IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DARLINGTON COUNTY COURT
(His Honour Judge Howarth)

B3 99/0956

Royal Courts of Justice

Wednesday, 12th July 2000

Before:

LORD JUSTICE PILL
LORD JUSTICE CLARKE
MR. JUSTICE BENNETT

- - - - - - - -

MARK WILLIAM WINSPEAR STEPHENSON
SANDRA KA YU STEPHENSON

Appellants

-v-

DAVID JOHNSON
ANNE JOHNSON

Respondents

- - - - - - - - -

(Computer Aided Transcript of the Stenograph Notes
of Smith Bernal Reporting Limited
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Official Shorthand Writers to the Court)

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MR. J. MacDONALD Q.C. and MR. R. SHARPE (instructed by Messrs Darling & Stephensons, Darlington) appeared on behalf of the Appellants/Claimants.

MR. T. HIRST (instructed by Messrs Swinburne Maddison, Durham) appeared on behalf of the Respondents/Defendants.

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APPROVED JUDGMENT

1. MR. JUSTICE BENNETT: This is an appeal by the claimants from the judgment of His Honour Judge Howarth on 27th July 1999, whereby he dismissed their claim and found in the defendants' favour. The judge gave permission to appeal.

2. The claimants are the owners of the property, 1, Hartforth Village, Richmond, North Yorkshire, and have been the owners since 31st December 1993. Their neighbours are the defendants, Mr and Mrs Johnson, who are, and have been since 18th April 1986, the owners of Hartforth Hall. In February 1996 the claimants began litigation against the defendants over the disputed boundary between their properties. The matter came on for hearing in front of the judge in April 1999 and occupied four days. The judge reserved his judgment which he delivered on 27th July 1999. He found and declared inter alia that the true boundary of the claimants' and the defendants' properties lay along the line marked red and then green on the plan TB 304(a), as contended for by the defendants. That plan is to be found in the core bundle in front of us at page 12. From that decision the claimants appeal. The claimants accept that the red line from point A to point B on TB 304(a) correctly defines that part of their boundary with the defendants, but they say that the judge fell into error in deciding that the line coloured green defined the other part of their boundary, and that the learned judge should have found that their boundary went from approximately point B along the dotted line marked as "plan 4: deed of gift between Cradocks 1973 (1914 map)".

3. The origins of this case go back to 1973. The properties were then in common ownership, that is, they were owned by Major Guy Cradock. He owned Hartforth Hall Estate. He died in April 1975.

4. Prior to his death he conveyed, by deed of gift dated 1st October 1973, to his wife Mrs Cradock the freehold of 1, Hartforth Village. The plan attached to the deed shows that the shape of the land conveyed was roughly triangular. The northerly boundary ran through woodlands which formed part of the parkland surrounding Hartforth Hall. As at October 1973 that boundary was not marked on the ground by either a fence or any other feature.

5. On 10th July 1978 the executors of the estate of Major Cradock vested the estate, including Hartforth Hall, in Sir Josslyn Gore-Booth, his beneficiary. At some point after Major Cradock's death and before 10th July 1978, Mrs Cradock moved out of Hartforth Hall and into 1, Hartforth Village.

6. At about the time she moved she caused a fence to be erected. The fence ran along the broken red line as shown on the plan at page 48 in the core bundle. The judge found that if that plan

was compared to the plan annexed to the deed of 1st October 1973, then it was clear that the easterly end of this fence started from the roadside at a point southwest of that marked on the plan annexed to the deed and further the northerly boundary as fenced had a dog leg or bend in it, whereas the line of the plan annexed to the deed was almost straight.

7. It is, in my judgment, an important feature of this case that part of that fence remains in existence to this day; that is to say, the easterly section which runs from point B on TB 304(a) in a straight line to the roadway and is coloured green thereon. The judge found that that section of the fence was nearer to Mrs Cradock's house than the actual boundary which is shown on TB 304(a).

8. In 1985 Sir Josslyn decided to sell Hartforth Hall and some land. He instructed Knight, Frank & Rutley. On 5th February 1986 Sir Josslyn entered into a contract with the defendants to sell Hartforth Hall. Annexed to the contract is a plan described as "Plan No. 1" which is to be found in the core bundle at page 107. On 18th April 1986 the sale was completed. The original of the conveyance has been lost but a photocopy survives and is to be found in the core bundle at page 109. By clause 1 of that conveyance Sir Josslyn conveyed to the defendants:

> "All that the property more particularly described in the First Schedule hereto."

9. The First Schedule reads:

> "ALL THAT the property known as Hartforth Hall and adjoining land containing some eleven point zero five acres or thereabouts at Hartforth near Richmond North Yorkshire and shown for the purpose of identification only on the plan No 1 annexed ('the Plan No 1')."

10. By clause 2(b) of the conveyance the purchasers for themselves and their successors jointly and severally covenanted with Sir Josslyn as follows:

> "So as to bind the property and every part thereof for the benefit of the Vendor's adjoining property known as the Hartforth Estate to observe perform and be bound by the covenants contained in the Fourth Schedule hereto'".

11. Clause 1 of the Fourth Schedule provides:

> "The purchasers shall (if so required by the Vendor within twelve months from the date hereof) within a further six months erect to the reasonable satisfaction of the Vendor's surveyor and forever after at his sole expense adequately maintain in good and stockproof condition a post and minimum of four rail fence along the boundaries of the property between the points marked E D, D, C, B A, F G H and I J on the plan with five-bar gates between points B and C and between points H and I and likewise to maintain the remaining boundaries marked with an inward 'T' on the plan No 1."

12. On the plan attached to the conveyance which is identical, we were told, to the plan to be

found at page 107 attached to the contract of sale, are some crucial markings, that is to say, the letters A, B, C, D and E along a line drawn as the southern boundary of the land sold with Hartforth Hall. Furthermore, along that particular line are 'T' marks. The letters A, B, C, D and E are the letters, and the 'T' marks are the 'T' marks, referred to in clause 1 of the Fourth Schedule. 'T' marks indicate an obligation imposed on the defendants to maintain the boundaries.

13. At page 10 of the judgment the learned judge said that he had been given no explanation as to how those lines came to be drawn. However, the learned judge found Sir Josslyn to be, and to have been, a man of precision and that he would not have sold the land to the defendants without fixing the boundary in a precise way. The judge also found that at point D on Plan No. 1 a large tree was marked as a dog leg in the boundary. The judge accepted the evidence of the first defendant, Mr Johnson, that that part of the boundary had been pegged at the horse chestnut tree seen in photograph 17 in the core bundle. Accordingly, point D on Plan No. 1 the judge found to be that chestnut tree. Furthermore, he accepted the defendants' evidence that the boundary from point A to point D had been pegged out.

14. In the light of that evidence the judge construed the April 1986 conveyance. At page 18 of his judgment he said:

> "The verbal description does not identify a single boundary. The plan is 'for the purpose of identification only'. In order to identify the boundaries it is inevitable that regard has to be paid to such other evidence (if any) as there may be. The first place where other evidence is to be sought is within the Conveyance itself. No help is to be derived either from the grant or exception and reservation of easements, but the covenants by the purchasers do give some real assistance. This reference to the covenants for assistance with the definition of the boundaries is supported by the fact that the plan No. 1 annexed to the conveyance has 'T' marks on most of the lengths of the boundary. The use of 'T' marks indicates a likelihood of the conveyance containing a covenant imposing a liability for the maintenance of a boundary structure or a provision as to the ownership of boundary structures.
>
> The purchasers' fencing covenant contained in the Fourth Schedule imposes a covenant to erect a fence on the boundary between the points A to B, C to D and D to E and a gate between the points marked B to C and a covenant to maintain the boundaries which have T marks on them. The logical inference from this covenant is that there was at 18th April 1986 no fence or other boundary structure between the points marked A to B, B to C, C to D and D to E on plan No.1 and that there was then a fence or other boundary structure on the other lengths of the boundary which have T marks upon them. One length of the boundary which is marked with a T mark is the length running from point E in an easterly direction to the road running from Hartforth Lane to Hartforth Village."

15. The judge continued:

> "The only fence or other similar structure in the region of the line running from point E in an easterly direction to the said road is the easterly end of Mrs Cradock's fence. I have already accepted Mr Johnson's evidence about the pegs which had been driven into the ground in the region of the line from the points A to D on the said plan No.1."

16. The judge considered two authorities, Willson and another v Green and Webb v Nightingale. He then went on as follows:

> "The section of the boundary between the points marked A and D on the plan No.1 annexed to the conveyance dated 18th April 1986 divided the land conveyed by Mr Gore-Booth to Mr and Mrs Johnson from land retained by Mr Gore-Booth. The land owned by Mrs Cradock or Mr Gerald Vane lay a short distance to the south of this boundary line. The fixing of this length of the boundary concerns only Mr Gore-Booth and Mr and Mrs Johnson.
>
> Accordingly I hold that this section of the boundary as at 18th April 1986 lay along the line of these pegs, which ran in a straight line from the end of the Ha-Ha to the centre of the horse chestnut tree. I also hold as a matter of construction that Mr Gore-Booth was expressed to convey all the land up to and including the easterly end of Mrs Cradock's fence by the said conveyance. This section of the boundary did not divide Mr and Mrs Johnson's land from that of Mr Gore-Booth. It divided Mr and Mrs Johnson's land from that of Mrs Cradock or Mr Gerald Vane. The conveyance dated 18th April 1986 cannot by itself have defined the eastern section of Mrs Cradock's fence as the line of the boundary since neither Mrs Cradock nor Mr Gerald Vane was a party to that deed. There is no evidence that either Mrs Cradock or Mr Gerald Vane was aware of the contents of this conveyance. They are unlikely to have had any such knowledge."

17. The judge found that although Mrs Cradock and Mr Vane must be treated as having made an open offer to the owner of the land to the north of No. 1 Hartforth Village, there was no evidence of any acceptance of that offer. He then concluded as follows:

> "It must clearly follow from the above findings as to the true construction of the conveyance dated 18th April 1986 that (a) point E on the plan No.1 annexed to that conveyance represents the westerly end of the eastern section of Mrs Cradock's fence and (b) the line between the points D to E on that plan is a line from the centre of the horse chestnut tree to the westerly end of the remaining section of Mrs Cradock's fence."

18. The claimants do not challenge those findings before this court.

19. The judge found that Sir Josslyn in 1986 did not convey to the defendants all the land between Hartforth Hall and No.1 Hartforth Village. Sir Josslyn retained "an irregularly shaped strip of land between the northerly boundary of No.1 Hartforth and the south-easterly boundary of the Hartforth Hall land". So, as I understand it, if one stood at point A or B on "plan No 1", that is to say, roughly the gate at photograph No. 22, and then looked south away from the gate towards the

road, one would look across a piece of land retained by Sir Josslyn until at an undefined point Mr Vane's property at No.1 began.

20. It will be remembered that Mrs Cradock had erected a fence on or after moving into No.1 Hartforth Village and that that part of that fence remains to this day, as I have already described. The judge found that in the autumn of 1985 that part of the fence from points A to B on the plan at core bundle page 48 was removed on the instructions of Mr Gerald Vane, Sir Josslyn's uncle. Although Mr Vane was not the owner of No.1 Hartforth Village (he was not to become the owner until a deed of gift dated 12th June 1986) the judge found that Mrs Cradock must have made clear her intentions by then (that is, by the time the fence came down) to give the property to Mr Vane. Mrs Cradock was by then quite frail and indeed went to live in a home for elderly people in Leicestershire. Mr Vane was visiting Hartforth regularly before moving in.

21. Furthermore, the judge found that in the autumn of 1985 Mr Vane did not want the easterly section of Mrs Cradock's fence (that is to say, from point B to the road and marked in green on TB 304(a)) to be taken down. No instructions were given by Mr Vane for that section to be removed.

22. In about December 1987 the defendants, at the request of Mr Scrope, Sir Josslyn's agent, erected a fence in accordance with their obligations under the April 1986 conveyance. It was erected along the line in plan No. 1 between points A and B, C and D, and D and E. As the line appeared to go through the middle of the chestnut tree, the defendants in fact erected that part of the fence to the north of the tree. The fence then turned south-easterly and ran in a straight line to the point where it met the remaining section of Mrs Cradock's fence. In January 1988 the fence erected by the defendants was approved by Mr Scrope on behalf of Sir Josslyn, not only as to the quality but also as to its position.

23. Between points B and C the defendants were obliged to erect a five bar gate pursuant to clause 1 of the Fourth Schedule. However, the judge found that in September 1987 the first defendant and Mr Vane agreed that all that was required was a wicket gate, and accordingly a wicket gate was erected between points B and C as shown in the photographs before us. The first defendant wrote to Mr Scrope asking for permission to erect only a wicket gate. That was readily granted.

24. Shortly after the erection of the fence by the defendants, Mr Vane planted a beech hedge on his side. That can clearly be seen in the photographs. It is now well established.

25. Thus, from 1987 onwards, until September 1993, Mr Vane occupied the land to the south of

the defendants' fence and to the south of Mrs Cradock's fence and the defendants to the north. The judge put it this way:

> "From December 1987 until September 1993 nobody questioned the boundary between Hartforth Hall and No.1 Hartforth Village. The land to the north of Mr Johnson's fence was occupied by Mr and Mrs Johnson. The land to the south of it was occupied and gardened by Mr Vane either as the owner of the land or as the licensee of Sir Josslyn Gore-Booth. Nobody ever challenged Mr and Mrs Johnson's occupation of any part of the land to the north of this fence."

26. There the matter might have rested but for the death of Mr Vane in 1993. The administrators of his estate decided to sell No.1 Hartforth Village. However, it was clear that Mr Vane had not owned but only occupied, with the permission of Sir Josslyn, part of the land which Mr Vane had used as his property, in particular the land owned by Sir Josslyn to the south of the defendants' fence. It thus made sense for the administrators and Sir Josslyn to sell what they both owned to one purchaser.

27. When the sale particulars were drawn up it was noticed that the defendants' fence did not coincide with the position which can be plotted on the ground if the boundary line on plan No.1 was marked out on the ground on the basis that the plan was used as a definitive document. By comparing on TB 304(a) the line of the defendants and of Mrs Cradock's fence with the line as on the plan No. 1, it can be seen that a not insubstantial piece of land was involved.

28. Accordingly, on 20th October 1993 solicitors acting for the administrators and Sir Josslyn wrote to the first defendant. That letter is to be found at page 165 in the core bundle. The relevant parts read as follows:

> "Our clients are intending to sell No 1 Hartforth together with its garden and therefore recently reviewed the siting of fences along their boundary with Hartforth Hall. This inspection revealed that a fence had been sited incorrectly and encroached substantially into their land.
>
> We attach a copy of the plan used when Hartforth Hall was sold to you. The boundary is shown clearly marked in black. Our clients' land is shown shaded blue and your land is shaded green. The fence that has been erected is shown in red.
>
> We have advised our clients that the fence is incorrectly positioned and that you have no right to the land shaded in blue nor to a right of access over it."

29. By looking at the plan at page 166 it can be seen that the claimants were then alleging, as indeed they alleged in their particulars of claim, that the true boundary ran from point A by the wicket gate, across and then down to the road, which line was some distance to the north of the defendants' fence and Mrs Cradock's fence.

30. By a letter dated 22nd October 1993 Mr Andrew Johnson, the defendants' son, replied. It embodied the defendants' case.

31. In November 1993 No. 1 Hartforth Village was auctioned, proper notice having been given of the boundary dispute. No.1 Hartforth Village, including the land up to the line drawn on TB 304(a) as "plan 3: conveyance to Stephensons", was conveyed to the claimants on 31st December 1993.

32. In September 1995 the claimants erected a fence along a line to the north of the existing fence, namely along the broken black line A-B on the plan annexed to the particulars of claim which they averred was the true boundary. The defendants promptly took that fence down. Proceedings then followed.

33. Upon those facts the learned judge made the following findings relevant to the issues in this case:

> 1. The Deed of Gift conveyed to Mrs Cradock the land to the south and east of the dotted line on plan TB 304(a).
>
> 2. When Mrs Cradock erected the fence along the line shown on Mr Thompson's plan at core bundle page 48, she did not enclose all of her land. In particular, she did not enclose the piece of land which remains in dispute, that is to say, the piece of land shown on TB 304(a) between the dotted line I have referred to and the green line, including the gap in the wall which was created by the British Army during World War II.
>
> 3. There was no express agreement that the fence that Mrs Cradock erected (along the green line) between her and her great nephew, Sir Josslyn, represented the boundary between that part of her property and Hartforth Hall.
>
> 4. But, by erecting such a fence Mrs Cradock was making an offer to Sir Josslyn that she was willing to agree with him that the fence did represent that part of the boundary between their respective properties. The judge said:
>
> "It seems to me that by erecting and maintaining a fence the position of Mrs Cradock's fence she was making an offer to the owner of Hartforth Hall that she was willing to enter into an agreement that the boundary between their properties should be along this fence line. This offer could be accepted by the owner of Hartforth Hall communicating his or her acceptance to the offeror. The communication of this acceptance could be either express or by acts from which it can be properly inferred."

34. Mr MacDonald QC on behalf of the claimants challenged that finding. He submitted that the judge should have found the fence was erected as part of an informal family arrangement in relation basically to keeping rabbits out, and that it is artificial to say that Mrs Cradock was making an offer to Sir Josslyn.

5. The judge found that it was clear that in the autumn of 1985 Mr Gerald Vane did not want the easterly section of Mrs Cradock's fence to be taken down. Mr MacDonald said that the true position was that Mr Vane wanted the westerly section of Mrs Cradock's fence taken down so that he could enlarge his garden. There was no offer or a renewal of an offer. The fact that Mr Vane merely left Mrs Cradock's fence in being cannot amount to an offer.

6. At page 19 the judge said:

> "As we have seen Mr and Mrs Johnson's fence was erected in about December 1987 and Mr Scrope is to be taken as having approved it on behalf of Mr Gore-Booth in January 1988. Although Mr Scrope was only interested in the quality of construction of this fence, he never informed Mr Johnson of this fact. By his letter dated 10th February 1987 Mr Scrope had required Mr Johnson to erect the fence in accordance with the fencing covenant in the Conveyance dated 18th April 1986. This would include the requirement to erect the fence on the boundary. The approval by Mr Scrope which is to be taken as having been given must be treated as being an approval not only of the quality of the fence but also of the position of the fence."

35. A little later the judge continued:

> "The asking for approval of the fence in Mr and Mrs Johnson's solicitors' letter of 14th January 1988 and the subsequent giving of this approval (by inference) must amount to a boundary agreement between Mr and Mrs Johnson and Mr Gore-Booth in respect of the section between the points marked A to E on the plan No.1 annexed to the Conveyance dated 18th April 1986. The boundary line agreed was the line of Mr Johnson's fence."

36. Mr MacDonald, as I understand it, did not challenge those findings. The learned judge continued as follows:

> "Mr Johnson's fence as erected ended at the westerly end of the remaining section of Mrs Cradock's fence, that is to say, at point E on the said plan. A further piece of evidence which I accept is that of Mr Gordon Thompson about the gap in the wall. ... Put shortly a fence was erected across the gap in Major Cradock's life time. It remained there until Mr Johnson removed it to put a water main through. Mr Gordon Thompson then replaced it and the gap remained fenced until Mr Johnson again removed it so Mr Johnson could try to get access to his hotel with a motor coach. It is thus the case that if Mr Vane had owned any land to the north of Mrs Cradock's fence he would not be able to obtain access to it without either climbing over the fence either in the gap or between point E and the road or by trespassing on Mr Johnson's land, by going through the wicket gate between points B and C on the

> Conveyance plan and then walking to it over Mr Johnson's land.
>
> As we have seen the fencing remained in this position without any objection until the writing of the letter dated 20th October 1993. This is a period of nearly six years. During this time Mr Vane reinforced the established boundary by having the beech hedge planted.
>
> The erection by Mr and Mrs Johnson of their fence seems to me to be a communication by them to Mr Vane which any reasonable person would infer amounted to an acceptance of Mr Vane's inferred offer to accept the eastern end of Mrs Cradock's fence as the boundary rather than have it accurately plotted out with the assistance of a professional surveyor.
>
> Accordingly I conclude that there was a boundary agreement between Mr Vane of the one part and Mr and Mrs Johnson of the other part in the terms which I have already mentioned. This agreement was made either when Mr and Mrs Johnson completed their fence or within a reasonable time thereafter when Mr Vane made no objection.
>
> In reaching my conclusion about the making of a boundary agreement between Mr Vane and Mr and Mrs Johnson I realise that I have attempted to produce a picture by putting various pieces together in the manner of a jigsaw puzzle. I believe I have used all the pieces and put them together correctly to produce an accurate whole."

37. Mr MacDonald submitted that there was no boundary agreement between Mr Vane and the defendants. Mr Vane had never made an offer. Such an offer cannot be implied from his conduct. The judge in trying to solve the jigsaw puzzle had forced the pieces together and produced a distorted picture.

38. It is convenient if at this stage I now mention a particular submission of Mr MacDonald. He submitted that prior to the first defendant purchasing Hartforth Hall, he had walked the boundaries and knew or at least must have known that the fence erected by Mrs Cradock either did not or could not mark the boundary. The first defendant accepted in evidence that he had a plan, namely at core bundle page 94, which showed the proposed boundary running from point D thereon to point E, and that point E extended beyond the line of a fence running in a north-westerly direction on the other side of the road, which ended in a position roughly opposite to the gap in the wall made by the British Army.

39. Mr MacDonald showed to us various passages in the first defendant's evidence, particularly the transcript of evidence from page 8H to page 9F-G, for the purpose of submitting that the first defendant knew that Mrs Cradock's fence was not the boundary. However, in reading on in that transcript, it is apparent to me that the first defendant was not saying that which Mr MacDonald contends that he was. I refer in particular to the transcript at page 9H through to page 10C. Accordingly I reject the submission of Mr MacDonald. It is fair to say that, in the light of that

passage at page 9 and over into page 10, he did not really pursue this particular point. Nevertheless, in my judgment the evidence does not establish that the first defendant knew that the fence was not the boundary. Indeed, the judge made no finding that the defendant knew that the fence was not the boundary.

40. In giving permission to appeal, the judge said that the law as to implied boundary agreements could be beneficially clarified by an appeal. Mr MacDonald, in opening his clients' appeal, expressly disclaimed any intention of inviting this court to "clarify matters of law". He submitted that the sole issue was whether the judge had correctly drawn the right inferences from the primary facts when he found an implied agreement between Mr Vane and the defendants. It is thus to that issue that I now turn.

41. The fundamental submission of Mr MacDonald was to this effect. His clients have a good paper title to the disputed land. The Deed of Gift of 1973 is the root of their title. On 12th June 1986 there was conveyed to Mr Vane exactly what had been conveyed to Mrs Cradock in 1973. On 31st December 1993 exactly the same piece of land was conveyed to the claimants by the administrators of Mr Vane's estate. The judge so held and Mr MacDonald said he was right so to do. Mr MacDonald further submitted that boundaries run according to the description in the parcels of a conveyance and any plans annexed thereto. The principles of adverse possession are in being to assist in sorting out problems relating to boundaries, and the court should not therefore strive to find agreements varying that which has been agreed in a conveyance.

42. I would not accept that part of Mr MacDonald's submissions that the law should not strive to find boundary agreements. I refer to Neilson v Poole (1969) 20 P & CR 909, a decision of Megarry J. He was concerned with whether or not a boundary agreement had been reached and whether or not that agreement was void for want of registration. At page 919 Megarry J said:

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

43. These words were spoken, I accept, in the context of whether the boundary agreement in that case was void for want of registration as a land charge. Nevertheless, in my judgment, those words, coming as they do from Megarry J, are of considerable assistance in this case.

44. The question that has to be asked is whether, on the facts of this case, the judge drew the correct inferences from the primary facts and whether he was entitled to conclude that the facts founded an agreement between Mr Vane and the defendants that the green fence, running along the

green line on TB 304(a), and which can be seen in photographs Nos. 2 to 8 inclusive (that is to say, up to the yew hedge), was the boundary between the land owned by him at 1, Hartforth Village and Hartforth Hall.

45. Mr MacDonald made a further submission along these lines. The conveyance of 1986 cannot convey to the defendants what I have referred to as the disputed land. He accepted that the judge had found that the land conveyed to the defendants was the land as fenced, that is, as fenced by the first defendant after the conveyance and as had been fenced by Mrs Cradock along the green line.

46. In my judgment, the judge was correct to assess the significance of the facts as they were when the defendants completed the erection of their fence in December 1987 or within a reasonable time thereafter and to look back, as he did, over all the events, particularly from and including 1985. In my judgment, the significance of the facts is as follows.

47. First, the remainder of the fence constructed by Mrs Cradock is a fence of posts, two rails, a strand of wire below the two rails and chicken wire to keep the rabbits out. The fence has no gate and thus there is no access from that part of No. 1 Hartforth Village to the land the other side of Mrs Cradock's fence. The most easterly point of the fence joins the stone wall to the west of the gap created by the British Army: see photographs Nos 2 and 3.

48. Second, I accept the submission of Mr Hirst, counsel for the defendants, that the area of woodland beyond the fence was of no importance to Mr Vane, either from a gardening or a financial point of view. The gap in the wall would have been a liability for him. Either he would have had to fence it or risk livestock getting into his garden. It could be said to be a positive benefit to Mr Vane that the fence went to the point in the stone wall which was most advantageous for him. The fact therefore that he did not take down that section of the fence when demolishing the rest of Mrs Cradock's fence is significant.

49. Third, Mr Vane, in my judgment, must have been aware of the defendants' obligations under the Fourth Schedule. The judge said:

> "On 17th July 1987 Mr Scrope wrote a letter of reminder to Mr and Mrs Johnson. Mr Johnson states in his witness statement that he spoke with Mr Gerald Vane in about September 1987 and agreed with him that there was no need for a five-barred gate across the drive between Hartforth Hall and Hartforth Village as required by the fencing covenant. Instead Mr Vane and Mr Johnson agreed that all that they required was a wicket gate. Mr Vane wanted to incorporate the south easterly section of this drive into his garden and to make it part of his lawn. The cost of a wicket gate was

> less than the cost of a five-barred gate. The Deed of Grant ... had granted Mrs Cradock a right of way ... over the south-easterly section of this drive. Mr Vane was clearly entitled to the benefit of this right of way. If you compare the plan to the 1973 Deed of Grant with Plan No.1 to the Conveyance ... it is clear that this right of way did not affect any land conveyed by the Conveyance. This is clear when the north westerly boundary of enclosure 458b on the 1973 Deed Plan is compared with the same boundary on Plan No.1 ...
>
> Mr Gore-Booth only reserved a right of way on foot over the driveway running across Hartforth Hall .... He did not need a five-barred gate to exercise this right, a wicket gate was all that was practically required. ...
>
> Mr Johnson wrote to Mr Scrope on 4th September 1987 informing him of his discussion with Mr Vane and asking to vary the covenant requirements in two respects."

50. Mr Vane thus, in my judgment, was actively involved in negotiating a wicket gate in substitution for the five barred gate in the fence that was to be the boundary between that part of his garden occupied by him with the licence of Sir Josslyn, and the defendants' land at Hartforth Hall.

51. Fourth, the fence erected by the defendants ran to Point E on the plan annexed to the conveyance, which point Mr MacDonald accepted is the westerly end of the remaining part of Mrs Cradock's fence. Mr Vane would thus have been well aware that the defendants' fence, delineating part of the defendants' boundary, joined Mrs Cradock's fence. Mr Vane at no time suggested that Mrs Cradock's fence should be moved to the line delineated on the Deed of Gift.

52. Fifth, the 'T' mark on the plan of the defendants' conveyance, together with the Fourth Schedule, imposed an obligation on the defendants to maintain the boundaries, and so far as is germane to this case, the boundaries from point E in an easterly direction to that road. Significantly, in my view, there was no obligation upon the defendants under the Fourth Schedule to fence that section of the boundary, but there was an obligation to fence from points A to E where no fence existed at the time of the conveyance. If then there was no obligation to fence from point E to the road, but there was an obligation to maintain the boundaries, then I am driven to the conclusion that, on a proper construction, the obligation to maintain the boundaries from point E to the road must mean an obligation to maintain Mrs Cradock's fence. It is significant that Mr Gerald Vane must have to some extent been involved in the negotiations about what has been referred to as the dog leg fence; that is, the fence erected by the first defendant.Thus, in my judgment, Mr Vane can at that stage have been taken to have consented to the position that the boundary was as delineated by Mrs Cradock's fence.

53. Sixth, after the defendants erected their fence, at no time did Mr Vane ever suggest to the

defendants that there was a section of land immediately to the north of Mrs Cradock's fence which the defendants had no business to be occupying and which he owned. That is not surprising. Mr Vane, in my judgment, simply did not want it and probably did not look upon it as his anyway.

54. Mr Hirst in his submissions drew our attention to a passage in the evidence of the first defendant beginning at page 15H and going through to 16A:

> "(Q) You knew that your contract was with him. (A) Yes. So that was why we got our solicitor to contact his solicitors. Why do it direct when everything else had been done by solicitors? All I did was pass on the message that Gerald Vane wished to have a wicket gate instead of a five bar gate, as he said because he wanted to extend his garden which I thought was quite a good idea for him and as I said to him at the time, you know, I don't mind losing that exit when I already have one."

55. Mr Hirst says that the words "that exit" referred to the gap in the wall. There is a further passage to a similar effect in the transcript of Mr Johnson's evidence at page 19C-F. So it is that Mr Hirst submitted that there was evidence that Mr Vane either knew or must have known that the exit, the gap, was not part of his property.

56. Mr MacDonald submitted that the judge did not accept that part of the first defendant's evidence. For my part, I would not accept that submission. The first defendant gave evidence and, in my judgment, the learned judge either accepted that evidence or certainly did not reject it.

57. In summary, in my judgment, the judge was right to find an agreement between Mr Vane and the defendants. It is not strictly necessary for a court to have to find an offer and an acceptance. The course of the parties' conduct, that is to say, Mr Vane and the defendants, should be looked at and if, on the balance of probabilities, an agreement is established, that is sufficient. In my judgment, the conduct of Mr Vane and the defendants does establish such an agreement.

58. My finding of an agreement thus renders it unnecessary to move to the other grounds of appeal relating to estoppel. The judge found at page 23 that an estoppel was made out. At page 25 the judge made what he called some general remarks on the facts as he found them to be. Mr MacDonald criticised those remarks. In my judgment, in the light of the judge's finding as to the implied agreement which I consider to have been correct, it is unnecessary to go into matters of estoppel. The judge was right in finding the agreements which he did find.

59. Accordingly, for my part I would dismiss the appeal.

60. LORD JUSTICE CLARKE: I agree. To my mind, the essential question is whether an agreement should be inferred between Sir Josslyn Gore-Booth and Mrs Cradock or Mr Vane that

the north eastern boundary of No. 1 Hartforth Village was or was to be treated as along the line of the "existing fence" as indicated on the plan TB 304(a). It is expressly accepted by Mr MacDonald that if such an agreement is to be inferred it has legal effect. In my judgment, such an agreement should be inferred as between Sir Josslyn and Mr Vane. Mr MacDonald correctly concedes that on the true construction of the conveyance dated 18th April 1986 between Sir Josslyn and the respondents, it was agreed that the south east boundary of the property being conveyed was represented by the same existing fence. He further correctly concedes either, as I understand it, on the true construction of the conveyance, or on the basis of a subsequent agreement to be inferred from the discussions between Mr Johnson and Sir Josslyn's agents and the erection of the new fence, that the boundary immediately to the west of the existing fence was the line of the dog leg along which the fence was subsequently erected. That fence was erected pursuant to the respondents' obligations in schedule 4 of the conveyance to which my Lord, Mr Justice Bennett, has referred.

61. The appellants' case is that, although Sir Josslyn purported to convey the triangular area to the north of the existing fence to the respondents, he did not in fact do so because it was still owned by Mrs Cradock. I am bound to say that that seems to me to be very unlikely indeed. It is much more likely that the boundary was shown as including the existing fence because that is where Sir Josslyn and his agents at that time thought it was. Mrs Cradock had erected the fence. The purpose of the dog leg was to enable Mr Vane to extend the garden of No. 1. Although the Deed of Gift relating to No. 1 by Mrs Cradock to Mr Vane was not executed until 12th June 1986, Mr Vane was already on the scene in the autumn of 1985, because the judge held that the remaining part of the fence erected by Mrs Cradock to the south of the existing fence was removed at that time on his instructions. There must have been discussion between Sir Josslyn and Mr Vane about the proposed dog leg fence.

62. It seems to me that both Mr Vane and Sir Josslyn must be taken to have agreed that the northern boundary of the property surrounding no. 1 was along the line of the whole fence, which comprised both the dog leg and the existing fence. It makes no sense to draw a distinction in this regard between the dog leg and the existing fence. The obvious inference is that both treated the relevant boundary as being represented by the whole fence. There is no evidence that Mr Vane ever thought that he owned the area north of the existing fence. He would, after all, have had to climb over the fence to reach the land to the north of it. Nor is there any evidence that during the 1980s Sir Josslyn thought that it was owned by Mrs Cradock or Mr Vane. On the contrary, the 1986 conveyance shows that he and his agents regarded it as his.

63. To my mind, the only reasonable inference to draw from all the evidence, including that referred to by my Lord, is that the north eastern boundary was accepted by all as the line of the existing fence.

64. For these reasons and those given by my Lord, the judge was in my opinion right to hold that the whole fence, both the dog leg and the existing fence, represents the south east boundary of the land conveyed to the respondents. It follows that it represents the northern boundary of the property subsequently conveyed to the appellants by Sir Josslyn and the personal representatives of Mr Vane. I, too, would dismiss the appeal.

65. LORD JUSTICE PILL: I also agree that the appeal should be dismissed for the reasons given by Bennett J. The Hartforth Hall estate in North Yorkshire was divided in 1973 by the extraction from it of a property known as No. 1 Hartforth together with the garden to that property. This was achieved by means of a deed of gift. Members of the family have since been involved with both properties. The importance of the dispute is as to the eastern boundary of No. 1 Hartforth. The issue is whether an access to the highway is within the property of the Hartforth Hall Hotel, as it now is, or within the property of No. 1 Hartforth. That has commercial importance, at any rate to the defendants who are the owners of the Hartforth Hotel.

66. In my judgment, the judge was entitled to make what I regard as his central finding of fact at page 20 of the judgment. Accordingly, I conclude that there was a boundary agreement between Mr Vane of the one part and Mr and Mrs Johnson of the other part. The judge was, in my view, entitled to reach that conclusion from the evidence he heard and against the background in this case. It has been argued on behalf of the plaintiffs, who are the owners of 1, Hartforth, that the relevant access is within the boundaries of that property. Mr MacDonald QC has forcefully argued that boundaries are formal and that it is fundamental that the relevant land was conveyed to the owner of No. 1 Hartforth by the deed of gift in 1973. Mr MacDonald submits that the law's mechanism for dealing with a situation where boundaries are to depart from those which accord with conveyances is by way of the law relating to adverse possession. There is a good paper title to the land in the title of No. 1 Hartforth. The court, he submits, should not strive to find agreements which conflict with the paper title. The court should not be astute to replace the effect of a conveyance by the actions of parties unless their intentions are clear. Mr MacDonald submits that there is no satisfactory evidence to support the view that Mr Vane agreed to the boundary for which the defendants contend, and that to imply that there was such an agreement is, as he puts it, to go a bridge too far.

67. Mr Justice Bennett has set out the background to the dispute and the events since 1973. The

deed of gift of 1973 is clearly a relevant consideration. So is the fact that members of the family have been involved with both properties. Mrs Cradock is the great aunt of Sir Josslyn Gore-Booth and Mr Vane, who for a time was the owner of 1, Hartforth, was the uncle of Sir Josslyn. Both Mrs Cradock and Mr Vane are now dead. The judge was entitled to have regard to the conveyance to the defendants in April 1986 and to the provisions as to fencing within that conveyance. They include a reference that the ownership of what is marked as a fence on the eastern part of the boundary is to go into the ownership of the defendants. I accept, and the judge recognised, that Mr Vane was not a party to that conveyance. The deed of gift to him occurred shortly afterwards in June 1986. The judge was entitled to have regard to Mr Vane's involvement with both properties during that time and at later periods when he was the owner. He was deeply involved in the creation of a boundary fence between the two properties along the western part of the boundary. It was he who specified the type of gate which was to exist in one part of the boundary. He clearly knew a good deal about the background to the ownership of the properties. Moreover, there was evidence, to which the judge did not expressly refer, but to which Bennett J has drawn attention, about a discussion between Mr Johnson and Mr Vane as to the gate at the western boundary. Mr Johnson gave evidence, which is not and cannot be the subject of dispute, that he was quite prepared to make concessions about the gate at the western end because he had access to his property over what is now the disputed access at the eastern end. Those were matters which the judge was entitled to take into account in reaching the conclusion that he did.

68. We have been referred to the case of Neilson v Poole (1969) 20 P & CR 909. Megarry J considered the effect of an agreement as to boundaries in the context of whether such agreement needed to be registered. The claimants rely upon a statement of Megarry J near the end of his judgment:

> "The law ought not to encourage people to be aggressive about their rights by the fear that in granting any indulgence they will be treated as having yielded up their rights. A man who puts in garden canes short of the point that he considers to be the true though unmarked boundary, in order to serve as a warning to himself and others against any arguable trespass on to his neighbour's land, ought not to be treated as having thereby represented that the canes show the true boundary."

69. At page 919 Megarry J said:

> "There may, of course, be cases in which it is uncertain or doubtful whether a boundary agreement will convey any land."

70. The learned judge considered a situation in which a boundary is clear from a conveyance but an agreement is made as to other land beyond the vague boundary, and whether it is necessary

in those circumstances to register the boundary agreement. In this case there is at least doubt as to the "proper" boundary. That boundary is not clear from the conveyances in my judgment and certainly not clear from the conveyance to the defendants in 1986. It is a similar situation to that existing in Neilson v Poole, though in that case Megarry J was confident in the view that the conveyed boundary coincided with the boundary agreed. In that context Megarry J stated:

> "I must, too, bear in mind that a boundary agreement is, in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured in the law. I also bear in mind that many boundary agreements are of the most informal nature, and that the penalty of failure to register an estate contract is that the agreement will be void against a purchaser."

71. I accept, as does Mr Hirst on behalf of the defendants, the sentiments expressed by Megarry J near the end of his judgment. Nevertheless, in my judgment, the passage which I have just cited indicates a favourable view of the value of boundary agreements. That value is indorsed by Megarry J and too much formality must not be expected. It is the task of the court to consider the evidence as a whole and to reach a conclusion as to whether or not a boundary agreement has been made. It is not suggested in this case that, against the background described, any question of registration would arise.

72. It is for those reasons, as well as those given by Bennett J, that the judge was entitled to conclude that Mr Vane did agree the boundary which is now disputed by the claimants. I also agree with Bennett J that it is neither necessary nor appropriate to go on to deal with the estoppel argument raised. In both matters the claimants rely upon the same facts. In my judgment, those facts permit, and indeed require, the inference that there was an agreement, and it is not appropriate to go on to attempt to dress up the same facts as an estoppel and consider whether on those facts an estoppel would occur. This appeal is accordingly dismissed.

Order: Appeal dismissed with costs of the appeal and the costs of the trial, save for those costs incurred by the easement argument and the right of way argument; agreed minute of order to be provided to the court as to the costs below; the stay on the application to rectify to be removed; application to cross appeal dismissed; costs on the cross appeal to be the appellants' costs; application to adduce further evidence dismissed; no order as to costs.

(Order not part of the judgment of the court)