useful, it is regrettable that they were not*

> *introduced at the outset as opportunities were missed to clarify issues with the experts. The properties are in a semi-rural location and the disputed boundary is well over 200 feet long: the difference between the experts amounts to a matter of inches at each end, and no amount of looking hard at the site visit could do more than impress upon me the respective features on which each party relies (or not), and the real difficulties of deciding this application…"*

10. The parcel of land which was to become No.73 was first carved out of a larger estate by a conveyance dated 29 June 1960 made between Emily Jane Lovell, Henry Hugh Diment and Robert Eric Diment, the executors of the estate of Hugh Diment, and Brian Winchester Pressly by which the vendors conveyed to the purchaser:

> *"ALL THAT piece of land situate on the West side of and having a frontage of Fifty feet or thereabouts to Coombe Valley Road in the Parish of Preston-cum-Sutton Poyntz in the Borough of Weymouth…and is for the purpose of identification only more particularly delineated on the plan drawn [on the conveyance] and thereon coloured pink…"*

11. There is no verbal description of the width of the rear of the parcel.

12. The conveyance plan, which purports to be drawn to a scale of 1:1250, marks the front and rear boundary lines (ie east and west boundaries) as 50 feet and 36 feet in width respectively, with apparently straight line boundaries on all sides. There are no measurements of the width of the plot at any point between the front and rear. The plan also shows a series of other plots either side of No.73 and, at each end of the plots shown on the plan, indicates the lengths of the final long boundaries at the southern end of the series of plots as being 250 feet and the northern end as 230 feet but there are no specific indications of the lengths of the northern or southern boundaries of any of the plots in between, including No.73 and No.75. The lengths of the front and rear boundaries of the various parcels shown on the conveyance plan (and the plan of No.75) vary from plot to plot.

13. By clause 1 of the first schedule to the conveyance the purchaser, being the Appellants' predecessor in title, covenanted on notice to erect *"and for ever after maintain"* stock proof fences along the western and southern sides of the plot marked "T" inwards on the conveyance plan (ie the rear boundary and the boundary with No.71). In other words the purchasers had no responsibility for fencing the boundary in dispute in this case. It appears to have been accepted before the learned Judge that there were original concrete posts along the southern boundary (paragraph 10 of the decision) and that the fence line of that boundary, with No.71, is the original boundary line.

14. No.75 is a parcel which was subsequently carved out of the remainder of the same estate by a conveyance dated 1 July 1960 made between the same executor vendors to Philip Edward Stuart Webb. By clause 1 of this deed the property conveyed was described as:

> *"ALL THAT piece of land situated on the West side and having a frontage of fifty feet or thereabouts to Coombe Valley Road…with a depth therefrom of two hundred and fifty feet or thereabouts and a width at the rear of thirty six feet or thereabouts which said piece of land is for the purpose of identification only delineated on the plan annexed hereto and thereon edged red and numbered 8…."*

15. That parcel is shown on the conveyance plan, marked with the number "8", and the lengths of the eastern and western boundaries are also marked as 50 feet and 36 feet respectively and again appear to be straight line boundaries. By clause 1 of the schedule to the conveyance the purchaser entered into similar fencing obligations to those entered into by the purchaser of No.73 with the consequence that he was responsible for fencing, on notice, and thereafter maintaining the fence along the boundary between No.75 and 73. Compliance with this fencing obligation is a matter of some considerable dispute, there being no agreement that it was ever complied with.

16. By a conveyance dated 26 October 1971 the Appellants purchased No.73 which was described in the schedule to the conveyance in the following terms:

> *"ALL THAT piece of land situate on the west side of and having a frontage of fifty feet of thereabouts to Coombe Valley Road…as the same is for the purpose of identification only more particularly delineated on the plan drawn on a Conveyance dated the Twenty-ninth day of June One thousand nine hundred and sixty…and thereon coloured pink TOGETHER WITH the messuage or dwellinghouse and premises erected on the said piece of land or on some part thereof and know as "Maru" 73 Coombe Valley Road Preston…"*

Being a mere repetition of the original deed, insofar as material, the terms of this later conveyance have been of no assistance in ascertaining the position of the boundary.

17. As I have already mentioned, the boundary between the two parcels of land has been a matter of contention for some considerable time. By 1977 the Appellants were in dispute with Mr Webb, their then neighbour, and each asserted that the other had trespassed on their land. Solicitors became involved but no agreement was reached. On 1 August 1986 the Appellants' then solicitors, Wickham & Lloyd-Edwards, wrote to Mr Webb stating that the *"boundary between your two properties has been a source of discord for some time"*, objecting to what they considered to be further acts of trespass on the Appellants' land which they identified by a plan, enclosed in the letter, on which the Appellants' solicitors had indicated what they considered to be the line of the true boundary. The Appellants' main concerns were the positions of an oil tank and a shed which Mr Webb had placed partially on what the Appellants considered to be their land, a contention which finds support in answer to question 5 in the replies to enquiries before contract given to the Appellants prior to their purchase of No.73. The dispute was not resolved (see Lloyd-Edwards' subsequent letter to Mr Webb of 17 November 1986).

18. Mr Webb's widow later sold 75 Coombe Valley Road to Mr and Mrs Crosby in about 1987. The Crosbys thereafter sold to a Mr and Mrs Tanner in about 1994. During part of the period of the Crosbys' ownership and during part of the time that No.75 was owned by the Tanners, Mr Murdoch, and at times both the Appellants, lived abroad, No.73 was tenanted for a period, the dispute over the boundary line appears largely to have gone to sleep, but in any event it remained unresolved. Mr Crosby is said, however, to have been of the view that during his period of ownership there was no subsisting dispute as to the position of the boundary. The Appellants' position is that they did not want to engage in a dispute about the boundary at a time when they were not living at the house but that Mr Crosby was well aware of the existence of the dispute. When in about 1996 the Tanners replaced the fencing behind the houses the Appellants contend that the Tanners were well aware of the unresolved dispute and, despite requests, refused to remove the encroaching shed. The allegedly encroaching oil tank, but not the footings on which it had stood, had been removed in about 1991.

19. The Respondents completed the purchase of No.75 from Mrs Tanner on 5 August 2010. The Appellants contend that Mr Murdoch had informed Mr Amesbury during July 2010, prior to the Respondents' purchase, that the oil tank footings and shed had at all material times been on the Appellants' land and that the angle irons at the front of the properties, which had been installed by Mr Webb, did not mark the boundary. The position of the boundary between the two properties was a matter of concern between these new neighbours, the parties to this appeal, from the early stages of the acquisition of No.75 by the Respondents even though it would appear that no disputes had been disclosed in the vendor's replies to enquiries before contract.

20. In the summer of 2011 the Respondents sought planning consent to build a garage in the front garden of 75 Coombe Valley Road, which the Appellants did not object to in principal, but they contended that the plan attached to the application misstated the true position of the boundary between the properties. During the course of August 2011 the dispute appears to have escalated, but I will not set out the detail of that escalation here save to say that at one point the Respondents accused the Appellants of deliberately moving and altering items which might be described as boundary features, namely concrete and metal posts and hedging, and a policeman made a visit at one point. It seems to me that a low had been reached. Planning consent for the construction of a garage, based on revised plans, was granted.

21. On 17 October 2011 the Appellants applied for voluntary first registration of their title to No.73 which was completed on 23 November of that year.

22. By an application dated 16 December 2011 the Appellants applied to HM Land Registry, on form DB, to determine the exact line of the boundary between No.73 and No.75 lodging a number of documents (listed in form DL), including a two page plan of the boundary prepared by Warde Barwick Land Surveyors dated 15 December 2011. HM Land Registry gave notice of the application to the Respondents who filed an objection, the grounds of which the Registrar considered to be arguable, and the matter was referred to the Adjudicator pursuant to section 73(7) of the LRA 2002 because it was not possible for the Registrar to dispose of the objection by agreement. The Adjudicator allocated number REF/2012/0496 to the reference. In their Case Summary, which they drafted after consulting the parties and then sent to the Adjudicator, HM Land Registry described the parties' respective positions as follows:

> *"5. The Applicants say that boundary features have been replaced and moved over the years and there is no longer any physical evidence of the original line of the boundary. They rely on measurements taken from the title deeds and say there can be no dispute as to the true line of the boundary because the two plots were originally identical in width.*
>
> *6. The Objectors dispute the accuracy of the application plan by Warde Barwick Surveys Ltd because, they say, it uses measurements taken from unreliable fixing points. They also say the plan is inconsistent with evidence of the original physical boundary, marked by the end of a retaining wall across the Objector's garden which aligns with the position of an old wooden post between the houses, the concrete base of which is still visible. The Objectors also say the application is inconsistent with plans submitted by the Applicants to the local planning authority."*

23. The Adjudicator issued directions on 17 May 2012 and 18 July 2012. In her interim order dated 2 August 2012 the learned Judge had fashioned the directions so as to enable the parties to advance their respective cases in respect of the Appellants' claim to have the boundary determined, a point which was emphasised in reasons given by a different Deputy Adjudicator in a further set of directions dated 10 October 2012 in paragraph 11 of which it is recorded that

> *"As this is a determined boundary application, it is the boundary line shown on the plan prepared by Warde Barwick Surveys Ltd in support of their application which the applicants need to demonstrate in their expert evidence. It is not sufficient for them to adduce expert evidence supporting some other boundary."*

In paragraph 13 of the reasons given in that same order the learned Deputy Adjudicator said

> *"This deadline is intended to be a final one and it is highly unlikely that it will be extended. If the applicants are unable to serve an expert's report which supports the boundary which the applicants are claiming in these proceedings they have to decide whether they continue to pursue these proceedings, or make a fresh application to Land Registry for a different determined boundary which is supported by expert evidence they are able to call. The applicants should be aware of the costs consequences if they wish to withdraw the present application."*

24. It is to be noted that both HM Land Registry and the Adjudicator at the interim stages of this application and reference focussed on the fact that the application was for a determined boundary and not the identification of a general boundary and gave directions (and guidance) to the parties to prepare for a dispute about the accuracy of the plan which had been attached to the Appellants' original application. The expert

evidence referred to was surveying evidence concentrating on the dimensions of the parcels of land in question and plotting of the features on them. Again, such evidence was intended to provide expert opinion on the accuracy of the Appellants' plan.

25. Expert evidence was exchanged. Following a meeting of experts, Mr Rose, now acting for the Appellants, and Mr Vaughan for the Respondents, on 6 December 2012 a joint statement was prepared which contained a considerable degree of agreement and also identified a number of issues for decision by the Tribunal including the location of the frontages of the two properties (which was obviously a key matter because the point from which the various measurements were to be taken was highly contentious). The experts were jointly of the view that the frontages would have been based on the Ordinance Survey maps which had been used as the basis of the plans which had been attached to the conveyances. However, as Mr Vaughan subsequently pointed out, Ordinance Survey plans show physical features not legal boundaries. They agreed that the plots would have been laid out, according to the measurements shown on the plans, by the use of a tape measure. They expressed the view that *"Plot frontages would have been arranged to fit the perceived space"* but they could not be certain as to the points from which the frontages of the plots would have been measured at the original dates of grant. As to the plants growing between the two parcels of land the Appellants' surveyor was of the view that they might have shown the physical boundary whereas the Respondents' surveyor believed that vegetation was not a reliable indicator of a legal boundary and that the evidence of historic fencing was a better guide. The joint statement was accompanied by a number of clear photographs showing features of the two properties which they considered to be significant. Following an exchange of correspondence between the experts seeking to clarify their respective positions Mr Vaughan changed his opinion in some respects and the learned Judge gave further interim directions to enable both parties to adduce additional material at the forthcoming hearing. It is plain from that brief analysis that the experts rightly left the legal questions, as to the position of the boundary, and the starting points from which various dimensions were to be measured, to the lawyers and the Adjudicator.

26. The Reference initially came on for hearing in Poole on 15 January 2013. There was a site visit before the hearing followed by two days of evidence and oral submissions which supplemented those which had been made in writing. I am told that the issue of the learned Judge's jurisdiction was raised by her, namely whether if she concluded that the application for a determined boundary should be cancelled, it would nevertheless be open to her to go on and make a substantive determination of the true position of the boundary. The Appellants then submitted that it would be open to her to do so while, I am told that the Respondents said that she could not and should not. In the event she decided that she could and should but did not later give detailed reasons for that conclusion.

27. The learned Judge, in a careful, detailed and lengthy written decision, explained why the Appellants' application for a determined boundary failed but nevertheless set out her factual and legal findings as to the position of the legal boundary. It is plain from the terms of her judgment, which I consider in greater detail below, that the learned Judge's findings as to the legal boundary were <u>not</u> the reasons why the Appellants' application for a determined boundary had failed. Her order, dated 20 August 2013, was in simple form:

> *"The Tribunal directs the Chief Land Registrar to cancel the Applicants' application made on 19 December 2011 in Form DB dated 16 December 2011".*

The learned Judge made no order and gave no directions as to the position of the legal boundary. Thus the only place in which her conclusions as to the legal boundary were to be found was in her written reasons for her decision.

28. In paragraphs 5 to 10 of her written decision the learned Judge described what she had observed at the site visit in the area between the two properties, by reference to the sections which had been identified in the report of the Appellants' expert (see his plan at Appendix IV). She specifically noted that the features described in the report accorded with what she had seen at the site visit:

> *"5. …the first section at **1A-1B** is marked by a low hedge and some planting. There is no existing boundary feature such as a fence though the obvious conclusion is that the hedge/planting roughly defines whose house is on what side. But there are remains of previous fences marked on Plan 2A [described as the Further Joint Expert Plan dated December 2012] by reference to angles and post sockets…What has been removed recently are the angle irons towards the road end of the front garden…, wooden posts further towards the house and garage and panel fencing closest to the gap between the properties, which was in existence when No.75 was sold to the Respondents, and which was removed by the Respondents in 2010…In addition the Applicants cut down a length of mature conifers running parallel to the wooden panel fence in the rear garden in December 2012.*
>
> *6. **1B-1C** covers most of the gap between the Applicant's garage wall and the south side of the Respondents' property. Again there are concrete footings, old oil tank supports, the remnants of a dilapidated shed, and the start of a wood panelled fence which proceeds through the first part of the rear gardens, attached (to put it loosely) to the south west corner of the shed erection (near "the post attached to the post", creating one of two right angle kinks which feature in this dispute…). The Applicants have contended for decades that the shed and the oil tank supports trespass onto their property. There is now no clear boundary features as such though there was until recently some fencing on the line of the post sockets…"*
>
> *7. The third section is **1C-1D**. This is a wooden panel fence, with a varied history... Its starting point at the shed is contentious... It now finishes at 1D short of a retaining wall*

*running north-south across (for the sake of a description) the Respondents' garden, forming the "rockery return", the second of the two right angled areas of dispute…Mrs Murdoch says she planted a conifer in or near the space made by the rockery return…, felled in December 2012. It is the Applicants' evidence, as given by Mrs Murdoch, which I accept, that the rockery return retaining wall was in position when they bought No.73, and that it has probably moved over the years with the pressure of soil behind it.*

*8. The line between **1D-1E** was marked roughly by a privet hedge…when inspected by [the Appellants' expert]. The garden starts to slope upwards steeply from 1D. In the vicinity of **1E-1F** is a post and wire fence which due to the ground conditions, the steepness of the slope, and the difficulty of actually inspecting it, I did not see…*

*9. Subject to various debates about historic features which have been removed. [the Respondents' expert] does not dispute [the Appellants' expert's] general description of the boundary as such and it is broadly reflected in the Respondents' statement of case…The gateposts for No.73 are set up the driveway and are therefore unhelpful as a boundary feature. The southern gatepost of the two leading to No.75 has proved more contentious.*

*10. The "eclectic" nature…of the disputed boundary is in marked contrast to the boundary between No.73 and the property to the south, No.71, where concrete posts remain at regular intervals…The extent to which measurements can be taken off these concrete posts is disputed but there appears to be little challenge to the fact that these are an original feature marking the southern boundary of No.73"*

29. The principal dispute between the parties, in their respective opening skeletons, was as to the proper construction of the conveyance of 29 June 1960 made between Lovell and Diment, by which No.73 was first carved out as a separate parcel of land, in the light of the physical features of the land from time to time and whether the structures erected between the two parcels of land from time to time were placed on the boundary line or in some other position, whether deliberately or not. The Appellants opening skeleton for the hearing before the Judge had not addressed the application for a determined boundary but had confined itself to identification of the position of the legal boundary between the two properties. They asserted that there was no dispute (between the Appellants and the Respondents) as to the boundary line between No.71 and No.73 and therefore asked the Tribunal to find that the boundary

with No.75 lay in a straight line measured 50 feet at the front (eastern end) and 36 feet at the rear (western end) from the boundary with 71 in accordance with the conveyance dated 29 June 1960 and the plan referred to in that conveyance. The emphasis in the Respondents' opening skeleton was on the inability of the Appellants to prove the line for which they contended in their application for a determined boundary and they asked for that application to be dismissed (paragraph 19). The second argument advanced by the Respondents was that even if they were wrong as to the proper construction of the title deeds and the position of the legal boundary the Appellants' title to the land to the north of the line contended for by the Respondents had been extinguished by adverse possession and on that additional ground the Appellants' application was also to be dismissed (paragraph 27). The thrust of the Respondents' position, as I see it, was that they did not ask for the Judge to make a positive finding in their favour but to conclude that the Appellants could not prove their case.

30. On the other hand the Appellants, at least by the time that they served their closing submissions, asked the Judge to find the true boundary line and not simply dismiss the application for a determined boundary arguing that

> *"It cannot have been intended that at the conclusion of a hearing of this magnitude no finding would be made as clearly a County Court Judge under the old process would have been compelled to make a finding."* (paragraph 2)

I pause there to note that the process had been chosen by the Appellants, who could have commenced proceedings in the local county court. The Respondents in closing repeated their assertion that the Tribunal should cancel the application for a determined boundary given the limited powers afforded to the Adjudicator by Rule 119 of the Land Registration Rules 2003, as reinforced by the relevance guidance to be found in section 5 of HMLR PG40, namely to give effect to the application or to cancel it in whole or in part. Their principal submission was that the Appellants' plan was not within the required tolerance for a determined boundary, namely 10mm however one interpreted the expert evidence of Mr Rose for the Appellants. The Respondents' secondary position was that in any event the divergence between the line claimed by the Appellants and the legal boundary line was significantly greater and that identification of the legal boundary was not a question of simple measurement but had to take account of (and I infer, give way to) the physical features of the land, the position and relevance of which were a matter of dispute, and the items constructed on the land from time to time according to the Respondents' evidence and the aerial photographs. They say that the dimensions on the conveyance are not exact and that there is difficulty measuring them in any event. Their third position was that by adverse possession the Appellants to any land to the north of the boundary line contended for by the Respondents had been extinguished. The Respondents' closing skeleton again concluded with a plea that the application for a determined boundary be cancelled.

The Decision

31. Towards the beginning of her written decision the learned Judge identified her task as being:

> *"[To]determine (i) where the legal boundary is between No.73 and No.75, and (ii) is the Applicants' determined boundary ("DB") line as depicted on the plan attached to their application, on the correct line? And (iii) are there any issues decided by adverse possession principles?"*

It is common ground that in deciding whether to give effect to or cancel the application for a determined boundary in the circumstances of this case the learned Judge need only have relied on the indisputable fact that the plan which had been attached to the application was not within the accepted tolerances; the experts agreed that the Appellants' determined boundary line was out by at least 11mm between points F-G on the plan. The learned Judge did not identify for decision whether she had jurisdiction to find the true position of the legal boundary, although that is an issue which she briefly touched on in paragraph 50 of her decision.

32. From paragraph 13 to 26 the learned Judge made chronological findings of fact as to the physical features of the two parcels of land from time to time with specific reference to the various fences, posts, angles, walls, shrubs and other items which had been constructed or planted on the two parcels (and/or between them) over the years. She reached her conclusions after having heard the live oral evidence of the parties, their witnesses, their experts and having read a number of documents and taken account of the late-produced aerial photographs. The detailed analysis of the oral evidence is contained in paragraphs 44 to 48. The learned Judge did not accept or reject either side's evidence on a wholesale basis but carefully picked her way through the disputes piecing the overall factual picture together as she saw it.

33. The learned Judge, in paragraphs 27 to 43, carefully analysed and again picked her way through the detailed and sometimes complicated and changing opinion evidence of the experts given in their reports and orally at the hearing. It was at the conclusion of this section of her decision that the learned Judge concluded that the line asserted by the Appellants as the determined boundary line was outside the required tolerance. She could have brought her decision to an end at that point and directed the Registrar to cancel the application for a determined boundary. However, she continued to consider the legal boundary and emphasised that although the experts gave detailed evidence as to the measurements which they had taken there remained a significant factor, unresolved by the expert evidence, as to the accurate position of the point(s) from which the relevant dimensions should be measured.

34. In rejecting the application for the boundary line to be determined, and before turning to her other conclusions, the learned Judge held (in paragraph 50) as follows:

> *"Mr Glen correctly submitted that I have to give effect to or reject the DB application: see Matson v Maynard at paragraph 48-52. His basic point is that the application has to be rejected for a number of reasons and I agree. Since every property has a legal boundary if I reject the DB application I should endeavour to make findings as to where the legal boundary is, as urged upon me by Mr Shale [for the Appellants] and recognised by Megarry J in Neilson v Poole. It is not in the parties' best interests, however hard that might be, to encourage further litigation. Plainly for the Applicants, the*

> *protection of a general boundary is found wanting. That has caused both sides to expend costs disproportionate to the difference in measurements between the experts. Deciding where the legal boundary is, if not on the DB line, has not been straightforward."*

35. The learned Judge's substantive decision as to the position of the legal boundary is set out in paragraphs 52 to 61 of her decision. In essence she held that:

    i) the dimensions in the conveyance of 29 June 1960 and the attached plan were imprecise and should not be allowed to *"triumph over physical characteristics";*

    ii) the correct approach was to consider the extrinsic evidence as well as the contents of the conveyance;

    iii) there was no evidence that either the north or south boundaries of No.73 had been laid out by the developer at the time of the 1960s conveyances: in other words she found that there were no boundary features at that time;

    iv) as a matter of fact the starting point for the measurement of the eastern boundary was point A, after rejection of the other contenders for the starting point and forming the view that the best evidence supported point A as the south-eastern boundary of No.73;

    v) the boundary between the two parcels was a straight line as demonstrated by early aerial photographs. That line was consistent with the position of angle irons in the ground later installed by Mr Webb in about 1986 as a boundary feature (in line with concrete footings in the front garden also installed by him) replacing hurdles along the same line as appeared in early photographs;

    vi) the fence post between the south-west corner of the Respondent's house (to the west of the shed) and the post socket to the east of the oil tank plinth were long-standing boundary features and the legal boundary ran between them;

    vii) the fence line running west from the fence post mentioned above to the southern end of the dwarf wall indicated the original boundary line;

    viii) the boundary then ran to point M, the south-western corner of an original fence post at the far western corner of the two parcels, which was consistent with the experts' agreed measurement of just under 36 feet between M and a point referred to as L on the Appellants' southern boundary.

36. The learned Judge rejected the defence of adverse possession in relation to the rear of the garden, partly on the ground that the parcels of land claimed by the Respondents were too small, but she held that if the Appellants had title to the land to the north of the line marked by the angle irons and concrete fence sockets installed by Mr Webb in 1986 their title had been extinguished by 1998.

37. By her subsequent decision dated 16 October 2013 the learned Judge refused permission to appeal and ordered the Appellants to pay 80% of the Respondents'

costs. The learned Judge directed herself that the usual starting point in considering a order for costs was that the losing party should pay the costs of the winning party but that it was open to the Tribunal to make a different order in the exercise of its discretion. She identified a number of reasons, from paragraph 14 of her decision onwards, why she should depart from the usual principle and order that the Appellants pay 80% of the Respondents's costs. She held that the Respondents had gained more from the litigation than the Appellants, even though they had not succeeded in every respect.

The Appeal

38. I granted permission to the Appellants to appeal on amended grounds, settled by different counsel to counsel who had appeared at the hearing below. The amended grounds were served in substitution for the original grounds which had been drafted by the Appellants in person. The Appellants do not seek to overturn the order dismissing their application for a determined boundary, but challenge the decision of the learned Judge on jurisdictional and substantive grounds. The amended grounds asserted that the learned Judge erred:

i) in holding that she had jurisdiction to find the true position of the boundary;

ii) in concluding that it lay in the position which she described in paragraph 61 of her decision;

iii) in purporting to determine the Respondents' adverse possession claim;

iv) in ordering the Appellants to pay 80% of the Respondents' costs. The Appellants submit that if they succeed on this appeal in overturning the learned Judge's substantive decision then her costs order should fall with it, but otherwise they no longer pursue an independent ground of appeal against the costs order.

39. By their notice the Respondents asserted that:

i) there being no appeal against the decision made by the learned Judge to cancel the application for a determined boundary the appeal should be dismissed;

ii) the learned Judge had jurisdiction and was right to determine the underlying dispute as to the position of the boundary and adverse possession;

iii) her legal and factual conclusions in that regard were correct;

iv) her decision on costs was within the ambit of the discretion afforded to her.

Standing to bring the appeal

40. The Respondents assert that the Appellants are not entitled to bring this appeal because they do not seek a different order to that made by the learned Judge in which she directed the Registrar to cancel the application for a determined boundary. They

submit that the right of appeal against a "decision" contained in section 111 of the LRA 2002 is a limited one and is confined to the direction given to the Registrar and not to the reasons for giving that direction. They draw an analogy with the approach taken by the courts to attempts to challenge reasons given in the course of judgments rather than the orders which follow them, and rely on *Lake v Lake* [1955] P 336 and *Compagnie Noga d'Importation et d'Exportation SA v Australia & New Zealand Banking Group Ltd* [2002] EWCA Civ 1142 and say that the Upper Tribunal is in an identical position to an appeal court, in which respect they rely on *Grosvenor v Aylesford School Governors* [2014] EWCA Civ 491.

41. The Appellants seek to distinguish *Lake* and *Cie Noga* on the grounds that in those cases the appellants had succeeded in the courts below but wished to challenge adverse findings of fact made by the trial judges in the course of their conclusions which led to the order in such cases whereas here the Appellants were unsuccessful below and wish to challenge jurisdictional and legal findings, namely as to the position of a boundary, which a proper understanding of those two cases would permit. They also rely on a decision of the Court of Appeal in *Secretary of State for Work and Pensions v Morina* [2007] 1 WLR 3033 and *LS v London Borough of Lambeth* [2010] UKUT 461. In *Morina* the Court of Appeal held that the Secretary of State could appeal on the question of jurisdiction of the Commissioner who had made the challenged decision, even though it did not seek to alter the Commissioner's order. In *LS* the Upper Tribunal construed the word "decision", in the context of a housing benefit appeal, was to be read broadly and where a right existed to appeal a decision, as opposed to a judgment or order, the right is to be construed commensurately widely.

42. Mr Glen, for the Respondents, submits that *Morina* and *LS* were decisions which turned on the proper construction of specific statutory provisions, different to those which I have to consider and that the principles stated in *Lake* were not doubted in those cases.

Discussion on standing to bring an appeal

43. Section 111(1) LRA 2002 confers a right of appeal on *"…a person aggrieved by a decision of the First-tier Tribunal…"*. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") also speaks of appeals from a "decision". It is common ground that an appeal may be brought both in respect of matters of law and matters of fact. By The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 the First-tier Tribunal is obliged to provide to the parties a *"decision notice stating the Tribunal's decision"* and *"written reasons for the decision"* (r.36(2)(a) & (b)): the rules therefore appear to distinguish between the decision and the reasons given for it, but the rules do not govern the construction of the provisions in the Acts relating to appeals and should not be construed, in my judgment, as limiting the meaning of the word "decision" in sections 111(1) or 11(1) of the two Acts or the rights of appeal conferred by them.

44. In any event, the Appellants here do not seek to challenge either the decision, in the sense of the final order made, or the reasons which gave rise to that order, both of which related to the Appellant's formal application for a determined boundary. Before me the Appellants seek to challenge the learned Judge's reasons and

conclusions in respect of separate issues, namely a dispute as to the position of the legal boundary, which the learned Judge purported to resolve only after having rejected their application for a determined boundary, and her jurisdiction to do so. It is those two decisions which the Appellants seek to challenge, which were not part of the reasons which gave rise to the terms of the directions contained in the decision notice. As a matter of principle it seems to me that it would be wrong in the circumstances to confine the interpretation of the word "decision" in the Acts to the terms of the "decision notice" and not to give it its ordinary meaning with the result that it would include the two decisions under appeal in this case. I draw comfort in reaching this conclusion from the comments of the Court of Appeal in the *Cie Noga* case which I refer to below.

45. The Appellants' argument that it would be wholly unfair if these findings could not be challenged on appeal but could nevertheless found the basis of an issue estoppel or abuse argument in subsequent applications to HM Land Registry or in other proceedings is not one which I can properly engage with. Whether the findings could give rise to an issue estoppel or abuse of the process was not fully argued before me and, in these proceedings, as opposed to any subsequent application or proceedings it would be inappropriate to determine that question prospectively when facts and circumstances may change considerably, and I therefore decline to do so. Further, whether it would be unfair, if an estoppel were to arise but the findings behind it could not be challenged in the Upper Tribunal, is not a sound basis on which to approach the problem. There may be greater substance in the Appellants' submissions based on the Human Rights Act 1998 incorporating Article 6 of the Convention relating to fair trials and Article 1 of the First Protocol relating to Protection of Property, but by reason of my conclusions below and because these submissions were based in part on the assumption that an issue estoppel would subsequently arise and in any event were not fully argued on both sides I do not rule on them.

46. The principal authority relied on by the Respondents in support of their contention that the Appellants have no right to appeal in this case is *Lake v Lake* [1955] P 336, a decision of the Court of Appeal, comprising Sir Raymond Evershed MR and Lords Justices Hodson and Parker. The Court of Appeal were faced with the challenge by a wife, on her husband's petition for divorce, to the factual findings of her adultery made in the court below. The wife had cross-prayed for a decree of judicial separation. At first instance Commissioner Sir Harry Trusted QC found the adultery proved but dismissed the husband's petition for divorce and the wife's cross-petition. The wife appealed against the finding of adultery but did not seek a different order to that made by the Commissioner at the conclusion of the case. The jurisdiction of the Court of Appeal to entertain an appeal was then governed by s.27(1) of the Supreme Court of Judicature (Consolidation) Act 1925 which provided that:

> *"Subject as otherwise provided in this Act and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court, and for all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court".*

The wife sought to appeal on the grounds that the word "judgment" in that section was capable of being distinguished from "order" and extended to the reasons given for a decision and not merely the formal document drawn up afterwards. Both the Master of the Rolls and Lord Justice Hodson gave reasons for dismissing the appeal, with both of whom Lord Justice Parker agreed. Evershed MR held (at 342) as follows:

> *"The next question that we must decide is whether, in the circumstances as I have stated them, there is, properly speaking any subject-matter upon which we could properly entertain an appeal. I have come to the conclusion that there is not."*

His Lordship then considered the form of the order before confirming that it was satisfactory, in the sense that there was no requirement for it to state the various grounds on which a petitioner or cross-petitioner had succeeded or failed, before continuing:

> *"Therefore, I start by assuming and accepting that this is an appropriate and correct form of order. From that it seems to me to follow inevitably that we could not now entertain an appeal upon the matter of fact, Aye or No, was the wife guilty of adultery? for the short and simple reason that, even if we came to the conclusion that the commissioner formed a wrong view on the facts, we could not make any alteration in the form of the order under appeal. It would still stand correctly recording the result of the proceedings, exactly as it stands now. I go further. Let it be supposed that Mr. Laughton-Scott were free to raise this matter in the court, and that the court came to the conclusion – as sometimes does happen – that the matter of the trial of this issue was not satisfactory – I am not, of course, suggesting we should in this case, because we have not gone into it – the right course for the court to take, presumably, would then be to order a new trial. A new trial of what? That again, as I think, shows the impossibility of our acceding to Mr Laughton-Scott's request, for I cannot see how we could possibly order the issue of adultery as such to be retried, seeing that a retrial could not possibly lead, in the circumstances, to any effective result whatever."*

The Master of Rolls then considered the specific statutory provision which then regulated appeals, namely s.27 of the 1925 Act (see above) which permitted the Court of Appeal to entertain appeals from *"the whole or any part… of any judgment or order"* before concluding that:

> *"..the argument cannot be sustained. Nothing which Mr Laughton-Scott brought to our attention from the cases which he mentioned persuades me that the words "judgment or order" in the rule, or where they occur in the Judicature Act, 1925, is meant anything other than the formal judgment or order which is drawn up and disposes of the proceedings, and*

> *which, in appropriate cases, the successful party is entitled to enforce or execute. In other words, I think there is no warrant for the view that there has by statute been conferred any right upon an unsuccessful party, even if his wife can be so described, appeal from some finding or statement – I suppose it would include some expression of view about the law – which may be found in the reasons given by the judge for the conclusion at which he eventually arrives, disposing of the proceeding."*

The Master of the Rolls next turned to the question of whether the finding of adultery was now res judicata such that the wife was estopped from denying the charge but declined to express a concluded view on the grounds that it was neither necessary nor desirable and that the success of such a plea in future litigation might depend upon the particular circumstances and facts of that subsequent case. Lord Justice Hodson gave the following reasons for dismissing the appeal:

> *"If that order is correct, there is nothing on the order against which the wife can appeal. Appeals under section 27 of the Judicature Act, 1925, lie against judgments or orders of the High Court, and there is no doubt that that section is dealing with the formal judgment or order. The distinction between "judgment" and "order" has been dealt with in this court by Lord Esher M.R. in* Onslow v Inland Revenue Commissioners*. I need only read one sentence: "A 'judgment' is a decision obtained in an action, and every other decision is an order". That is drawing a distinction between judgments obtained in an action and other orders, but it is only dealing with the formal order and not with the reasons for the decision, which may, in many cases (especially where, as here, alternative defences are put forward), lead to a successful defendant finding himself or herself in the position of having won a case, and having had matters decided against him or against her about which some feeling of dissatisfaction may remain. Nevertheless, it does not follow that the judge, in arriving at his conclusion, has determined those matters in that way, there is an appealable issue. That, I think, is this case. There was no slip in the order, and there is not appeal against the reasons given by the judge before making the order."*

47. Taken at face value, and if applied by analogy to the proceedings before the Tribunal, it may be said that the reasoning of the Court of Appeal in that case prevents the Appellants from challenging the decision of the learned Judge but, in my judgment, that would not recognise the differences between the *Lake* case and the instant case. First, in *Lake*, the facts that the wife sought to challenge formed part of the reasons which led to the order which was made by the Commissioner. Here the findings as to her jurisdiction and the position of the legal boundary did not lead the learned Judge to conclude that the application for a determined boundary should be dismissed: she only went on to consider the position of the legal boundary after having dismissed the application for a determined boundary. Secondly the finding as to a boundary is a

matter of law, not a matter of fact. Thirdly, the Court of Appeal in *Lake* did not have to consider whether the Commissioner had jurisdiction to make the findings of fact. The Commissioner plainly had enjoyed such a jurisdiction given that the wife was unhappy with the findings made in the exercise of that jurisdiction, whereas here there are fundamental challenges to the role and jurisdiction of the learned Judge. Fourth, the decision in *Lake* is persuasive only, based on the interpretation of a different statute to that which regulates appeals from the Tribunal.

48. In any event, *Lake* has been considered more recently by the Court of Appeal, which has adopted a more nuanced position, in *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd & others* [2002] EWCA Civ 1142. Lord Justice Waller, emphasised that the jurisdiction of the Court of Appeal was a statutory jurisdiction to *"hear and determine appeals from any judgment or order of the High Court"*, before moving on to look at *Lake*::

> *"27. Lake v Lake [1955] P 336 can at first sight be read as an authority about the importance of a "judgment" or "order" being contained in a formal document. But that I think may be by virtue of the way it was argued, and in any event is too restrictive an interpretation. A formal order was made in the then usual form in favour of the wife in matrimonial proceedings, but the Commissioner in his reasoned judgment, and by virtue of questions asked of him at the conclusion of the proceedings, had found that the wife had committed adultery. In the Court of Appeal, counsel sought to get an amendment to the formal order; that was rejected. Counsel then sought to argue that even without something in the formal order he should be allowed to appeal the finding of adultery. The appeal was rejected by the Master of the Rolls, at least as the first ground, on the basis that the formal order "records accurately the conclusion which, in the end of all, the commissioner reached" [342] and on the ground that even if successful there was nothing in the formal order that would be varied [343]. Hodson LJ's initial reasoning appears to me to be the same. It is true that in the Master of the Rolls' judgment and in Hodson LJ's judgment some reliance is placed by them on the order or judgment being the "formal order" but that is as compared (I suggest) with the "reasons for it". It is difficult to think that there simply could be no appeal without a formal order. Many appeals are brought on the basis of an order made by a judge prior to the formal document being drawn up, and In re B (A Minor) (Split Hearings: Jurisdiction) [2000] 1 WLR 790 demonstrates that the correct reading of Lake v Lake is not that some formal document recording the order must exist. <u>Lake v Lake properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would be appellant would not be seeking to challenge or vary, then there is no jurisdiction to</u>*

*entertain an appeal [my underlining]. That is in my view consistent with In re B. That this is so is not simply by virtue of interpretation of the words "judgment" or "order", but as much to do with the fact that the court only has jurisdiction to entertain "an appeal". A loser in relation to a "judgment" or "order" or "determination" has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not one he or she does not like.*

*28. The decision on a preliminary issue will be a judgment or order even if it is limited to a finding of fact. There is no difficulty where the only issue to be decided at a preliminary stage is one of fact. It is that issue on which the court has been asked to pronounce a judgment and, even if the court exercises its power to give judgment against a party on the whole of the case, since that was the issue the court was asked to determine, and since it is that issue on which the whole case ultimately turns, it will be the determination of that issue which will be the relevant judgment or determination so far as jurisdiction is concerned. In Re B is a good example of a decision on preliminary issues of fact. Furthermore the case having been adjourned, and the facts making a difference as to what might flow from the adjournment, the facts in Mr Pollock's words were pregnant with legal consequences. If however in that case the court had gone on to make a decision in relation to the legal consequences which one party would not seek to challenge, in my view that party would not be entitled simply to appeal the findings because it did not like the reasons for the decision in his or her favour. It is in that context that it might be appropriate for the court at first instance to consider whether some declaration should be granted to provide a "judgment" or "order" or "determination" which could be the subject of an appeal. If for example the findings of fact might be relevant to some other proceedings, (and Mr Pollock accepted this), it might be appropriate to make a declaration so as to enable a party to challenge those findings and not find him or herself prejudiced by them. The findings would still be pregnant with legal consequences. It is to go beyond the scope of this judgment to consider precisely what circumstances might allow for the granting of a declaration where findings of fact might affect other proceedings. If an issue estoppel might arise that I suppose might provide a basis. Even in Lake v Lake it might at least through the modern eyes relating to declarations have been appropriate to grant a declaration even*

> *though issue estoppel did not apply in that context [see the judgments of the Master of the Rolls and Hodson LJ at 345 and 347]. The fact that there may be circumstances shows the breadth of the discretion that the court has in relation to granting declarations, but the circumstances envisaged are not the circumstances that are suggested as allowing the court to make the form of declaration that Rix LJ did in this case."*

49. Therefore, according to the Court of Appeal in *Cie Noga,* the Court of Appeal the true ratio of *Lake* was not that one can only appeal against something that is contained in the order made at the conclusion of the hearing but that

> *"if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal."*

If the learned Judge's findings as to (i) her jurisdiction to try the boundary dispute or (ii) the position of the legal boundary had been recorded in her "final order" the Appellants would be seeking to challenge or vary it, such that on a proper understanding of *Lake*, as explained by *Cie Noga*, the Appellants would have standing to make and the Upper Tribunal would have jurisdiction to entertain an appeal. In the light of that authority it is appropriate to construe the references to "decision" widely so as to include the two challenged findings in this case. In my judgment, therefore, the Appellants do have the necessary standing to prosecute their appeal.

50. I was also referred to *Secretary of State for Work and Pensions v Morina* [2007] EWCA Civ 749 in which the Court of Appeal distinguished *Lake v Lake* in a case where the appellant had succeeded below but wished to challenge the reasons for that conclusion rather than its outcome. The Respondents submit that this case concerns the construction of different statutory provisions to those in play in the instant case. However, in my judgment it is some further support for my conclusions that the word "decision" in the context of a tribunal's determination may be interpreted more widely than "judgment or order", and that the policy of *Lake* ought not to prevent a challenge on appeal on a jurisdictional point.

51. *LS v London Borough of Lambeth* [2010] UKUT 461 (AAC), which concerned the scope of rights of appeal to the Upper Tribunal against an interlocutory decision by which an appeal was struck out and the proper construction of section 11 of the Tribunals, Courts and Enforcement Act 2007 is further support for a broad construction of "decision".

52. *Pavel Maslyukov v Diageo Distilling Ltd & another* [2010] EWHC 443 (Ch), which was relied on by the Respondents, was an attempted appeal by a successful party to that litigation. Mr Justice Arnold held that this was contrary to the principle in *Lake v Lake* and that the *Morina* decision had no application. In my view that decision does not prevent me from reaching the conclusion that the Appellants have standing to pursue their appeal before the Upper Tribunal. It turns on the construction of a very different statutory regime and it was not an appeal in respect of an alleged lack of jurisdiction to reach the conclusions which were said to give rise to the appeal.

53. For the above reasons I have come to the conclusion that the Appellants do have standing to pursue this appeal.

Jurisdiction of the learned Judge to resolve the boundary dispute

54. The Appellants submit that the learned Judge had no power to find the legal boundary on the application before her. They say that on a proper construction of s.60(3) of the LRA 2002 and Rules 117-120 of the Land Registration Rules 2003 the Registrar is only entitled, on an application for determination of a boundary, to complete it, cancel it or refer it (in the event of objection) to the Adjudicator. They further say that on a proper construction of sections 73, 108 and 110 of the LRA 2002 and rule 41 of the relevant Procedure Rules of 2003 (now rule 40 of the 2013 rules) the jurisdiction conferred on the Adjudicator, and later the Tribunal, following reference of an application by the Registrar is a binary one in that the Adjudicator/Tribunal must either give effect to the application or cancel it. Neither the LRA 2002 nor any of the Rules confer wider powers on the Adjudicator/Tribunal. The Appellants pray in aid the Land Registry's own Practice Guide (no.4) and the commentary of the learned editors of Ruoff & Roper (paragraphs 5.015 and 48.014). Mr Duckworth emphasises in his skeleton that this is not a surprising conclusion given that what is in issue in an application under section 60(3) is the accuracy of the applicant's plan, not the true position of the boundary, and asks me to note that there is no corresponding provision entitling a respondent to lodge a rival plan or seek the ascertainment of a rival boundary.

55. In paragraph 50 of her decision the learned Judge relied on the decision of one of her colleagues in *Matson v Maynard* (REF2004/579). Mr Duckworth, for the Appellants, submits that *Matson v Maynard* is not binding on the Upper Tribunal, but is in any event wrong for a number of reasons insofar as it purports to conclude that the Adjudicator/Tribunal has jurisdiction to find where the true boundary lies where an application for a determined boundary has failed.

56. The Respondents rely on the fact that the Adjudicator/Tribunal is a specialist forum for the resolution of a wide range of disputes relating to land, and boundaries and that the jurisdiction which it exercises is not merely a summary one (see *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch). They rely on the decision of the Deputy Adjudicator in *Matson v Maynard* and say that in the process of reaching her decision on the determined boundary application in the instant case the learned Judge was bound to make findings as to the underlying position and that she had jurisdiction to do so, citing *Silkstone v Tatnall* [2011] EWCA Civ 801 in support of that proposition.

Discussion on jurisdiction

57. Consideration of the jurisdiction of the Adjudicator/Tribunal has to begin with recognition of the fact that the office of the Adjudicator to HM Land Registry (subsequently the First-Tier Tribunal) was created by Act of Parliament and, together

with other statutory bodies, does not have the inherent jurisdiction enjoyed by the Senior Courts or an equivalent jurisdiction unless expressly granted. The House of Lords was called on to consider the extent of a similar statutory jurisdiction, namely that of the former Lands Tribunal, in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808. The House examined the powers of the Lands Tribunal, conferred by the Town and Country Planning Act 1959, in connection with the obligation of a local authority to purchase interests of owners of land affected by certain planning proposals. The statutory procedure provided for an affected owner to serve a notice on the compensating authority requiring them to purchase the affected land and for the local authority to serve a counter-notice if they objected to doing so. Section 40(2) of the Act of 1959 set out the six different grounds of objection on which a compensating authority could rely in their counter-notice, which included, at paragraph (e)

> *" that (for reasons specified in the counter notice) the interest of the claimant is not an interest qualifying for protection under this Part of this Act".*

In the event of a failure to agree, the matter could be referred to the Lands Tribunal which, by section 41(2)

> *"shall consider the matters set out in the notice served by the claimant and the grounds of objection specified in the counter-notice"*

and, by subsection (4)

> *"If the tribunal determines not to uphold the objection, the tribunal shall declare that the notice…is a valid notice. "*

The compensating authority's counter-notice in that case relied on the grounds of objection contained in paragraph (f) of section 40(2) but made no mention of, and could not be construed as relying on, the ground contained in paragraph (e) of section 40(2). Before the Lands Tribunal the compensating authority asked the tribunal to find, as a preliminary point of law, that the respondent's interest did not qualify for protection, in other words that there was a valid ground (e) objection. The Lands Tribunal and the Court of Appeal (following a statement of case by the Lands Tribunal to the Court of Appeal) answered that question and held that the respondent's interest did indeed qualify.

58. The compensating authority appealed to the House of Lords on the grounds that the Lands Tribunal and the Court of Appeal had decided the substantive issue incorrectly. It would appear that the respondents made submissions in respect of the substantive issue before the House, but also addressed the question of whether the Lands Tribunal and the Court of Appeal had jurisdiction to determine the paragraph (e) objection, arguing that the House of Lords should not answer a question which had not been referred to the Lands Tribunal and had not therefore been properly before the Court of Appeal. Lord Reid, in his speech at p.816, said:

> *"The Court of Appeal did not give effect to a preliminary objection by the present respondents but proceeded to answer*

> *the question in the case in their favour. Your Lordships, being inclined to take a different view about the proper answer to this question, heard a fuller argument on the preliminary objection. For reasons, which I shall state in a moment, I am of opinion that the Lands Tribunal had no jurisdiction to entertain or decide this preliminary point of law, and that accordingly this case should never have been stated and the question in it should not have been answered by the Court of Appeal, and should not now be answered by your Lordships."*

Having examined the relevant provisions of the Town and Country Planning Act 1959 relating to the jurisdiction of the Lands Tribunal his Lordship came to the conclusion that the Lands Tribunal

> *"had no jurisdiction to do anything more in this case than to determine whether the objection in the appellants' counter-notice should or should not be upheld. The question in the case stated is in no sense a preliminary point of law. It is irrelevant to the question referred to the tribunal because, whichever way it is answered, the answer can make no difference in determining whether the objection in the counter-notice is a valid objection. Its purpose and effect could only be to determine the validity of a ground of objection not stated in the appellants' counter-notice and, therefore, not referred to the tribunal."*

59. His Lordship then considered the argument that either there had been a notional amendment of the counter-notice, so as to include the preliminary point, or alternatively a waiver of what the compensating authority described in argument as procedural matters *"even though the procedure is prescribed by statute"*. Lord Reid dealt with the issue as follows:

> *"But the appellants say that the respondents cannot be allowed to maintain this point now because they consented to the matter being dealt with by the tribunal. What in fact happened was that the appellants requested the tribunal to deal with this point as a preliminary point of law; this request was intimated to the respondents and they did not object; the respondents appeared before the tribunal and argued the point but, not being then alive to their rights, they did not protest. I need not consider whether this amounted to a consent to widening the reference to the tribunal, because, in my judgment it is a fundamental principal that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction."*
>
> *"If the High Court, having general jurisdiction, proceeds in an unauthorised manner by consent there may well be estoppel. And an arbitrator, or any other tribunal deriving its*

> *jurisdiction from the consent of parties, may well have his jurisdiction extended by consent of parties. But there is no analogy between such cases and the present case. The tribunal in the present case had no power to state a case except with regard to some matter arising out of the exercise of its limited statutory jurisdiction, and this stated case does not deal with any such matter. I am, therefore, of opinion that the stated case was not properly before the Court of Appeal and is not properly before your Lordships. Accordingly this House ought to refuse to answer the question set out in the case stated…"*
>
> *"But, in the circumstances, I do not think that it would be right simply to leave the matter there. The Court of Appeal have answered the question and their answer stands as an authority in the reports. If we disagree with that answer I think that we ought to say so, and if we say so, we must give our reasons."*

Lords Jenkins and Hodson expressly agreed with what had been said by Lord Reid. Lord Morris of Borth-y-Gest held that since the question which had been appealed had not been referred to the Lands Tribunal there had been no authority to deal with it and that *"The tribunal could not assume a jurisdiction with which it would only be endowed if certain steps had been taken and certain conditions satisfied"* and that the decision of the Lands Tribunal on the question had been of *"no effect"* and any views expressed in relation to it would be *obiter*. Lord Devlin gave a concurring speech and held that the orders made by the Lands Tribunal and the Court of Appeal must be set aside *"as orders made without jurisdiction"*.

60. With those considerations in mind I therefore turn to consider the specific statutory provisions relating to the resolution of disputes relating to registration of land, the powers and duties of HM Land Registry and of the Adjudicator and the Tribunal.

61. The Appellants' application to HM Land Registry was made under section 60(3) of the LRA 2002. Section 60 is headed "Boundaries" and provides as follows:

> *"(1) The boundary of a registered estate as shown for the purposes of the register is a general boundary, unless show as determined under this section.*
>
> *(2) A general boundary does not determine the exact line of the boundary.*
>
> *(3) Rules may make provision enabling or requiring the exact line of the boundary of a registered estate to be determined...*
>
> *(4) Rules under this section must provide for applications for determination to be made to the registrar."*

62. Section 60 makes no mention of title to land and, properly construed, relates to the registration of plans which show the parcels, and boundaries, of the related registered titles. Sub-sections 60(1) and (2) refer to general boundaries, which necessarily have room for doubt as to precisely where on the ground the legal boundary is to be found. By contrast, however, I infer that the purpose of section 60(3) is to prevent potential disputes between adjoining land owners in the future and provide a public record of boundaries which cannot be disputed on grounds of inaccuracy. Therefore, as will be seen, the details and plan to be provided by the applicant for a determined boundary is to have a very high degree of accuracy, a tolerance of 10mm. The required accuracy is, in my judgment, the key to understanding the scope of this subsection, the procedure for determining a boundary and the role of the Adjudicator/Tribunal in the event of a reference being made by the Registrar. It is the accuracy of identification of the line, rather than title to the line, which is the focus of the application according to the rules. Mr Glen submits that the only sensible reason for rejecting an application for a determined boundary is because the true line is somewhere else. Superficially that is true but does not mean that the issue to be resolved is one of title to a line rather than accuracy of the plan depicting it. If the plan is not accurate there is no requirement in the LRA 2002 or related rules for the true position of the boundary to be identified: as will be seen, the application must in those circumstances be rejected by the Registrar or the Adjudicator/Tribunal as the case may be.

63. The rules referred to in sections 60(3) and (4) are to be found in The Land Registration Rules 2003 (SI 2003 No.1417). An application for the determination of the exact line of a boundary is governed by rule 118 which requires the applicant to submit a plan, or a plan and a verbal description, identifying the exact line of the boundary claimed and *"evidence to establish the exact line of the boundary"* (r.118(2)(b)). The procedure on an application for the determination of the exact line of a boundary is set out in rule 119 which requires the Registrar to give notice of the application to the owners of the land adjoining the boundary (r.119(1)) if he is satisfied that:

> *"(a) the plan, or plan and verbal description…identifies the exact line of the boundary claimed,*
>
> *(b) the applicant has shown an arguable case that the exact line of the boundary is in the position shown on the plan, or plan and verbal description….and*
>
> *(c) he can identify all the owners of the land adjoining the boundary to be determined.."*

failing which he must cancel the application (r.119(7)). If, however, he is so satisfied and gives notice of the application to the adjoining owner he must also give notice of the effect of paragraph 6 of the rule, which provides that:

> *"Unless any recipient of the notice objects to the application to determine the exact line of the boundary within the time fixed by the notice…the registrar must complete the application".*

Completion of the application involves making entries on the registers of the affected land stating that the boundary has been determined with such particulars as he considers appropriate (r.120(1)).

64. On a proper construction of rules 118 and 119 they do not require proof of the applicant's title, and the Registrar at that stage is not to undertake a detailed investigation into questions of title, the emphasis is on the accuracy of the line claimed.

65. If the Registrar is not satisfied of the three matters (a) to (c) above he must cancel the application without any determination of the position of the boundary. If he is so satisfied and serves notice on adjoining owners but they fail to object in time he must give effect to the application, even though the applicant has only shown an arguable case for the line claimed so long as the plan, or plan and verbal description, identify the exact line. It is only if the Registrar is satisfied of the three matters and the adjoining owners object in time that the Adjudicator/Tribunal has a role to play. Mr Duckworth rightly points out that the rules do not make provision for the objector to put in their own plan and contend for a different determined boundary, a factor which supports the contention that section 60(3) is not intended to provide a mechanism for resolving boundary disputes between neighbours but only for providing accurate public records as to the position of the boundary of a registered parcel of land. In my judgment the correct analysis of these provisions is that the scheme intends that the outcome of the application will be completion or cancellation, not a general determination of boundary issues.

66. It is also to be noted that there are other specific provision in the LRA 2002 which are much better suited to the resolution of boundary disputes between neighbours. For example s.65 governs alteration of the register (by giving effect to Schedule 4 to the Act) and s.97 which governs the right to apply for registration based on adverse possession (by giving effect to Schedule 6 to the Act). Given the existence of these other provisions there is no need to strain the natural meaning of the provisions relating to determined boundaries so as to found a jurisdiction to resolve a general boundary dispute based either on a disputed construction of documents of title, the accuracy of the registered plan, or adverse possession.

67. Once an objection has been raised section 73 of the LRA 2002 comes into play. Section 73, which is headed "Objections", provides that:

> *"(1) Subject to subsections (2) and (3), anyone may object to an application to the registrar.*
>
> …
>
> *(5) Where an objection is made under this section, the registrar–*
>
> …
>
> *(b) may not determine the application until the objection has been disposed of.*

> *(6) Subsection (5) does not apply if the objection is one which the registrar is satisfied is groundless.*
>
> *(7) If it is not possible to dispose by agreement of an objection to which subsection (5) applies, the registrar must refer the matter to the adjudicator.*
>
> *(8) Rules may make provision about references under subsection (7)."*

68. By the Transfer of Tribunal Functions Order 2013 the word "adjudicator" was replaced in the Act by the words "First-tier Tribunal", but the relevant provisions remained substantively unchanged. Therefore section 73(7) obliges the Registrar to refer a disputed application for a determined boundary to the Adjudicator, whose jurisdiction is provided by section 108, which bears the heading "Jurisdiction" and reads:

> *"(1) The adjudicator has the following functions –*
>
> *(a) determining matters referred to him under section 73(7), and*
>
> *(b) determining appeals under paragraph 4 of Schedule 5.*
>
> *(2) Also, the adjudicator may, on application, make any order which the High Court could make for rectification or setting aside of a document..."*

It is plain from the wording of that subsection alone that Parliament intended to confer limited powers on the Adjudicator to undertake the tasks (or "functions") which were then listed in the paragraphs which followed. There is no room or reason for expanding those functions beyond what appears in that subsection. The meaning of paragraph (a), being the relevant paragraph here, is clear and, in my judgment, limits the power of the Adjudicator/Tribunal to determining the matter referred. It is also to be noted from subsection (2) that where Parliament wishes specifically to provide a broader based jurisdiction, equivalent to an inherent jurisdiction, it can do so but will use appropriate language in conferring such powers. The words of paragraph (a) should, in my view, be given their ordinary meaning. They cannot, in the context, be construed as conferring on the Adjudicator/Tribunal powers equivalent to an inherent jurisdiction. There is, in my judgment no material distinction between the scheme under consideration before me and that which the House of Lords examined in the *Essex County Council* case.

69. I move on, therefore, to identify *"the matters referred"* to the Adjudicator for determination in this case pursuant to subsection (1)(a).

70. The Land Registration (Referral to the Adjudicator to HM Land Registry) Rules 2003 (SI 2003 No.2114) apply where section 73(7) of the Act obliges the Registrar to refer a matter to the Adjudicator/Tribunal. When he does so the Registrar must send a case summary to the Adjudicator, after consultation with the parties, which must contain *"details of the disputed application"* and *"details of the objection to that application"*

(r. 3(2)(e) & (f)). The rules, like the statute, speak of referral of *"the matter"* to the Adjudicator (see for example rule 3(1) and rule 5(2)). The Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 (SI 2003 No.2171) contains the following relevant definitions in the interpretation rule (r.2(1)):

"*matter*" is defined as *"the subject matter of either a reference or a rectification application";*

"*substantive decision*" as "*a decision of the adjudicator on the matter or on any substantive issue that arises in it but does not include any direction in interim parts of the proceedings or any order as to costs…"*

*"substantive order"* as *"an order or direction that records and gives effect to a substantive decision"*.

71. The subject matter of the reference here was the Appellants' disputed application for a determined boundary, as is apparent from the case summary, drafted by the Land Registry and sent to the Adjudicator, which gives by way of details of the objections to that application the Respondents' challenges to the accuracy of the Appellants' plan. The Appellants' application was not for resolution of a general boundary dispute and the Registrar's reference to the Adjudicator did not cast it as such. It therefore seems to me that the matter which was referred to the Adjudicator for determination was the application for a determined boundary, the issue for the Adjudicator being the accuracy of the Appellants' plan. That the issue identified in the case summary was the accuracy of the plan submitted by the Appellants is consistent with my view that the key to understanding the provisions relating to determined boundaries is that very accuracy.

72. Part 5 of the Rules (rr.32 to 43) sets out the procedure for determination of references by the Registrar to the Adjudicator under section 73(7) of the Act. Rule 41 provides that:

> *"(1) Where the adjudicator has made a substantive decision on a reference, the substantive order giving effect to that substantive decision may include a requirement on the registrar to –*
>
> *(a) give effect to the original application in whole or in part as if the objection to that original application had not been made; or*
>
> *(b) cancel the original application in whole or in part."*

73. The effect of The Transfer of Tribunal Functions Order 2013 (SI 2013 No.1036) was that any proceedings that were pending before the Adjudicator to HM Land Registry immediately before 1 July 2013 were to continue as proceedings before the First-tier Tribunal which the Adjudicator to HM Land Registry had become. By The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 the First-tier Tribunal was obliged to provide to the parties a *"decision notice stating the Tribunal's decision"* and *"written reasons for the decision"* (r.36(2)(a) & (b)). I construe the first of those as the equivalent of an order in the courts system and the second as the

judgment given the reasons which led to the making of the order. As with rule 41 of the 2003 Practice and Procedure Rules these new rules entitled the Tribunal to require the Registrar to take certain steps:

> *"40(2) Where the Tribunal has made a decision, that decision may include a direction to the registrar to –*
>
> *(a)give effect to the original application in whole or in part as if the objection to that original application had not been made; or*
>
> *(b) cancel the original application in whole or in part."*

74. Thus, although there has been a change in the rules there is no difference in substance. It is plain, as Mr Duckworth submits, that the power of the Adjudicator/Tribunal to give directions to the Registrar is binary in that he may direct the Registrar to give effect to or cancel the original application but nothing else. There is no power for the Adjudicator/Tribunal to prefer the objector's position and to direct the Registrar to give effect to that position. Nor is there any power to give a direction requiring the Registrar to give effect to other findings and conclusions made by the Adjudicator/Tribunal in the course of giving his *"written reason for the decision"*.

75. The above analysis is consistent with the view of HM Land Registry as expressed in their "Practice Guide 40: Land Registry plans, supplement 4, boundary agreements and determined boundaries" in paragraph 4 of which, under the heading "Determined boundaries", they say:

> *"The boundary of a registered estate as shown for the purposes of the register is a general boundary, unless shown as a determined boundary under section 60 of the Land Registration Act 2002. Unlike a general boundary, a determined boundary shows "the exact line of the boundary of a registered estate". The Act does not define "exact".*
>
> *Land Registry does not determine a boundary in the sense of resolving a disagreement as to where the exact line of the boundary is located. Instead, with the exact line having been identified by the registered proprietor and (ideally) their neighbour, Land Registry will then make it apparent from the register that the boundary has been determined. Reference to the boundary concerned being a determined boundary is made in the property register of each affected title. The general position of the boundary will be marked on the title plan of each affected registered title, often with lettered points showing the extent of the boundary which is determined. A filed copy of the determined boundary plan (see below) is retained and can be referred to in order to identify the exact line.*

> *It is not always possible for the owner to apply for a boundary to be shown in the register as determined. In particular, the applicant may be unable to produce the necessary evidence to establish the exact line of the boundary."*

76. It has also to be borne in mind in considering the question of jurisdiction that the LRA 2002 contains a specific provision permitting the Adjudicator/Tribunal to cause the real dispute between the parties to be transferred out to the courts to be resolved, namely section 110 of the Act, which is headed "Functions in relation to disputes" and provides:

> *"(1) In proceedings under section 73(7), the adjudicator may instead of deciding a matter himself, direct a party to the proceedings to commence proceedings within a specified time in the court for the purpose of obtaining the court's decision on the matter.*
>
> ….
>
> *(4) If, in the case of a reference under section 73(7) relating to an application under paragraph 1 of Schedule 6, the adjudicator determines that it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, but that the circumstances are not such that the applicant ought to be registered as proprietor, the adjudicator –*
>
> *(a) must determine how the equity due to the applicant is to be satisfied, and*
>
> *(b) may for that purpose make any order that the High Court could make in the exercise of its equitable jurisdiction."*

77. There are two points to be noted in respect of this provision: first it contains a mechanism for transfer out to the courts, in cases where the Adjudicator/Tribunal forms the view that the court is a more appropriate forum and secondly, subsection (4) provides a further example of the way in which Parliament has extended the jurisdiction of the Adjudicator/Tribunal by specifically conferring equivalent powers to that enjoyed by the High Court. In relation to the first point it seems to me that this is the power that the learned Judge should have used in this case when faced with the reality of the situation, namely that the issue before her was not the accuracy of the plan relied on by the Appellants but a boundary dispute properly so called. The court would not have been constrained in making appropriate findings of fact and law and giving effect to them by appropriate consequential orders, including declaratory relief, a course which simply was not open to the learned Judge who was limited by the procedure which had brought the matter before her.

78. It was suggested that the decision of *Matson v Maynard* is authority for the jurisdiction which the learned Judge purported to exercise. I respectfully disagree. In *Matson v Maynard (REF/2004/0579)* Deputy Adjudicator McAllister had before her two applications, one for a determined boundary and one for alteration of the register

so as to correct (as the applicants saw it) the position of the general boundary. The Adjudicator could have stayed the proceedings and required the parties to commence proceedings in the county court, but did not do so. As a preliminary issue the learned Deputy Adjudicator was asked to determine the relationship between the two applications and to decide, in particular, whether, if an application for a determined boundary were rejected, the Adjudicator nevertheless had jurisdiction to find that the boundary lay somewhere other than the proposed determined boundary. In paragraphs 49 onwards of her decision the learned Deputy Adjudicator held as follows:

> *"49. In my judgment it is correct to say that the jurisdiction of the Adjudicator [in respect of an application for a determined boundary] is limited to either accepting the determined boundary application or rejecting it. If it is accepted, then the Registrar will be directed to give effect to it.*
>
> *50. If it is rejected, it seems to me that the position is more complex. The Adjudicator will have to give reasons for rejecting the application. The only sensible reason, it seems to me, is that the true line of the boundary is not where the applicant claims it to be, but somewhere else. Having therefore determined where the boundary is, the Adjudicator will make findings of fact to that effect. Those findings, in my judgment, will be binding on the parties. Either party could then make an application for a determined boundary based on those findings, so long as sufficient evidence and technical details were produced to satisfy the Land Registry. In the alternative the boundary as found could be put before the Registrar in the same way as any order made by the Court as to the position of the boundary.*
>
> *51. Mr Maynard and Ms Dickson argued that the very fact that the application must either be accepted or rejected supports their argument that the process of determining a boundary for the purpose of the Act must be consensual. They argue that only courts can determine boundary disputes.*
>
> *52. To restrict the jurisdiction of the Adjudicator to a simple yes or no outcome would, in my view, be unduly restrictive and contrary to good sense. The Adjudicator will have had (almost always) the benefit of a sit view. He will have heard expert evidence and argument. An outcome which is to the effect that the applicant has to keep trying in order to ensure that the application is correct (so as to satisfy the Land Registry and so as to defeat any objection) is plainly undesirable. The underlying issue is the true position of the boundary. That is what is being sought when an application for determined boundary is made. This boundary will be both a boundary for Land Registration purposes and a legal boundary. If the Adjudicator is in a position to make this determination, then a further application to the Land Registry,*

> *though necessary, becomes a formality. There are many instances where the Adjudicator has to make findings of fact or determinations of law in order to resolve the underlying dispute which was the subject of the original (disputed) application. These findings will be binding even if it is necessary to obtain (in some cases) further relief from the Court (such as damages for trespass)."*

79. I do not share the learned Deputy Adjudicator's view as to the jurisdiction of the Adjudicator. While I appreciate, and sympathise with, her concern that to hold that the jurisdiction of the Adjudicator was limited in the way suggested would in some respects be "unduly restrictive and contrary to good sense" the key to determining the jurisdiction is, in my respectful view, the proper construction of the Act of Parliament and the related rules which give rise to and govern that jurisdiction. Nor do I accept at face value the steps in the reasoning which led the learned Deputy Adjudicator to her conclusion. There are more reasons than those given in paragraph 50 of her decision as to why it might be that an application for a determined boundary fails. One of those reasons is, as is apparent from the current case, that the plan relied on by the parties is deficient. Technical as that reason might be it is sufficient to defeat the application, and for the reasons I have already given it is the principal criterion in a determined boundary application. It does not follow from that reason that the Adjudicator has jurisdiction, or is compelled or ought, to make findings as to the position of the legal or general boundaries. It would be wrong in principle to seek to imply words into a statute so as to confer additional jurisdiction to that which is specifically identified. Further, the learned Deputy Adjudicator held in paragraphs 50 and 52 that the parties would be bound by the findings of fact as to the position of the boundary but does not give her reasons for that conclusion. I am not sure that she is correct, but that would not be a good reason for proceeding with a course of action which could not result in relief be given to the parties by the Adjudicator. The order made at the conclusion of the hearing could do no more than direct the completion or cancellation of the determined boundary application. Nor does she recognise that these findings involve a finding of law as to the position of the boundary (*Scott & another v Martin* [1987] 1 WLR 841). Nor does the decision address the issue as to standing, with which I have dealt above, namely whether a disatisfied party can challenge that part of the decision which deals with the legal/general boundaries, on the assumption that such findings are binding, but where the Tribunal cannot grant any related relief in respect of them. In my view section 110 provides an answer to the problems raised by the Deputy Adjudicator, the parties should be directed to commence proceedings in the court system in a situation where it is an underlying boundary dispute, rather than a determined boundary application, which really requires resolution.

80. The Respondents, and the learned Judge in paragraph 50 of her decision, relied on the judgment of Megarry J, as he then was, in *Neilson v Poole* (1969) 20 P&CR 909 as providing encouragement to judges to resolve boundary disputes where they can, in accordance with the overriding objective, but in my view that decision does not support the Respondents' contention that the learned Judge had statutory jurisdiction to do so. Properly understood that case gives guidance as to how the court should approach the evidence in a boundary dispute, not whether a tribunal has jurisdiction to do so.

81. Nor in my judgment do the decisions in *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch) and *Silkstone v Tatnall* [2011] EWCA Civ 801 assist the Respondents. In *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch) Mr Justice Briggs, as he then was, heard an appeal from a Deputy Adjudicator who had directed cancellation of an application for a restriction entered by the appellant who claimed to be the sole beneficial owner of the property pursuant to a resulting trust. The respondent's case had been that the appellant enjoyed no interest whatsoever in the property. The issue before the Adjudicator was as to the existence of the appellant's alleged interest, not its quantification (see paragraph 31). The appellant's principal argument before Mr Justice Briggs was that the Deputy Adjudicator should not have tried the issue of whether the appellant had a beneficial interest but should only have ascertained whether she had an arguable claim to one. Mr Justice Briggs held otherwise. Having set out the statutory framework pursuant to which opposed applications came before the Adjudicator the learned judge held:

> *"16. It follows in my judgment that what has to be referred to the Adjudicator under section 73(7), where an objection which is not obviously groundless cannot be disposed of by agreement, is not merely the question whether the applicant has a relevant right or claim, but the additional question whether the entry of a restriction is necessary or desirable for the purposes of protecting that right or claim. Both of those questions fall within what is described in section 73(7) as "the matter" to be referred to the Adjudicator.*
>
> *17. It is also apparent from section 73(5) to (7) that determination of that application for the restriction, where there has been an objection, requires the objection to be "disposed of". The disposal of the objection is therefore an integral part of the matter referred to the Adjudicator under section 73(7).*
>
> *18. It follows from that analysis that the precise nature of the Adjudicator's function on any particular reference under section 73(7) will be significantly affected by an examination of the precise restriction sought, the nature of the claim or right thereby sought to be protected, and the basis of the objection which led to the reference. It is plain from section 110(1) that the Adjudicator is given a broad discretion, on a reference under section 73(7), whether to decide "a matter" himself, or to require it to be decided in a competent court, and it is equally plain from the panoply of procedural powers given to the Adjudicator under the Practice and Procedure Rules that a decision to decide a matter himself may properly involve a trial, rather than merely a summary review directed merely to the question whether an asserted claim is reasonably arguable."*

His Lordship therefore rejected the submission that the Deputy Adjudicator had no jurisdiction to conduct a trial of the question whether the appellant had a beneficial interest under a resulting trust before considering whether, in the exercise of his

discretion, he ought to have done so. The reasoning of Mr Justice Briggs does not lead to the conclusion in this case that the learned Judge in the case before me had jurisdiction and/or ought to have identified conclusively the position of the general boundary. The essence of Mr Justice Briggs' decision was that it was open to the Adjudicator to conduct a full trial where appropriate. It is not authority for the proposition that the Adjudicator has jurisdiction to resolve issues which had not been referred to him. The issue before the learned Judge in the instant case was not whether there should have been a summary determination or a trial. In the instant case the boundary dispute was not referred to the learned Judge to determine, whereas the plan dispute was: the boundary dispute was not part of the "matter" referred.

82. In *The Chief Land Registrar v Silkstone* [2011] EWCA Civ 801 the matter which had been referred to the Adjudicator had been an objection to an application made by a registered proprietor of land for the cancellation of a unilateral notice affecting his title which alleged that the beneficiaries of the notice had acquired a right of way by prescription over the registered proprietor's land. The claimants of the right of way purported to withdraw their case on the first day of the hearing before the Deputy Adjudicator. The Deputy Adjudicator nevertheless proceeded to cancel the notice and was upheld on appeal by Floyd J, as he then was. On appeal from his decision in the Court of Appeal Rimer LJ described The Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 (SI 2003 No 2171) as a comprehensive set of provisions of the type to be found ordinarily in a procedural code governing a judicial proceeding.

> *"48. I would summarise the position in my own words as follows. A reference to an adjudicator of a 'matter' under section 73(7) confers jurisdiction on the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application. If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself. In the case of an application under section 36 to which an objection has been raised, the relevant issue will be the underlying merits of the claim to register the unilateral notice. Neither party can by his unilateral act (including by his expressed withdrawal of his application, objection or case) bring the reference to an end. Equally, neither party can be compelled to advance a case to the adjudicator that he no longer wishes to advance. A party who conveys such a wish to the adjudicator can be regarded as conveying his wish to 'withdraw' his application, objection or case but it is then for the adjudicator to rule in his discretion as to how to deal with any such withdrawal. That will require a consideration of all the circumstances."*

In that case the Deputy Adjudicator was entitled to, and indeed needed to, determine whether the underlying right existed. That was not the issue for resolution by the learned Judge in the instant case: the issue for her was whether the plan was accurate, she had no power, in my judgment, to go on to consider the position where the plan was not accurate. In any event *Silkstone* is a case which considers and examines an

express jurisdiction: it does not seek to find an inherent jurisdiction where none exists on the face of the statute. It is to be noted that the rules which were being considered by the Court of Appeal in that case allowed the Deputy Adjudicator to grant specific relief relating to the issue before him, in contrast to the situation here.

83. For the above reasons I have come to the conclusion that the learned Judge lacked jurisdiction to decide the position of the legal boundary and to that extent her decision was outside her powers, the appeal should be allowed, and the learned Judge's decision as to the position of the legal boundary should be set aside in accordance with the principles explained by the House of Lords in the *Essex County Council* case.

The boundary dispute

84. Given my conclusions above not only is there is no necessity to determine the merits of the Appellants' challenge to the learned Judge's findings as to the legal boundary but, as in the *Essex County Council* case, the matter is not properly before the Upper Tribunal in any event because of the lack of original jurisdiction just as much as it had not been before the learned Judge. In the *Essex County Council* case the House nevertheless went on to consider and express a view on the substantive appeal even though what they were to say was obiter. They did so because the matter had already been the subject of a decision in the Court of Appeal, which had acted without jurisdiction, and might be considered to have set a precedent (per Lord Reid), had been fully argued, and in any event it raised a point of general importance (per Lord Devlin). The only one of those reasons that applies here is that the substantive point has been fully argued on this appeal. In deference to the parties and in acknowledgment of the considerable industry on their parts I intend to comment, as briefly as possible, on their arguments relating to the boundary dispute, even though my comments are, in my view, neither determinative of the issue nor binding on the parties.

85. The Appellants submit, in essence, that the learned Judge (1) applied the wrong legal principles in construing the documents of title (failing to direct herself correctly in accordance with *Ali v Lane* [2007] 1 P & CR 26, (2) wrongly identified the position of the legal boundary, and (3) although the question of adverse possession did not arise given the learned Judge's earlier conclusions nevertheless she reached incorrect conclusions in respect of the Respondents' contention that the Appellants' claim was defeated by adverse possession, particularly given that No.73 was tenanted for part of the time and therefore, it is said, time could not run against them under the Limitation Act 1980.

86. The Respondents remind me that this is an appeal and not a re-hearing and that deference should be accorded to the view of a specialist tribunal. They submit that I should not overturn the learned Judge's findings of fact unless they are perverse. The Respondents contend that the learned Judge directed herself correctly as to the law relating to construction of conveyances and the admissibility of extrinsic evidence and reached appropriate conclusions when taking account of her factual findings. As to adverse possession they say that the learned Judge applied the correct legal principles to the facts as she found them and that her decision cannot be impeached. They tell

me that time started running against the Appellants under the Limitation Act 1980 before No.73 was tenanted and that, in any event, the tenancy point was not taken before the learned Judge and is therefore not open to the Appellants to argue on appeal.

Discussion on the boundary dispute

87. The appeal is a true appeal and I remind myself of the limits to my function, particularly in relation to findings of fact made by the learned Judge. Lord Justice Mummery in *Wilkinson & others v Farmer* [2010] EWCA Civ 1148, on a second appeal from the decision of a Deputy Adjudicator, expressed certain views about the role of a judge in my position performing an appellate function:

> *"39. I would…accept that there were some grounds for differing from the Deputy Adjudicator's treatment of aspects of the evidence about the trees and vegetation along the eastern boundary at the time of the 1898 Conveyance. However, the judge, who was hearing an appeal, and not re-trying the case, went too far in concluding that there was insufficient evidence for the decision that the Land Registrar had made a mistake when registering the titles of the parties by showing the width of the road as extending to the full width of the land tinted brown. That was a decision that the Deputy Adjudicator, as the fact-finding tribunal, was entitled to reach on the construction of the reservation in the context of a reasonable assessment of all the evidence of the objective contemporaneous circumstances, in particular the facts known about the width of the road passing between The Nelson Arms and Nelson Cottage."*

88. Similarly Vos J (as he then was) in *Wilson & another v Grainger* [2009] EWHC 3145 (Ch), hearing an appeal on a question of fact from a decision of a Deputy Adjudicator made similar observations. So far as the facts are concerned I have set out above my view that the learned Judge picked her way carefully between the various versions of events that she was confronted with. She had the advantage of a site visit and live oral evidence. She was in a much better position than I to form a view of the facts. There is no reason why I should go behind those findings. The probative value, relevance and effect of them is a different matter, which I will consider in due course.

89. The parties agree that the starting point for deciding the position of the legal boundary is to construe the conveyance of 29 June 1960 and to seek to ascertain the intentions of the parties to that conveyance in 1960. In *Pennock v Hodgson* [2010] EWCA Civ 873 (paragraph 9) Lord Justice Mummery distilled the principles to be derived from Lord Hoffmann's speech in *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894:

> *"(1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land…"*

> *(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 inference from evidence of relevant 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."*

90. In this case the parcels clause incorporates a plan, which contains the often seen combination of words "for the purposes of identification only" and "more particularly delineated on" which are, in the circumstances, "mutually stultifying" (per Megarry J in *Neilson v Poole*). Neither the conveyance nor the plan in the instant case specifically identify boundary features and although they each contain dimensions there is no clear indication on the documents as to the point(s) from and to which those dimensions are to be measured.

91. The learned Judge found that the boundaries had not been laid out by the original vendors at the date of the conveyance in 1960.

92. Both parties therefore rely on *Ali v Lane* in relation to the admissibility of extrinsic evidence, and in particular conduct which occurred after the date of the conveyance, as an aid to construction of the conveyance, but disagree as to it true ratio and effect. Lord Justice Carnwarth, in a judgment with which the other two members of the Court of Appeal agreed, reviewed the authorities relating to such evidence in the context of a boundary dispute and set out his conclusions in paragraphs 36 to 38 as follows:

> *"36. The conclusion I would be inclined to draw from this review is that Watcham remains good law within the narrow limits of what it decided. In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended.*
>
> *37. The qualification is crucial. When one speaks of "probative value" it is important to be clear what needs to be proved. In this case the issue concerns the line of a boundary which was fixed not later than 1947. Evidence of physical features which were in existence in the 1970s is of no relevance to that unless there is some reason to think that they were in existence in 1947, or they are replacements of, or otherwise*

> *related, to physical features which were in existence in 1947. Similarly, evidence of Mr Attridge Senior's understanding of the position of the boundary, or actions by him apparently relating to that boundary, is of limited probative value, even if admissible. Such evidence begs the questions whether his understanding of the boundary was well-founded, and if so how strict he was in observing it, particularly having regard to the disused state of the disputed land during that period.*
>
> *38. I would add that in principle reference to the intentions of the parties means the parties to the original conveyance. Thus in Watcham the user relied on by the Privy Council was that of the Watcham family, who were the beneficiaries of the original certificate. In none of the cases reviewed above was account taken of the conduct of subsequent owners. Megarry J might possibly have been willing to go further. Where the evidence of the intentions of the original parties is unclear, long and unchallenged usage may, as he said, be*
>
> *"... good reason for tending to construe the (original) conveyance as having done what the parties appear to have treated it as having done..."*
>
> *I do not read that as necessarily confined to long usage by the original parties. We need not decide whether that is a permissible extension of the Watcham principle. It would only apply if there were evidence of a long period of acceptance of a specific boundary by a succession of parties on both sides of the boundary. That is not this case. The unilateral actions of the owner of one side (in this case Mr Attridge) could not be relied on as binding on the owner of the other."*

93. Thus where the subsequent conduct is probative of what the original parties intended the court may have regard to it. In *Bradford & another v James & others* [2008] EWCA Civ 837 a differently constituted division of the Court of Appeal considered a similar question and Lord Justice Mummery, with whom Lords Justices Jacob and Wilson agreed, applied *Ali v Lane* with approval citing it as support for the proposition that in relation to extrinsic evidence in the context of a conveyancing dispute *"The evidence of undisputed subsequent acts is admissible if it is of probative value in determining what the parties intended at the time of the 1976 Conveyance"*.

94. However, while the probative value of the evidence is an essential criterion for its admissibility it is not the sole criterion, nor necessarily a sufficient criterion. The reasoning of Carnworth LJ, as I understand it, did not extend the principle to include conduct of successors in title to the original parties, except, perhaps, where successors on both sides accepted the position of a boundary. That is not this case. I was referred to *Norman v Sparling* [2014] EWCA Civ 1152 in support of a contention that the law had moved on since *Ali v Lane* but on examination that case turns on an analysis of the behaviour of the original parties to the conveyance, not their successors in title. I am not prepared, if I am encouraged to do so by the parties, to

attempt to extend the principles of *Ali v Lane:* that must await a further decision of the Court of Appeal in due course. The *Ali v Lane* principle is presently confined, in my judgment, to consideration of the subsequent conduct of the parties to the original deed, and does not allow the court to have regard to the conduct of successors save where the successors have both accepted an agreed position, which, as I have already said, is not this case.

95. There are, however, real difficulties in resolving a boundary dispute where the relevant and admissible evidence is sparse. The Respondents submit that the tribunal should then do the best it can with the materials available to it and refer me, in support of that proposition, to the decision of Mr Christopher Nugee QC (as he then was), sitting as a Deputy Judge of the High Court, in *Derbyshire County Council v Fallon & another* [2007] EWHC 1326 where he commented on the approach which should be taken where the evidence to show the position of the true boundary is limited. The learned Deputy Judge held (in paragraph 16 of his decision):

> *"Nor do I think this is an appropriate case to decide on the burden of proof; where the Court is asked to determine where a boundary lies, I think it should be very reluctant in effect to say that it cannot be determined. I think it is preferable for the Court to do its best, even with limited material available, to assess where the probabilities lie…"*

96. Notwithstanding that sentiment it seems to me that the tribunal can only take account of admissible evidence with probative value in seeking to ascertain the true position of the boundary. There may be occasions where it cannot be said, even on the balance of probabilities where the legal boundary lies having regard to the documents of title and the admissible extrinsic evidence. In such cases the resolution of the dispute might turn on adverse possession.

97. The learned Judge did not analyse the principles of *Ali v Lane* but did purport to apply them. Her starting point for ascertaining the boundary was a post on the southern boundary of No.73 which she referred to as point A which she held to have been an original boundary feature, which I interpret as a feature which existed at the date of or shortly after the conveyance (see paragraphs 10 and 55 of her judgment.

98. It is also plain from paragraph 52 of her judgment that she was focusing on the extrinsic evidence at the date of the conveyance because she found as a fact, in that paragraph, that the boundaries had not been installed at the date of grant. I infer that she was therefore looking to the subsequent conduct as evidence of what was intended at the date of the conveyance. That is consistent with the approach which she took in paragraphs 53 to 55 of her judgment where she seeks to establish what was on the ground in 1960. However, from paragraph 55 onwards the learned Judge made findings of fact as to features which could not be shown to have come into existence until some years after the original conveyance. In paragraph 55 itself she relied on the previous existence of some hurdle fencing which she could date to 1968 (paragraphs 17 and 55) and angle irons which she found to have been installed in 1986. She did not identify them as features which had been installed by the original parties. As she said in respect of the angle irons they were the "best evidence of the boundary as the occupiers understood it to be in 1986…". That is the subjective view of a successor in title to the original parties to the conveyance and, in my judgment, not admissible

extraneous evidence within the *Ali v Lane* principle. In those two respects, namely relying on features which could not be linked evidentially to the original parties to the conveyance and taking account of the subjective views of successors in title she fell into error and that fundamentally and fatally undermines her conclusions as to the position of the legal boundary.

99. The learned judge made no further findings in the succeeding paragraphs of her judgment as to features which had been installed or acts that had been carried out by the original parties to the conveyance or could be shown to have existed at or close to the date of the conveyance. The matters which the learned Judge relied on in paragraphs 56 to 61 (eg she dates the privet hedge to 1968, the rockery return to 1971, "no idea when the dwarf wall was built") are not, in my judgment, evidence which is of "*probative value in determining what the parties intended*" within the meaning of that phrase in the judgment of Lord Justice Carnwarth in *Ali v Lane*. For those reasons her conclusions on the true line of the boundary are, I regret, unsafe in my view.

100. As to adverse possession it seems to me from a consideration of paragraphs 62 to 64 of her judgment that the learned Judge had the correct test in mind and that she correctly applied the relevant principles to the facts as she found them to be. It is to be noted that she only found the defence to have been established in relation to the area in the front garden (paragraph 64) having given cogent reasons for not having done so elsewhere. In relation to the front garden, and notwithstanding the submissions now made by the Appellants, the learned Judge found as a fact that they had been excluded from land to the north of the line of angle irons during two alternative periods for the requisite length of time. Those are findings of fact that it seems to me were for the learned Judge to make and are not open to challenge before me on the basis of the submissions which I have heard. I infer also, from the reference to Mr Webb, that the learned Judge had in mind the requisite intention, the existence of which she was entitled to conclude from the primary facts as she found them. Even though her conclusions on this issue are only stated briefly I cannot view them as incorrect. I disregard the allegation that time did not run during part of the period having been told that the point was not taken before the learned Judge.

<u>Costs</u>

101. In the event that I reached the conclusion, as I have, that the learned Judge lacked jurisdiction to resolve the boundary dispute I was asked by the Appellants not only to set aside her decision in that respect but also to set aside her costs order and make a new costs order in favour of the Appellants. In the light of my conclusions it seems to me that the reasons given by the learned Judge for her costs order cannot stand and that the costs order itself should be set aside. However, in my view it would be inappropriate either (a) to make a new costs order or (b) make orders relating to this appeal, without giving the parties the opportunity to make further submissions in respect of such orders and (if they wish) to appear at a further short oral hearing. In those circumstances I direct that the parties have permission to make further written submissions, and if appropriate seek an oral hearing, in relation to both aspects of costs within 28 days of receipt of a copy of this decision.

**Decision issued: 4 January 2016**