UPPER TRIBUNAL **Ref: UT/2015/0064**
TAX AND CHANCERY CHAMBER **[2016] UKUT 0035 (TCC)**

Appellants: **(1) Christopher Martin Cantelmi**
(2) Maha Nakli

Respondent: **Ian John Hart**

Property address: 35 Dorset Road, London SW19 3EZ
Title Numbers: SY145694 and SY222897

Before: His Honour Judge Hodge QC
Rolls Building, Fetter Lane, London EC4A 1NL

Hearing date: **Tuesday 12 January 2016**

Representation: **Mr Daniel Dovar of Counsel appeared for the Appellants**
Mr John de Waal QC appeared for the Respondent

DECISION

Background

1. This is an appeal from a decision of Judge Ann McAllister, sitting as a Judge of the Property Chamber (Land Registration Division) of the First-tier Tribunal, dated 13th November 2014 following a hearing on 25 September 2014 preceded by a site visit the previous day. The Judge refused permission to appeal; but I granted permission to appeal on the Appellants' first ground of appeal at a hearing attended only by the Appellants on 29 July 2015. I refused permission to appeal on a second ground.

2. The Appellants are the registered proprietors of 35 Dorset Road, Merton Park, London SW19. The Respondent and his wife, Cindy Jayne Hart, are the registered proprietors of the adjoining property to the south, 37 Dorset Road. By an application dated 18 March 2013 the Appellants applied for the determination of the boundary between the two properties. For the reasons set out in her substantive decision, the Judge ordered the Chief Land Registrar to cancel the application.

3. Numbers 35 and 37 were built in 1904 to plans by the architect, Thomas Newell, and they share a common dividing wall. Although they are semi-detached dwellings, the properties are not symmetrical, with the flank wall of Number 37 extending beyond the house at Number 35 both at the front and at

the rear. Number 37 is said to be a mirror image of Numbers 1, 3 and 5 Dorset Road while Number 35 is said to be a mirror image of Number 7 Dorset Road. Numbers 1, 3, 5 and 7 were all built in 1884 to plans by H G Quartermain, who was the Estate architect immediately before Mr Newell. The Appellants' case is that the true boundary runs straight down the middle of, and some 7 inches (or 18 cm) inside, the wall separating the two properties (as shown by the red line drawn between the agreed datum point A and point B on the plan at 225). It is the Respondent's case that the true boundary runs along the external face of the wall along the line running from point A through points A1 and A2 to point B1 on the plan at 226. The Appellants point out that this produces two lines, with a deviation of some 2 degrees at point A1, whereas the original conveyance plans show the boundary to be a perfectly straight line. This result is said to be counter-intuitive. The Respondent argues that this is the only good point the Appellants have and that, as the Judge found, it goes against the weight of all the extrinsic evidence.

The decision

4. In her decision the Judge considered (1) the statutory and other requirements regarding applications to determine the exact line of a boundary (paras 7-9), (2) the history of the development of the John Innes Merton Park Conservation Area (of which both properties form part) and of the conveyancing of Numbers 35 and 37 by the common vendor in 1922 and 1924 respectively (paras 10-17), and (3) the law regarding the significance of 'T' marks on conveyancing plans (paras 18-21). Having referred to the evidence before her (paras 22-24), the judge then considered the relevant legal principles, citing from various case law authorities (paras 25-32). The Judge summarised the nature and effect of the Appellants' expert evidence, both written and oral, and she explained why she had not found it to be of any great assistance (paras 33-37). The Judge referred to the design evidence of other properties in the road, but she could not see how any assistance was to be derived from architectural drawings in respect of other properties, built at different time and by different architects (paras 38-39). The Judge rejected an argument that the position in relation to drainage assisted the Appellants in their argument that the boundary lay along the middle of the flank wall of Number 37 (para 40). The Judge considered the location of the chimneys and the flashing to be of central importance (para 41). Conversely, she considered the position of the supporting pillar at the end of the garden wall at the back of the properties to be of no assistance in establishing the boundary between the properties (para 42).

5. The Judge set out her conclusion that the boundary did not run along the centre line of the front or rear flank walls of Number 37 but along the outside, north-western, face of those walls at para 43 of her decision. She gave six reasons for reaching that conclusion at paras 44-46 of her decision. Mr Dovar (counsel for the Appellants) summarised the first five of those reasons at paragraph 15 of his skeleton for the appeal hearing as follows: (1) It was possible that the boundary line from point A to the wall could be as either party contended and this had been agreed by the Appellants' expert, Mr Robert Avenell FRICS. The Judge added that the point that the boundary line

was not entirely straight, but deviated by 2 degrees, increasing the length by 2mm, was of little importance given that the plots were not rectangular and the houses were not built square to the road, but the building line was at an angle of about 10 degrees to the road. The deviation was in any event insignificant. (2) There was no other evidence to support the Appellants' case. The evidence of the architectural drawings of other properties on the Merton Park Estate, notably Numbers 1, 3, 5 and 7, was said to provide no assistance, having been "built at different times and by different architects" (para 38). (3) The position of the chimney and flashings clearly indicated that the boundary was in line with the flashings. The Judge considered that "clear and compelling evidence would be needed in order to justify reaching a conclusion which is contrary to common sense". (4) Although the 'T' mark on the 1924 conveyance of Number 37 was "not determinate", it was a factor which, in the overall context of the case, assisted the Respondent. (5) The properties were not conventional semi-detached houses and their layout displaced any presumption which might otherwise arise by virtue of the fact that the properties were once in common ownership. The Judge's sixth reason was the written evidence of Mr and Mrs Barrett, the owners of Number 37 from 1982 until they sold the property to the Respondent and his wife in January 2013, which, although untested by cross-examination (since neither attended to give evidence) the Judge accepted. This was to the effect that, at least from 1982 onwards, the owners of both Number 37 and Number 35 had treated the boundary as the outside flank wall. Though not conclusive, that was said to be of some relevance. In argument, Mr Dovar described this sixth reason as a "makeweight" of minor relevance which failed to undermine the overwhelming evidence in support of the Appellants' case.

6. In her written reasons for refusing permission to appeal dated 16 December 2014, Judge McAllister said that the first ground of appeal raised points which had been dealt with at length at the hearing and in her decision. In her judgment, none of the four points identified as overwhelmingly in favour of the Appellants' case meant that the appeal had a real prospect of success. The conclusion reached had been that neither the layout, nor the design plans relating to other properties, nor the expert evidence (which was found to be of limited assistance), nor the fact that the properties had once been in common ownership, taken together, led the Judge to a finding that the line of the boundary ran along the middle of the centre line of the wall to the front and rear. Those factors were plainly outweighed by the points set out at paras 44-46 of the decision.

The Appellants' case on appeal

7. The sole remaining ground of appeal is that the First-tier Tribunal erred in that its decision failed properly to take into account material evidence. It is said by the Appellants that the Judge failed properly to take into account and/or to attach sufficient weight to (1) the evidence of Mr Avenell as to where the boundary line was located, in particular in relation to the front section; (2) the design plans relied upon by both parties; (3) the fact that both conveyances showed one straight line as the boundary; and (4) the fact that the rear fence was situated along the boundary line as contended by the Appellants. In his written skeleton argument in support of the appeal Mr Dovar also relied upon

a fifth factor, namely the presumption that arose from the fact that both properties had been in common ownership when built and had been built at the same time. Mr de Waal QC rightly raised no objection to this last point, which had been foreshadowed by Mr Dovar's written application for permission to appeal. In opening the appeal, Mr Dovar submitted that the Judge's decision was against the weight of the evidence and was one which no reasonable Tribunal could have reached.

8. Mr Dovar developed his grounds of appeal in his written skeleton argument in support of the appeal. He began by addressing the position of the front boundary line. Once the Respondent had conceded the datum point at A, he had been forced to adopt the contorted approach of having the boundary line broken into two straight lines joining at the intersection of the two properties, thereby converting a four-sided shape into a five-sided one, a detail appearing on none of the plans. It was submitted that common sense, the measurements on the conveyancing plans, the expert evidence, the position of the fence at the rear of the properties, the design plans, and the locus in quo all made it more probable that the boundary line should be one straight line rather than two lines at an angle to each other. Had the intention been that the Respondent should have the whole of the flank wall, why (Mr Dovar asked rhetorically) should the starting point for the boundary at the front of the properties not have been relocated slightly nearer to Sheridan Road, so as to create a single straight line. The fact that the properties themselves were not square to Dorset Road did not mean that the internal boundary line should be at an angle to the properties rather than one continuous straight line: the fact that the houses are at an angle to the road does not dictate how the boundary line between the two properties is to run.

9. Mr Dovar then addressed the design drawings. Having rightly accepted the admissibility of extrinsic evidence due to the paucity of detail and lack of precision in the conveyancing documents, the Judge had fallen into error in finding that no assistance was to be derived from the design drawings for Numbers 1, 3, 5, and 7 Dorset Road, despite both parties having relied upon them. Whilst not necessarily conclusive, they were said to support the Appellants' case that the true boundary was a single straight line dissecting the properties.

10. The Judge was said to have fallen into error in taking the position of the chimney and the flashings as effectively determinative of the case. In doing so, she had failed to take the expert and other evidence properly into account, and had given undue weight to only one factor, ignoring other, more weighty, evidence and considerations. As for the 'T' mark in the 1924 conveyance plan, whilst this might provide an implication of ownership of the boundary feature to which it referred, this was only an inference and it was not determinative of the matter. Moreover, (1) it only related to the fence extending from the rear of the buildings, (2) the fence was currently in a position which sat central to the flank wall and so was consistent with the boundary as contended for by the Appellants, and (3) the 1924 conveyance of Number 37 could not have conveyed land that had already been conveyed to the Appellants' predecessor in title by the earlier 1922 conveyance of Number 35. That conveyance (by

paragraph 7 of the Schedule) had required the purchaser of Number 35 to erect and thereafter maintain proper and suitable boundary fences.

11. Mr Dovar acknowledges that (at para 29 of her decision) Judge McAllister had cited *Cubitt v Porter* (1828) 8 B & 257 as authority for the proposition that a presumption as to shared ownership of a wall can arise from the common user of a wall separating adjoining lands and had stated that section 38 of the *Law of Property Act 1925* operates so as to divide ownership of the wall along the centre line, but with the important qualification that each party has a right of support from the other. Particular reliance was placed upon observations of Beldam LJ in *Dean v Walker* (1996) 73 P & C R 366 at 372-3 and the rationale underlying the presumption, which was "to insure to each [owner] a continuance of the use of the wall". Mr Dovar contends that the Judge was wrong to reject the presumption on the basis that the design of the two houses was not conventional. That was said to be no reason to dismiss the presumption that arises from the original common ownership of the two properties. Whilst the design might have been unconventional, it did not follow that in building or selling-off the properties it had been decided to leave one of them (Number 35) at the whim and mercy of the other (Number 37) in terms of the supporting wall enclosing, supporting and protecting one entire side of the former property. The presumption did not arise for aesthetic considerations but for practical reasons. Further, the position of the agreed datum point A had been deliberately chosen and marked on the conveyancing plan for Number 37, specifically to confirm that the boundary was one continuous straight line. That was the only plausible reason for locating the datum point at exactly this point on Dorset Road and not some 9 inches nearer to Sheridan Road. The Judge had also been wrong to reject the opinion evidence of the Appellants' expert (adverted to at para 34 of her decision) that if the shared wall had been intended to be wholly within the ownership of Number 37, he would have expected this to have been set out clearly, either on the conveyance plan or in the text of the conveyancing deed.

12. The Judge had totally failed to take into account the matters that not only supported the Appellants' case but had compelled a conclusion in their favour. In the absence of a sufficiently clear and accurate conveyance and plan, the following evidence pointed overwhelmingly towards the Appellants' boundary line: (1) the agreed starting point of the boundary line taken with the line of the flank wall: (2) the current layout; (3) the design plans; (4) the expert evidence (in particular as to the measurements of the boundary and the front); and (5) the presumption that arose out of the fact that the boundaries were originally in common ownership. All of these factors pointed towards a single straight line forming the true boundary between Numbers 35 and 37. The only consideration in favour of the Respondent was the chimney and the flashing; but not only was that consideration not compelling, it certainly failed to overcome the weight of the evidence pulling in the other direction.

The Respondents' case on appeal

13. The Respondent submits that the Judge's decision was one that she had been entitled to reach on the evidence. She had inspected the site and heard oral

evidence both from the Appellants' expert and (insofar as it was relevant) the first-named Appellant. Her decision should not be disturbed.

14. The Appellants' case is said to rest on the proposition that the original conveyancing plans show the boundary to be a perfectly straight line whereas the boundary line for which the Respondent contends involves a 2 degree deviation at point A1. However, that is said to be the Appellants' only good point and, as the Judge found, it is one that goes against the weight of all the extrinsic evidence. The Respondent's written skeleton argument addressed (1) the historic evidence, (2) the measurement evidence, (3) the design evidence and (4) the drainage evidence.

15. The Respondent submitted that Mr Avenell's written report had ignored the fact that the Merton Park development was very far from a conventional suburban development of semi-detached houses. In the case of a pair of semi-detached houses, such as Numbers 35 and 37, which are not mirror images of each other and were built at an angle both to the building line and to each other, it was not surprising that the boundary line might not be perfectly straight over its full distance. Neither of the conveyances or their plans assisted as to the precise location of the boundary. The 'T' mark along the rear boundary of No 37 suggested that it belonged to No 37 and one would not expect the ownership of the boundary to differ between the front and rear gardens. The measurement evidence was said to be equivocal.

16. Mr de Waal submitted that the historic illustrative design drawings and plans were relevant and of assistance to the court but that they supported the Respondent's case rather than the Appellants'. The pair of houses on the left of the plan at 155 are Number 7 (mirroring Number 35) and Number 5 (mirroring Number 37). They are said clearly to show the boundary running along the flank wall of Number 5 and not inside it. This is in contrast to the conventional pair of semi-detached houses on the right of the plan, Numbers 3 and 1 (which both mirror Number 37), where the boundary runs down the centre of the wall dividing the two houses. The design drawings of Numbers 5 and 7 at 153 and 163 (mirroring Numbers 37 and 35 respectively) do not support the Appellants' case that the boundary runs along the centre of the dividing wall, because there are no pecked lines within the dividing wall. The chimneys and fireplaces within the dividing wall between Numbers 5 and 7 accommodate and serve only Number 5, in contrast to the position with Numbers 1 and 3 (shown on the plans at 167-169) where the chimneys and fireplaces serve and accommodate both properties and where it is logical for the boundary to run down the centre of the dividing wall. Mr de Waal draws attention to the significant visual differences between the front elevations of Numbers 1, 3, 5, 7, 35 and 37 Dorset Road illustrated by photographs A16, A18 and A19 at 264-6.The examples of flues illustrated at figures 12 and 13 of the extract from "Anstey's Boundary Disputes and How to Resolve Them" exhibited to Mr Avenell's report at 216-7 do not correspond to the situation in the instant case. It is said to make no sense for part of the chimney which exclusively serves Number 37 to lie within the boundary of Number 35. The only design plan which shows a pecked line of any possible relevance to the present dispute is the attic and roof plan of Numbers 5 and 7 at 158; but there

is nothing to indicate that the pecked line denotes a legal boundary, and it may well represent only the line of the eaves.

17. A physical examination of Numbers 35 and 37 (as illustrated by the Respondent's photographs A9 to A12 at 262) is said to suggest that Number 37 was built first, with the outside of the flank wall of Number 37 marking the boundary. The Respondent also relies upon evidence of the drainage arrangements for each of Numbers 1, 3, 5, 7, 35 and 37 and upon the evidence of Mr and Mrs Barrett that it was they, as the owners of Number 37, who had maintained the boundary.

18. In the course of his oral submissions, Mr de Waal made the point that all of the various points advanced on the appeal by the Appellants had been raised before the First-tier Tribunal and had been considered and rejected by Judge McAllister (as acknowledged in her later decision refusing permission to appeal). Certain of the points made by Mr Avenell had raised issues of law for the Judge rather than matters of surveying expertise (as the Judge had noted at para 34). The Judge had heard Mr Avenell give evidence and she had not accepted all of his evidence at face value. No transcript of Mr Avenell's cross-examination, nor any agreed note of his evidence, had been placed before this Tribunal. At para 37 of her decision Judge McAllister had not found Mr Avenell's evidence to be of any great assistance.

Determination

19. In the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, the Upper Tribunal will interfere with the findings of fact made by a First-tier Tribunal only if it satisfied that the decision of the Judge is one that cannot reasonably be explained or justified, in the sense that it is one that no reasonable Judge could have reached: compare *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [58]-[68] per Lord Reed JSC (with whom the other members of the Supreme Court all agreed). Subject to what follows, I find that Judge McAllister has provided satisfactory and cogent reasons to support the conclusion at which she arrived. I can find no proper basis for concluding that the Judge misdirected herself or that she went plainly wrong.

20. Notwithstanding all that has been said on behalf of the Appellants, I do not accept that the Judge reached a conclusion that no reasonable Judge could have reached. Indeed, I would go further and say that I am in agreement with her conclusion. The Judge had had the benefit (denied to me) of having viewed the subject properties and their location. She had also had the benefit of hearing Mr Avenell's evidence. I can detect no error in her approach to that evidence.

21. I fully agree with, and would endorse, the first of Judge McAllister's reasons. In common (I think) with both counsel, I would not necessarily accept the

Judge's view that no assistance whatsoever is to be derived from the architectural drawings of Numbers 1, 3, 5 and 7 Dorset Road. But, in agreement with Mr de Waal, and for the reasons set out at para 16 above, in my judgment these drawings, and those of Numbers 35 and 37, do not support the Appellants' case. Rather, to the extent that they provide any assistance at all, they would seem to me to provide limited support for the case for the Respondent. At para 39 of her decision the Judge recorded that Mr Avenell had made the point that the pecked line shown on the attic and roof plan for Numbers 5 and 7 (at 158) might simply mark the eaves; and she stated that they were architectural drawings and there was no evidence that they were intended to show the legal boundary between the properties depicted.

22. I fully accept the third of the reasons provided by Judge McAllister for her decision. I agree with Mr de Waal's submission that it makes no sense for any part of the chimney which exclusively serves and accommodates Number 37 to lie within the boundary of Number 35. The point is apparent from the photographs and architectural and design drawings identified and relied upon by Mr de Waal (as referred to above) and would have been apparent to the Judge when she viewed the properties. She stated (at para 41) that she regarded the location of the chimneys and the flashing as "of central importance. If the Applicant's contention is correct, the boundary line would bisect the chimney which, visually, is sited on Number 37's side. This … is an outcome which, in the absence of any clear evidence to support it, makes very little sense." I do not consider that the Judge can be said to have fallen into error in requiring "clear and compelling evidence" to justify reaching a conclusion which, like her, I consider would be contrary to common sense. This feeds into the fifth of the Judge's reasons, with which I also agree and would endorse. It seems to me that the answer to the point made by Mr Dovar (as identified at para 11 above) that the Judge's conclusion as to the true boundary line would leave the owner of Number 35 at the whim and mercy of the owner of Number 37 in terms of the supporting wall enclosing, supporting and protecting one entire side of the former property is that this would be a classic case for the implication of an easement of support and protection in favour of Number 35, founded upon the presumed common intention of the parties to the 1922 conveyance of that property by the common vendor.

23. For the reasons advanced by Mr Dovar, I would not attach any weight to the 'T' mark on the plan to the 1924 Conveyance of Number 37. The Judge expressly recognised that this was not determinative; and I would not regard the limited weight which she clearly attached to it as vitiating her conclusion in favour of the Respondent. The Judge expressly recognised that her sixth reason was "not conclusive", merely noting that it was "of some relevance". I do not regard this as an error on the part of the Judge. In my judgment, none of the points advanced by the Appellants, whether singly or collectively, is sufficient to vitiate Judge McAllister's conclusion or her decision.

24. I therefore dismiss this appeal.

Costs

25. In principle, the Respondent, as the successful party, is entitled to his costs of the appeal. Unless these are agreed, the parties may file and serve written representations and statements of costs within 14 days after the formal handing down of this decision.

HHJ David Hodge QC

Decision Released: 26 January 2016