[2016] UKUT 0168 (TCC)

Appeal number: UT/2015/0042

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MELVYN ROY BEAN and PENELOPE JANE SAXTON

Appellants

- and -

HOWARD KATZ and IRIS BENJAMIN KATZ

Respondents

TRIBUNAL: Judge Elizabeth Cooke

Sitting in public at Royal Courts of Justice, Strand, London, WC2A 2LL on 16 February 2016

1. The Appeal is allowed.

2. In accordance with Section 12 of the Tribunals, Courts and Enforcement Act 2007 **I re-make the decision of the First-tier Tribunal and I direct the Chief Land Registrar to give effect to the appellants' application for a determined boundary dated 20 January 2011 as if the objection to that application had not been made.**

DECISION

1. This is an appeal from a decision made on 6 February 2014 in the Land Registration Division of the First-tier Tribunal on the Appellants' application for a determined boundary under section 60 of the Land Registration Act 2002. The First-tier Tribunal determined that the boundary was on the line claimed by the Applicants, save for one small section in respect of which it was found to be a right angle, rather than as the curve shown on the Applicants' plan. I refer to that section, as did the judge in her decision, as "the Front Section". This appeal, brought by the Applicants, relates only to the Front Section.

2. Permission to appeal was granted by Judge Edward Cousins in the Upper Tribunal (Tax and Chancery Chamber) on 11 March 2015 after an oral hearing. I heard the appeal on 16 February 2016. The application for permission to appeal, the grounds of appeal (as amended on 2 March 2015) and the skeleton argument for the Appellants were drafted by Mr William Hansen of counsel. He was taken ill very shortly before the hearing, and the Appellants instructed their solicitor Mr George Tedstone to represent them at the appeal, preferring to rely upon his detailed knowledge both of the land and of the legal authorities than to instruct fresh counsel at the last minute. Mr Tedstone represented his clients very ably and I am most grateful for his assistance. The Respondents did not attend and were not represented.

3. The Second Respondent applied, by letter dated 10 February 2016 to be removed from these proceedings. At the hearing I refused her request and she remains a party; I have given a separate written decision, setting out my reasons for that refusal.

4. The Appellants say that in the light of the findings of fact made at first instance the judge of the First-tier Tribunal erred in fact and law in finding that the boundary of the Front Section did not follow the line on their plan. They say that the facts found demonstrated that there had been at some point in the past a boundary agreement to the effect that the Front Section boundary was curved. Alternatively they say that the presumption of lawful title after 20 years' open and peaceable possession leads to the same conclusion.

5. Before I explain why, in my judgment, the Appellants are correct I set out the relevant law. In doing so I have to discuss the First-tier Tribunal's jurisdiction in relation to determined boundary applications - an issue that was not raised by the Appellants or the Respondents at first instance or on appeal, although Mr Hansen's skeleton argument, and Mr Tedstone at the hearing, referred to it.

They said that insofar as the decision in *Murdoch v Amesbury* [2016] UKUT 3 (TCC) was good law, as to which they reserved their position, it was irrelevant to the appeal. Nevertheless I have to discuss it, in order to make it clear that the First-tier Tribunal was able to make the order it made and also that it could have made an order in the terms in which I now re-make it. However, I bear in mind that jurisdiction was not regarded by the parties as an issue at first instance or on appeal and that therefore I have not heard argument on jurisdiction; my discussion on jurisdiction goes no further than is necessary in this appeal.

The law, and the jurisdiction of the First-tier Tribunal in relation to determined boundaries

Introduction

6. The boundary marked in red on the plan to a title registered at HM Land Registry is a "general boundary" (section 60(1) of the Land Registration Act 2002) which "does not determine the exact line of the boundary" (section 60(2)). However, section 60(3) provides as follows:

> "(3) Rules may make provision enabling or requiring the exact line of the boundary of a registered estate to be determined and may, in particular, make provision about—
>
> (a) the circumstances in which the exact line of a boundary may or must be determined,
>
> (b) how the exact line of a boundary may be determined,
>
> (c) procedure in relation to applications for determination, and
>
> (d) the recording of the fact of determination in the register or the index maintained under section 68."

7. Section 60 leaves the detail to the Land Registration Rules 2003, of which the relevant rules are 118 and 119:

> "118.—(1) A proprietor of a registered estate may apply to the registrar for the exact line of the boundary of that registered estate to be determined.
>
> (2) An application under paragraph (1) must be made in Form DB and be accompanied by—
>
> (e) a plan, or a plan and a verbal description, identifying the exact line of the boundary claimed and showing sufficient

surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map, and

(f) evidence to establish the exact line of the boundary."

119.—(1) Where the registrar is satisfied that—

(g) the plan, or plan and verbal description, supplied in accordance with rule 118(2)(a) identifies the exact line of the boundary claimed,

(h) 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, supplied in accordance with rule 118(2)(a), and

(i) he can identify all the owners of the land adjoining the boundary to be determined and has an address at which each owner may be given notice,

he must give the owners of the land adjoining the boundary to be determined (except the applicant) notice of the application to determine the exact line of the boundary and of the effect of paragraph (6).

…

(6) 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 (as extended under paragraph (5), if applicable), the registrar must complete the application.

(7) Where the registrar is not satisfied as to paragraph (1)(a), (b) and (c), he must cancel the application.

8. Accordingly the applicant must satisfy the registrar of the three matters set out in rule 119(1). Requirement (c) speaks for itself.

9. Requirement (a) is that the registrar is satisfied about the accuracy of the plan: it must identify the line claimed. If it is unclear, or on too small a scale (for example), the application must be rejected. Land Registry imposes certain technical requirements (see "Practice Guide 40: Land Registry plans, supplement 4, boundary agreements and determined boundaries" in paragraph 7, Determined Boundary plan requirements), for example that measurements be accurate to within +/-10mm; those requirements do not appear in the statute or the Land Registration Rules.

10. Requirement (b) is that the applicant has shown an arguable case that the line on the plan is in fact the boundary.

11. If those requirements are not met the application must be rejected. If they are met the registrar must notify adjoining owners, who may then object. If an objection is not groundless and cannot be disposed of by agreement, the matter must be referred to the First-tier Tribunal (Land Registration Act 2002, section 73(7)).

12. Where the registrar completes an application for a determined boundary, whether or not the matter has been referred to the First-tier Tribunal, Rule 120 of the Land Registration Rules 2003 provides as follows:

> "120.—(1) Where the registrar completes an application under rule 118, he must—
>
> (a) make an entry in the individual register of the applicant's registered title … and any registered title affecting the other land adjoining the determined boundary, stating that the exact line of the boundary is determined under section 60 of the Act, and
>
> (b) subject to paragraph (2), add to the title plan of the applicant's registered title … and any registered title affecting the other land adjoining the determined boundary, such particulars of the exact line of the boundary as he considers appropriate.
>
> (2) Instead of, or as well as, adding particulars of the exact line of the boundary to the title plans mentioned in paragraph (1)(b), the registrar may make an entry in the individual registers mentioned in paragraph (1)(a) referring to any other plan showing the exact line of the boundary.

13. So although the result of a successful application will be either the addition of "particulars" to the title plan or a reference to another plan, there is no requirement for the plan that accompanied the application to be used.

14. So much for procedure within Land Registry. But the application may meet with an objection. There is nothing in the rules to say what an objection may be about, but clearly it might relate to the requirement in Rule 119(1)(a) above and the technical quality of the plan, or to requirement (b) and the position of the boundary. Both of these are objections to the plan, and the latter obviously involves a question of title.

15. Where there is an objection which is not groundless the matter must be referred to the First-tier Tribunal (section 73 (7) of the Land Registration Act 2002).

16. In *Murdoch v Amesbury* (REF/2012/0496) the First-tier Tribunal had to address two different problems with the plan: it did not meet Land Registry's requirements that measurements be accurate to within +/-10mm, and the Respondent disagreed with the Applicant as to where the boundary was. The judge rejected the application because the plan was not satisfactory. Having done so, at the request of the Applicant she then made a finding as to the position of the boundary, on a line that did not coincide either with the Applicant's claimed line or with the position argued for by the Respondent.

17. The Applicant appealed that decision as to the position of the boundary, on the ground that having disposed of the reference the First-tier Tribunal did not have jurisdiction to go on to decide where the boundary lay. In the Upper Tribunal in *Murdoch v Amesbury* [2016] UKUT 3 (TCC), HH Judge Dight allowed the appeal, on the basis that the decision went beyond the statutory jurisdiction conferred by Section 73 of the 2002 Act and Rule 40 of the Rules. He said, at paragraph 62:

> "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."

18. The decision in the present case was quite different from the decision at first instance in *Murdoch v Amesbury*. The plan submitted by the Applicants was technically satisfactory. As to the position of the boundary, it was found to be accurate, save for one small section. The Chief Land Registrar was directed (pursuant to Rule 40(2)(a)) to give effect to the application in accordance with the First-tier Tribunal's direction that the boundary was determined to be on the line on the application plan save for the small Front Section, as to which a different line was prescribed (by reference to letters on a plan). Similar orders have been made routinely by the First-tier Tribunal and are not, in my judgement, within the scope of the deciding principle of *Murdoch v Amesbury* [2016] UKUT 3 (TCC), set out in paragraph 13 above.

19. However, HH Judge Dight also discussed the nature of determined boundary applications and the ability of the First-tier Tribunal to examine matters of title. At paragraph 62 he said:

> "it is the accuracy of the identification of the line, rather than title to the line, which is the focus of the application according to the rules."

20. Since that statement was not concerned with the subject matter of the appeal, it is *obiter* and not binding on the First-tier Tribunal. Furthermore, I think it is important that I make it clear that the First-tier Tribunal has jurisdiction to dispose of determined boundary references, such as the one in this appeal, where the objection is not to the quality of the plan but to what the plan says

about the boundary and where therefore it is necessary to look at the title to the properties concerned.

21. If that were not so, then the First-tier Tribunal would be unable to follow the scheme of the Rules, which require a determined boundary application to be assessed not only on the accuracy of the plan (Rule 119(1)(a)) but also on whether the line on the plan is in fact the boundary (Rules 119(1)(b)). The latter is a question about title (to the land on either side of a claimed line). Section 60 of the Land Registration Act 2002 makes no mention either of title to land or to plans; but the Rules refer plainly to both. It follows that where the requirement under Rule 119(1)(b) is in issue the First-tier Tribunal can examine the evidence and decide either that the application succeeds, because the line claimed is the boundary, or that it fails, because the line claimed is not the boundary.

22. It is therefore inevitable that the First-tier Tribunal will make findings about the position of the boundary, in order to give reasons for its decision (whether the application succeeds or fails). A very recent and typical example is *Noel v Knights* (REF/2014/0879); another is *Cantelmi v Hart* (REF/2013/0880), considered and upheld by the Upper Tribunal ([2016] UKUT 35 (TCC)). Similarly in allowing this appeal, I have re-made the decision of the First-tier Tribunal by making a decision that the First-tier Tribunal could have made in reviewing its decision (see paragraph 73 below). It is a decision simply to give effect to the application as if the Respondent's objection had not been made, and I have made that decision on the basis of an examination of title to the land and of the facts found at first instance, which leads me to a conclusion about where the boundary is.

23. There is a little more to say about the decision at first instance. In this case the First-tier Tribunal's finding was not simply that the line claimed was the boundary. The line claimed was the line on the Applicants' plan, and the judge's line followed it except for the Front Section, where she substituted a right angle for a curve.

24. The Appellants are challenging the decision at first instance insofar (only) as the line determined as the boundary diverges from the Horan plan in this short section. They might have argued therefore that the First-tier Tribunal did not have jurisdiction to depart from the binary pattern of success or failure. They might have sought to draw support from the *obiter dicta* in *Murdoch v Amesbury* at paragraph 74: "It is plain … 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."

25. However, they did not do so and in my view they were correct not to do so. Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2014 ("the Tribunal Rules") provides:

"(1) The Tribunal must send written notice to the registrar of any direction which requires the registrar to take action.

(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.

(3) A direction to the registrar under paragraph (2) must be in writing, must be sent or delivered to the registrar and may include—

(a) a condition that a specified entry be made on the register of any title affected…

26. Accordingly success or failure may be in whole or in part. And Rule 40(3) above enables the First-tier Tribunal to add a condition to its direction. As to the small section where the line determined by the First-tier Tribunal differed from the Applicants' line, I take it that the direction to the registrar to give effect to the application included a condition that a specified entry (the line along the right angle) be made on the register in accordance with rule 40(3) above.

27. Accordingly, there is no doubt in my mind that the First-tier Tribunal had jurisdiction to examine the title to the land concerned, to decide the success or failure of the determined boundary application on the basis of the decision as to where the boundary lay, and to direct the registrar to give effect to the application subject to that specific direction as to the Front Section. The appeal as regards the Front Section is successful, but not because the First-tier Tribunal lacked jurisdiction to make the direction she did as to the Front Section; there was jurisdiction to make it, but the appeal is allowed on the basis that the decision was made in error as to fact and law in so doing.

28. I can now go on to explain my reasons for my decision on the appeal; I discuss first the factual background, then the findings made at first instance, and finally the law as it applies to those findings.

The appeal: background

29. The Appellants are the registered proprietors of Marsden Lodge, 3 Smythemoore, Longford, Market Drayton Shropshire, registered at HM Land Registry under title numbers SL109200 and SL94449; this appeal concerns only the latter title. Their neighbour, the First Respondent, is the registered

proprietor of the adjoining property Moorside Farm, 1 Smythemoor, registered at HM Land Registry under title number SL40506; the Second Respondent is his former wife and I have been told that she has claimed and has been found to have a beneficial interest in the property.

30. The Appellants' application for a determined boundary was made on 20 January 2011. The boundary related to a long boundary, all of which adjoined land within the Respondents' title number SL40506. Their application was accompanied by a plan prepared by Keith Horan and Associates ("the Horan plan") , which met Land Registry's technical requirements and showed the line of the boundary to be A – B – C – Ci – Ei – Eii – Eiii – H and K –L.

31. The Front Section, to which this appeal relates, is at a corner which the Land Registry plan shows as a right angle. The Horan plan shows instead a curved line C – Ci – Ei – Eii – Eiii – H; there is a hedge on number 3's side of that curve. As to this small portion only of the boundary the judge rejected the line on the Horan plan and found that between points C and H the boundary lay instead a right angle, in line with the Land Registry plan and with the Respondents' objection to the determined boundary . In her decision she put it like this:

> "The boundary is determined as being
> (a) along the lines between the following points shown on the survey plans dated 20 January 2012 of Keith Horan Associates lodged with the application
> (i) K-L;
> (ii) E-Ci-C;
> (iii) C-B-A
> And
> (b) along the line H to the post below G and then at right angles to E as shown by a red line on the plan annexed hereto."

32. So where the First-tier Tribunal found the boundary to be between points Ci – E – post – H, with the right-angle at the post, the Appellants maintain that it runs C – Ci – Ei – Eii – Eiii – H as on the Horan plan. The effect of the decision at first instance was to give a small area of land to number 1, and to divide the curved hedge that runs on number 3's side of the curved line on the Horan plan so that part of it falls on number 3's side and part of it on number 1's side of the boundary. As I said above, the Appellants say that the evidence accepted at first instance led to the inevitable conclusion that their curved line was correct and that therefore the first instance decision was wrong in law, either because a boundary agreement could be inferred or because the evidence gave rise to a presumption that the boundary lay along the curved line.

The evidence at first instance

33. The conveyance that divided number 1 from number 3, and that ought to have defined the boundary at the Front Section, cannot now be found. The earliest document of title available is a conveyance of land that includes number 3 but not number 1, dated 3 May 1875. The plan attached to it provides, in the words of the judge at her paragraph 29, "relatively little assistance as to most of the boundary".

34. A plan of the area in 1880 is clearer than the 1875 conveyance, (paragraph 33 of the first-instance decision), and shows the Front Section as a right angle, along with some outbuildings which are not now present.

35. The next conveyance considered was again of number 3 dated 31 July 1974. Its plan is said to be "for the purposes of identification only", and it shows the Front Section as a curve. So does an aerial photograph from 1982. So does a conveyance in 1998 of additional land to the then owners of number 3 (but not of land adjacent to the Front Section).

36. The judge commented (her paragraph 38):

> "… all the plans I have seen and referred to have varying degrees of accuracy, none to the degrees required for determined boundaries. Most of the indications as to the boundaries are very thick. It follows that the plans are of limited assistance".

37. The judge of the First-tier Tribunal visited the two properties on 24 July 2013 and was able to look at the land along the whole boundary. At the hearing on 25 July she heard evidence from Mr Bean, and from a number of witnesses of fact as well as the Appellants' expert witness Mr William Rock, a Chartered Building Surveyor, who had prepared a report dated 29 July 2010 (Mr Horan, who prepared the Horan plan having died). The First Respondent gave evidence at the hearing; he relied upon a report produced by Mr Lowe, who was not called to give evidence at the hearing.

38. The judge said, at paragraph 49 of her decision, that she was satisfied that all the Applicants' witnesses were truthful witnesses who gave accurate evidence about matters that were within their knowledge. She said that there was "nothing in the documentation, plans or photographs which contradict any of them and their evidence is consistent with each other." She said at paragraph 60 that she was unable to accept the First Respondent's evidence save where it was supported by other evidence.

39. Accordingly, the First-tier Tribunal accepted the evidence of:

    a. Mr Peter Bucknall. His parents bought number 3 in around 1980, and he said that there was a curved boundary in the Front Section. Referring to that section, his witness statement said "… whilst my parents were alive, a hedge was growing there which marked the

boundary". Mr Tedstone at the appeal hearing told me that Mr Bucknall was a solicitor who bid for the property at auction on his parents' behalf and did the conveyancing for them;

b. Mr Peter Scott, who had lived close to the parties' properties 37 years and passed by on an almost daily basis; he said that the curved hedge had been in place throughout that time; and

c. Mr Bean, the First Appellant. He and Ms Saxton acquired number 3 in 1996 from Mr Bean's father; he said that the physical boundaries had remained unchanged throughout that time (save for a section of the boundary that is not the subject of this appeal). He said that he had consistently maintained the boundary features, including the curved hedge which he believed had been in place for 35 years. He believed the boundaries were the same during his father's ownership.

Mr Bean in his witness statement said (referring to the lines on the Horan plan):

"between points C, Ci and Ei is a line of small hedge growers and remains of older trees, which I believe to be the line of the old boundary hedge. I believe this to be the old boundary and that it goes on through Ei, Eii and Eiii to H.

The line D – E is the line upon which we erected a fence to keep our dogs from roaming…

Points J – G is a hedge which we believe was planted over 35 years ago on our side of an old fence which ran between Ei and H … I believe the boundary runs along the eastern side of the hedge.

40. The First Respondent in his evidence at the hearing did not contradict any of this. As the judge put it, "he accepted that the curved Front Section had been in place throughout his occupation without change"; he has been registered proprietor of no 1 since 1990.

41. The judge also had a report and oral evidence from Mr Rock. Referring to the Front Section, he said:

"There is evidence just beyond the hedge of timber fence posts to the east side of the hedge … which we suspect may be on the original line of the boundary".

42. He took the view that around the Front Section "the long-established boundary is curved". He said that the oldest trees or shrubs in this area were 40 – 50 years old (pages 12 and 13 of his report). He identified a point E some way beyond the curve (near to point Ci on the Horan plan) which he said was the

stump of an old tree and in line with other trees which Mr Rock said he suspected marked the original boundary. Mr Rock appended photographs to his report which include pictures of the old fence on the east of the hedge, with branches growing around the wire (consistent with an old fence).

43. Mr Rock's point E is not in the same position as point E on the Horan plan, which Mr Horan labelled as the end of a post and wire fence and to which Mr Bean referred in his witness statement as the fence he put up to keep the dogs in. Point E on the Horan plan is a very short distance to the west (number 3's side) of point Ei, and a line produced from Ci to Ei is straight. The line Mr Rock was identifying as the boundary was the curve Ei – Eii – Eiii on the Horan plan.

44. Mr Rock's evidence was challenged in cross-examination and, as the judge recorded at her paragraph 52, "consistently and convincingly rejected the suggestion that Mr Lowe's survey and analysis was more accurate than his evidence and Mr Horan's survey."

45. To summarise, the judge had before her old plans showing the Front Section as a right angle, but a 1974 conveyance plan showing it as a curve. She also had unchallenged evidence from the Appellants and their witnesses that the boundary had been on the eastern side of the curved hedge, along the posts of the old fence (clearly seen in the photographs annexed to Mr Rock's report) since at least around 1980, as well as Mr Rock's report.

The decision at first instance

46. The relevant paragraphs of the first instance decision fall into two groups: paragraphs 63-64, and 65-70.

Paragraphs 63 and 64: the boundary between points Ci and E or Ei.

47. In paragraph 63 the judge examined the boundary of what she called the Mid Section, which runs in a straight line away from the Front Section beyond point Ci and continuing to a point C.

48. The judge said that in the Mid Section the established fence followed a line of trees that is decades old, and said "there is no other evidence of a boundary". She expressly rejected the Respondent's suggestion of an unidentified movement of this part of the boundary.

49. She concluded in paragraph 64 that the boundary of the Mid Section ran "along Horan's line E – Ci – C." She did not say why she chose point E on the Horan plan and not point Ei which is where the Horan plan put the boundary. Point E on the Horan plan was not supposed to be a boundary feature at all, but was marked as the end of a post and wire fence (see Mr Bean's evidence, quoted above at paragraph [16]). It appears that the judge expressly accepted the Appellants' evidence about the boundary of the Mid Section but then used

point E on the Horan plan instead of point EI, which was the line identified by the Appellants and their witnesses.

50. I find that choice explicable only on the basis that the judge made a very understandable error as a result of the multitude of points on the Horan plan and the fact that Mr Rock's plan used different lettering. Point E on Mr Rock's plan lies on the straight boundary (not far, I think, from Ci); point E on the Horan plan is a post in the Appellants' relatively recent fence for their dogs.

Paragraphs 65 to 70: the Front Section

51. The next six paragraphs of the First-tier Tribunal's decision relate to the Front Section. At paragraph 65 the judge said

> "It is clear from the available documentation that in the 1880s the frontage of No 1 joined the boundary of No 3 to form an approximate right angle rather than a curve".

52. At paragraph 67 the judge observed that the wall and hedge, which I think in those paragraphs are the wall and hedge adjacent to the road near point H, "present as being part of No.3". She then at paragraph 69 stated that she was satisfied that the boundary was no further towards number 3 than the post below point G, and so determined the boundary as being along the line H to the post below G and then at right angles to E.

53. Because of the principles of law argued by the Appellants and discussed below, I take the view that that was not a conclusion that was open to her.

The law

54. In their Statement of Case the Appellants, as the applicants, argued that the evidence pointed to there being a boundary agreement in respect of the Front Section to the effect that the boundary was curved, and they pursue that argument on appeal supported by the findings of fact made at first instance. Alternatively, in their amended Grounds of Appeal they say that where there is a boundary feature established for twenty years or more, that raises a presumption as to the position of the boundary, which in this case was not displaced (S Jourdan and O Radley-Gardner, *Adverse Possession* (2nd edition) 4-08). I take those two grounds in turn.

Boundary agreement

55. In refusing permission to appeal her decision the judge observed that the boundary agreement point was not raised at the hearing in closing. Mr Tedstone told me that that was not the recollection of trial counsel, but conceded that at the end of a one-day hearing that had not been time to go into detail. In refusing permission to appeal the judge observed:

> "Boundary agreements may be reached very informally and by a very simple exchange of words or acknowledgement between the land owners. Accordingly, they may be found to exist on very limited evidence … Often they can be implied or inferred … Nevertheless the essence of a boundary agreements that two parties (or more) came to an agreement, an acknowledgement by each party to the other party of the same location for the boundary. The introduction of a feature by one party and inaction or silence of the other party cannot amount to an agreement."

56. Accordingly the judge refused permission to appeal. Judge Cousins gave permission to appeal on the basis that there was a good arguable case that the judge erred on fact and law. I agree, and I take the view that the authorities go further than the judge thought at first instance. They allow an agreement to be inferred from conduct of the kind evident in this case from the facts found, and in particular from the long-standing acceptance, over decades, of the boundary line of the old fence on the eastern side of the hedge.

57. Discussions of what is required for the finding of a boundary agreement often commence with the decision of Megarry J in *Nielson v Poole* (1969) 20 P & CR 909; at page 919 Megarry J said:

> "… a boundary agreement is, in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured in law. I also bear in mind that many boundary agreements are of the most informal nature."

58. A boundary agreement may be inferred from conduct; but whether there has been a boundary agreement is a question of fact and not of law (*Charalambous v Welding* [2009] EWCA Civ 1578 at paragraph 6). On occasions a boundary agreement may amount to a contract to convey land, in which case a written agreement is required, but generally a boundary agreement is simply a clarification. Megarry J in *Nielson v Poole* at page 918 put it like this:

> "Now a boundary agreement may constitute a contract to convey land. The parties may agree that in return for a concession by A in one place, straightening the line of division, B will make a concession in another place; and the agreement may thus be one for the conveyance of land. But there is another type of boundary agreement. This does no more than identify on the ground what the documents describe in words or delineate on plans. Nothing is transferred, at any rate consciously; the agreement is to identify and not to convey. In such a case, I do not see how the agreement can be said to constitute a contract to convey land.
>
> In general, I think that a boundary agreement will be presumed to fall into this latter category. "

59. In this case the original conveyance dividing the two properties cannot be found. The judge's finding about the boundary in the 1880s was not a finding about the original line of the boundary, on which she had no evidence, but about how things were on the ground at the time. There is no finding as to the original legal boundary and, since the time when that original conveyance was lost, the precise line of the boundary has been unknown.

60. It is well-established that a boundary agreement may be inferred from conduct: *Stephenson v Johnson* [2000] EGCS 92, CA at paragraphs 42 and 57; *Burns v Morton* [1999) EWCA Civ 1514, [2000] 1 WLR 347, CA at 353; *Charalambous v Welding* [2009] EWCA Civ 1578 paragraph 6 cited above; *Acco Properties Ltd v Severn* [2011] EWHC 1362 at paragraphs 10 and 68. But the judge drew the line at inferring an agreement from inaction. She said that there was no evidence of anything passing between the parties. Silence or inaction, she held, was not enough.

61. However, although there is no evidence of an agreement in words, there have certainly been actions from which an agreement can be implied or inferred. Someone planted the hedge around the Front Section, on number 3's side of the claimed boundary – certainly before 1980, perhaps before the 1974 conveyance. No evidence was called and no findings were made as to the circumstances in which the hedge was planted or the intention behind its planting. But someone put up the old fence of which the posts are still evident. No-one objected to the fence or the hedge, not even the First Respondent until 2004 when he challenged the Appellants with the Land Registry plan. They showed him the aerial photograph of the curved boundary from 1982 and he said nothing more about the matter until 2010.

62. In *Burns v Morton* [1999) EWCA Civ 1514, [2000) 1 WLR 347, CA the conduct relied upon as the basis for the inferring or implication of a boundary agreement was the building of a wall by the defendant, some inches away from the earlier boundary and without (as the judge at first instance found) consultation with the neighbours. Swinton Thomas LJ at p353 said:

> "the judge had to draw inferences from the facts that he had. He had to consider whether he had evidence from which he could properly imply an agreement between the parties to the effect that the boundary between the two properties should be in the position when the wall was built in 1979. The wall, by the time the judge gave his judgment in this case, had been there for some 20 years. It had, clearly, by that time been accepted by the owner of the adjoining property as being the true boundary to the property. The judge found, and in my judgment rightly found, that when the wall was built by Mr Morton it was indeed intended to demarcate the boundary between the two properties, and was accepted by both owners as the boundary from then onwards.

63. In that case there was evidence from the defendant that he intended the new wall to be the boundary, although there was no evidence from the relevant neighbours. We do not know in the present case when the hedge was planted and the fence put in – it is too long ago for anyone to know. Mr Rock's evidence, which the judge accepted, was that the fence to the east of the hedge was likely to have been the boundary; I take it that Mr Rock regarded the fence as the sort of feature that would mark a boundary. It is highly unlikely that the intention was to plant the hedge on a line that was partly on one side and partly on the other, which is where the judge's decision would place it, and the natural inference is that the fence, beyond the hedge from number 3's point of view, was the boundary.

64. In *Stephenson v Johnson* [2000] EGCS 92, CA the appeal court was asked to hold that the judge was wrong to find a boundary agreement in the absence of an offer and acceptance and indeed of any discussion. Again the crucial fact was the putting up of a fence and the absence of protest or of action. The Court of Appeal agreed that there was a boundary agreement; as Pill LJ put it at paragraph 72, "the facts permit, and indeed require, the inference that there was an agreement."

65. So here we have a boundary that may for some of the nineteenth century have been a right-angle on the ground; as the judge said, the nineteenth-century plans are of limited assistance. They do not claim to define the boundary. At some stage, over thirty-five years ago and perhaps even longer ago than that, a curved hedge was planted and a curved fence put in to the east (number 1's side) of the hedge. Either no protest was made by the then owners of number 1, or if any dissatisfaction was expressed it was resolved. The neighbours for at least thirty years, apart from a brief episode in 2004, treated the hedge and fence as marking a curved boundary along the line Ci-Ei – Eii – Eiii-H on the Horan plan. Given the impossibility of knowing what was said when the hedge and fence were installed, I have no hesitation in finding that there has been, at some stage in the past, a boundary agreement creating a curved boundary in the front section, and I think that in discounting that possibility the judge was in error.

The presumption arising from long-established boundary features

66. The Appellants' second ground in their Amended Grounds of Appeal is that

> "by virtue of the facts found and/or the evidence which she accepted [the judge] should have held that it lay along that line by virtue of the presumption of lawful title after 20 years open and peaceable possession."

67. In the 2nd edition of their book *Adverse Possession* (2011), Stephen Jourdan QC and Oliver Radley-Gardner say as follows at paragraph 4-08:

> "Where there has been open and peaceable possession of unregistered land for 20 years, the courts will presume, in the absence of evidence to the contrary, that the person in possession has title to it and that the true owner had made a proper grant of it accordingly."

68. That paragraph is cited in the Appellants' grounds of appeal. Certainly the curved corner cut off by the hedge and fence forming the physical boundary at the Front Section has been in the physical possession of the owners of number 3 for some decades, at least since 1980, probably since before 1974. If such a presumption arises, there has been nothing to displace it.

69. But the authors refer to a principle arising from possession in unregistered land. Title to number 1 has been registered since 1990. The most significant authority cited in the footnotes to that paragraph is *Foster v Warblington* [1906] 1 KB 648, CA, which related to the possession of oyster beds. At p 679 Fletcher Moulton LJ said

> "it is an unquestionable principle of our law that, where there has been long-continued enjoyment of an exclusive character of a right or a property, the law presumes that such enjoyment is rightful, if the property or right is of such a nature that it can have a legal origin."

70. There is no mention here of any limitation of that principle to registered land (I acknowledge that registered title would not have been in the contemplation of the members of the Court of Appeal in that case, on those facts and at that date). I have not heard detailed argument on the point. It may well be that the presumption also arises in registered land in circumstances such as have been found here.

71. However, in view of the finding I have made about a boundary agreement I do not need to decide this point and I say no more about it.

The appeal decision

72. Section 12 of the Tribunals, Courts and Enforcement Act 2007 reads as follows:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2)The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
(ii) re-make the decision.

…
(4) In acting under subsection (2)(b)(ii), the Upper Tribunal—

(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate.

73. My decision about the boundary agreement is that the First-tier Tribunal made an error of law and the appeal is allowed. In accordance with section 12(2)(b)(ii) above I re-make the decision, and following section 12(4)(a) I make the decision that the First-tier Tribunal could have made if it were re-making its decision. Decisions of the First-tier Tribunal take a particular form because its decisions are made upon references, by Land Registry, of applications to the Tribunal. Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states:

" (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. Accordingly, as the First-tier Tribunal could have done if it had re-made its decision immediately after making it I have directed the Chief Land Registrar to give effect to the applicants' application for a determined boundary as if the objection to that application had not been made.

75. In a case like this, if such a direction is not made the appellants have no choice but to make a fresh application for a determined boundary – or, perhaps, for alteration of the register to bring it up to date by changing the line of the determined boundary. Any objection to either application would be groundless insofar as it contradicted the decision I have made on this appeal. The making of a fresh application in that way would be a waste of resources – the Appellants' and Land Registry's – and it seems to me clear that Parliament intended, by the provisions of section 12, to enable the Upper Tribunal to deal with the matter directly as the First-tier Tribunal could have done.

Costs

76. It appears that no order for costs was made by the First-tier Tribunal. If the Appellants wish to apply for costs they may do so within 28 days of the date of this decision.

JUDGE ELIZABETH COOK
UPPER TRIBUNAL JUDGE

RELEASE DATE: 6 April 2016