

Neutral Citation Number: [2025] EWHC 317 (Ch)

Case No: PT-2024-MAN-000113

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Date: 14 February 2025

Before :

HHJ Halliwell sitting as a Judge of the High Court

Between :

LEE JAMES BOOTLE

Claimant

- and -

**(1) GHJ PROPERTY MANAGEMENT AND
DEVELOPMENT LIMITED**

**(2) FI REAL ESTATE MANAGEMENT
LIMITED**

Defendants

**Mr Gary Blaker KC and Mr Wilson Horne (instructed by LLM Solicitors LLP) for the
Claimant**

Mr Philip Rainey KC (instructed by Addleshaw Goddard LLP) for the Defendants

Hearing dates: 2-5, 13 December 2024

APPROVED JUDGMENT

HHJ Halliwell:

	Para
(1) Introduction	1
(2) Background	4
(3) Issues	24
(4) Witnesses	25
(5) The Site	47
(6) The Title Documents	52
(7) The historic Ordnance Survey Maps	64
(8) Expert evidence	68
(9) Position of the Boundary	84
(10) Claimant's drainage rights	99
(11) Trespass and encroachment	109
(12) Damages	113
(13) Injunctive relief	115
(14) The Defendants' cross application	137
(15) Inquiry as to damages	156
(16) Disposal	158
Appendix 1: Claimant's Title Plan	
Appendix 2: First Defendant's Title Plan	
Appendix 3: 1929 Conveyance Plan	
Appendix 4: 1930 Conveyance Plan	
Appendix 5: OS Maps: 1849-1911	
Appendix 6: Claimant's survey plan	
Appendix 7: Defendants' survey plan	

(1) Introduction

1. This judgment follows the trial of a boundary dispute in respect of two properties at Whittle-le-Woods, Chorley, Lancashire. There are also claims for injunctive relief and damages.
2. The Claimant (“**Mr Bootle**”) owns a substantial residential property known as Little Knowley Farm (“**Little Knowley Farm**”). The First Defendant (“**GHL**”) owns adjoining land to the south (“**the Development Land**”), now in the early stages of development. The Second Defendant (“**FI**”), an associated company, is responsible for the development work. The work has prompted an application for interim relief. On 22 August 2024, HHJ Cadwallader granted interim relief in Mr Bootle’s favour. On 9 September 2024, I made an order providing for such relief to continue on a modified basis only, see *[2024] EWHC 2989 (Ch)*.
3. Messrs Gary Blaker KC and Wilson Horne, of counsel, now appear on behalf of Mr Bootle. Mr Philip Rainey KC continues to appear on behalf of GHL and FI.

(2) Background

4. The properties were historically comprised in two separate agricultural holdings with a shared boundary some 120 metres in length. Little Knowley Farm is situated immediately to the north of the Development Land. To the west and east, the properties are now bounded by public highways, the A679 (Millennium Way) and B6228 (Blackburn Road). The shared boundary is shaped by a continuous ditch (“**the Ditch**”). The Ditch historically accommodated a watercourse, with fences and substantial vegetation to each side.
5. Mr Bootle is a local businessman. He is the director of a company involved elsewhere in the maintenance and repair of motor vehicles. On 24 August 2007, he purchased Little Knowley Farm as a family home. The transaction was completed and, on 24 September 2007, he was registered as sole proprietor under Title no. LA561274. At the time of purchase, the property comprised a farm house with outbuildings and some 10 acres of adjoining farmland. Mr Bootle obtained planning permission to demolish and rebuild the farm house and construct, in its place, a substantial five bedroomed house. This was achieved. The new house was constructed with a large walled garden. Agricultural use ceased and the land was landscaped. He moved in with his wife and three children. Two of his children have now left home.
6. Throughout this period, the Development Land continued in use as an agricultural holding. For many years, it was owned by a local farmer. His son, Mr Edwin Schofield (“**Mr Schofield**”) continued to graze sheep and cattle on the land for many years after his father had disposed of the freehold title. He did so with the permission of the freehold owners. This remained the case until earlier last year.
7. In September 2018, GH L acquired the Development Land. GH L was registered as proprietor, under Title no LAN24705. It obtained outline planning permission for the construction of up to 233 dwellings but then submitted an application for detailed planning permission for the construction of buildings for commercial, industrial, storage and distribution use (Use Classes E, B2 and B8). For this development, it obtained planning permission on 30 April 2024.
8. In anticipation of planning permission, GH L or its contractors commenced clearance work on 29 April 2024 or thereabouts. This included the removal of two large mature trees and some small trees on land to the west of the Development Land, near the A679.

9. This happened when Mr Bootle was away on business. However, on his return the following day, Mr Bootle advised workmen on site that they had cut down and removed trees on his land. He advised them that the boundary was the fence and hedge to the south of the brook, not the palisade fence on his land to the north.
10. Work on this part of the site did not resume until early June. Mr Bootle contends that, when further trees were cut down on his property, he arranged a meeting with Mr Timothy Knowles, the managing director of both Defendant companies. The meeting took place on site on 7 June 2024. Mr Bootle contends that Mr Knowles accepted that his workmen had chopped down trees on Mr Bootle's property and put this down to the absence, on holiday, of his site manager; confirming that it would be unnecessary afterwards to do any further work on Mr Bootle's side of the boundary.
11. Following this meeting, Mr Knowles's personal assistant sent a text message to Mr Bootle offering to pay for his landscaper to plant a selection of new trees. On the same day, 10 June, Mr Bootle met Mr Mark Adams, FI's head of development and construction, and reiterated his case that the boundary was aligned with the southern fence. This meeting again took place on the site. Mr Adams advised Mr Bootle that the Defendants were working from the filed plan. They did not reach agreement as to the position of the boundary.
12. Meanwhile, Mr Bootle instructed a surveyor, Mr Kevin Hainsworth, to provide him with a report on the alignment of the boundary. Following his initial visit on 13 June, Mr Hainsworth provided his initial plan on 6 July. He followed this with a Report dated 31 July 2024, concluding that the boundary was, for its full length, located 4 feet south of the remnants of the southern fence.
13. On 11 July 2024, Mr Adams attended a meeting with Mr Bootle's business manager, Mr Stephen Fells, and Mr Hainsworth. At this meeting, Mr Hainsworth advised Mr Adams of his conclusions on the position of the boundary. Mindful this was contrary to the position shown on the registered title plan, Mr Adams did not accept Mr Hainsworth's view. Mr Fells recalls that Mr Adams agreed not to carry out further work on the disputed boundary until he had obtained his own survey. Mr Adams's recollection is different. He accepts he advised Mr Fells that he did not immediately intend to carry out building work but draws a distinction between building work and other work.

14. By an email message timed, at 14:42 on 12 July, Mr Fells stated as follows.

“Hi,

Following on from our meeting on 11/07/24 I would like just to confirm the points discussed.

You are to obtain a detailed plan to confirm the boundary line.

Can you confirm when you expect to get this?

No work is to be carried out that’s running along the boundary line with Little Knowley Farm”.

15. Mr Adams’s response the same day, at 21:10, was as follows.

“Thanks Stephen.

Will respond when closed out our work

Mark”.

16. Once Mr Fells was made aware, through drone footage, that FI was continuing with works on the disputed area, he arranged another meeting with Mr Adams. This meeting took place on 18 July. Mr Fells attended with Mr Bootle’s son, Samuel. Mr Fells and Mr Adams have different recollections of the meeting. Mr Fells states that, when he reminded Mr Adams of his assurance that works on the boundary would cease, Mr Adams put this down to a misunderstanding. Mr Adams states that they were simply in disagreement about what had been agreed.

17. Mr Bootle instructed LLM solicitors to act on his behalf. By letter dated 24 July 2024, they asked GH L for an immediate undertaking to cease “groundworks and/or development works within the vicinity of the boundary... pending resolution of the boundary”.

18. GH L initially instructed Read Roper and Read as their solicitors. By letter dated 25 July, Read Roper and Read declined to offer any undertaking stating that their clients were “satisfied that their activities [were] confined to land which they own[ed]...”. GH L then instructed Addleshaw Goddard and, by letter dated 29 July, Addleshaw Goddard confirmed that Mr Hainsworth’s plan was “grossly inaccurate and opportunistic” and that “the actual boundary position is as per the fence which [he] has erected”. It was

also stated that this “accords with the Land Registry plans”. Again, they declined to offer an undertaking and stated that they could see no basis for an injunction.

19. In these circumstances, FI continued to carry out works on the disputed boundary. On 31 July, Ms Laura Francis, the Bootles’ house keeper was disquieted to see that their house could now be viewed from Millennium Way. She contacted Mr and Mrs Bootle who were on holiday abroad. They promptly asked her to take photographs and video film in relation to the progress of the works. Later the same day, their son, Mr Samuel Bootle, attended the site to take some additional photographs. Apparently, he was approached by Mr Timothy Knowles and they had heated exchanges.
20. Further correspondence between the parties’ solicitors ensued culminating in a letter dated 7 August in which LLM advised Addleshaw Goddard that the papers were with counsel and a letter dated 12 August in which Addleshaw Goddard stated that any application for interim relief should be made on proper notice.
21. Prior to the issue of proceedings, Mr Bootle applied for interim injunctive relief. The hearing took place, on 22 August, before HHJ Cadwallader. On Mr Bootle’s behalf, the hearing was attended by Ms Shea KC and Mr Horne. On behalf of GHL and FI, Mr Rainey KC also attended. However, Mr Rainey was in no position to challenge the essential elements of Mr Bootle’s case since he was not provided with the opportunity to take full instructions. His clients were only notified of the hearing earlier on the same day and they were thus unable to file evidence. It was thus treated as a hearing without notice. Ultimately, HHJ Cadwallader made an order (“**the 22 August Order**”) restraining GHL and FI from entering or performing works on land to the north of the boundary. The injunction was defined with reference to the boundary line marked out by Mr Hainsworth in a Report dated 31 July 2024. It was thus measured 4 feet to the south of the remnants of the southern fence.
22. Proceedings were issued the following day on 23 August and the return date was listed for hearing before me on 30 August. At the end of the hearing, I made directions for the parties to file further evidence together with additional written submissions. I then gave judgment on 9 September, [2024] EWHC 2989 (Ch), in which I observed that, in the absence of undertakings, I was minded to award an injunction providing, in modified terms, for GHL and FI to be restrained from entering or performing works on land to the north of the boundary shown on the registered title plan to Little Knowley

Farm. This was some distance to the north of the line originally marked by Mr Hainsworth in his Report dated 31 July 2024. By this stage, Mr Hainsworth himself accepted that the boundary was north of the line marked in his Report dated 31 July 2024. In these circumstances, the Defendants elected to give undertakings not to enter the land north of the boundary earmarked for injunctive relief in my judgment and the case was listed for trial on all issues on the claim save quantum. The determination of any counterclaim and the enforcement of the Claimant's cross undertaking in damages on 22 August 2024 were expressly hived off.

23. On 23 September 2024, the Defendants issued an application (“**the Defendants’ Cross Application**”) for an order setting aside the 22 August 2022 Order for material non-disclosure. Owing to the unavailability of counsel and listing difficulties, the Cross Application was not heard prior to trial. It is thus necessary for me to deal with the Cross Application at this stage.

(3) Issues

24. In broad terms, there are issues between the parties as to:

- a. the precise location of the boundary;
- b. whether and, if so, to what extent, GHIL or FI have encroached over the boundary and/or committed acts of trespass;
- c. whether Mr Bootle is entitled to rights of drainage;
- d. whether the court should award Mr Bootle injunctive relief and/or damages;
- e. whether the court should set aside the 22 August Order for want of full and frank disclosure; and
- f. whether the court should order an inquiry as to damages on Mr Bootle's cross undertakings as to damages.

(4) Witnesses

25. In addition to the expert evidence, five witnesses were called on behalf of Mr Bootle. This included Mr Bootle and his wife, Rebecca. On his behalf, Mr Kevin Hainsworth, Mr Stephen Fells and Ms Laura Francis also gave evidence.

26. Mr Bootle gave evidence about the circumstances in which he first acquired and developed Little Knowley Farm. He also gave evidence about his understanding of the

Boundary, the Defendants' acts of trespass and the evolution of the dispute which has given rise to these proceedings.

27. His evidence was of mixed quality. His main witness statement was made on 22 August 2024. If not immediately contemporaneous with the events which gave rise to the dispute, it was made shortly afterwards. His account was generally consistent with the contemporaneous documentation and the drone footage. It was also supported by the evidence of his witnesses. I am satisfied his account of these events was generally accurate as indeed was his description of the progress of the Defendants' works.
28. Unfortunately, however, some aspects of his evidence were coloured by his evolving perceptions about the alignment of the boundary. When he made his first witness statement, Mr Bootle's case was founded on Mr Hainsworth's report dated 21 August 2024 in which the boundary was alleged to run south of the Ditch. In this statement, re-verified at trial, he stated that the boundary was "south of tree line and the brook and was partially marked by a hedge and picket fence" on the Development Land. However, in cross examination, he stated that the seller had told him that the boundary was along the Ditch itself. It was implicit this was the line of the boundary and the Defendants had committed acts of trespass through their activities in and to the north of the Ditch.
29. Mrs Rebecca Bootle also gave evidence. She is Mr Bootle's wife and confirmed that, together with Mr Bootle himself, she moved into Little Knowley Farm shortly after it was purchased. They have three children who have lived there at various times in the past. Only their youngest child, Alana still lives with them at the property. She was able to give specific evidence about the initial occasion on 29 April 2024 when she observed the commencement of works near the boundary. More generally, she corroborated the evidence of Mr Bootle in relation to the progress of the works. In her witness statement, her stated understanding of the boundary position was based on Mr Hainsworth's initial report. No doubt her evidence was generally to the best of her knowledge and belief. There is nothing to suggest otherwise.
30. Mr Kevin Hainsworth is a chartered land surveyor. Mr Bootle initially instructed him to provide expert advice in connection with the present dispute. However, he was not called as an expert at trial. His expert reports were originally admitted in support of Mr Bootle's application for interim relief and they form an important part of the procedural

background. They also have a bearing on the Defendant's application for an order setting aside HHJ Cadwallader's injunction dated 22 August 2024. However, the parties were later permitted to rely only upon the evidence of one expert boundary surveyor each and Mr Bootle chose to rely on the evidence of Mr Damian Strangwick as his expert witness.

31. Nevertheless, Mr Hainsworth made a witness statement exhibiting videos and photographs that he had taken at his site visits on 13 June, 5-6 August and 15 August 2024 together with a plan showing their approximate location and orientation. Mr Hainsworth accepted that the photographs were taken from a position south of the Ditch. However, they provided helpful evidence in relation to the progress of the Defendants' works. They also enable me to draw inferences about the location of the works and the Defendants' putative acts of trespass. There was and is no good reason to challenge his factual evidence.
32. Mr Stephen Fells is operations director of a subsidiary of the James Group Limited, a company controlled by Mr Bootle. He is also a close personal acquaintance of Mr Bootle and, at his request, attended the site on repeated occasions in June, July and August 2024 to view the Defendants' works and persuade them not to trespass. He attended meetings with Mr Adams on 11 and 18 July 2024. He also engaged a company to carry out drone surveys in relation to the works and took photographs himself.
33. Mr Fells confirmed that, at the meeting with Mr Adams on 11 July 2024, he asked Mr Adams to put a hold on further work until after the Defendants had obtained their own survey and was advised this would not be a problem since he had plenty of other work to be done on the site. The meeting on 18 July 2024 took place after the Defendants resumed work. When he reminded Mr Adams of their discussion on 11 July 2024, Mr Adams advised him there must have been a misunderstanding.
34. Mr Fells' evidence was generally consistent and plausible. I am satisfied that his factual account was reliable.
35. Ms Laura Elizabeth Francis works for Mr Bootle and his family as their housekeeper. She gave evidence about the views from Mr Bootle's house at Little Knowley Farm and the occasion on 31 July 2024 when she became aware that, as a result of the Defendants' clearance works, the house had become visible from Millennium Way and alerted Mr and Mrs Bootle to the progress of the works. She took photographs and obtained video

images which were, again, admitted in evidence. Of course, Mr Bootle's cause of action is limited to acts of trespass on his land. Clearance works on neighbouring or adjoining land, including land screening Mr Bootle's house from Millennium Way, is not actionable in itself. From Ms Francis's evidence, it is not possible to show that Mr Bootle's house ceased to be screened from the highway owing to acts of trespass on the part of the Defendants. However, I am satisfied that the essential factual elements of her account were correct and I can thus rely on her evidence.

36. On behalf of the Defendants, three witnesses were called to give evidence, namely Mr Edwin Schofield ("**Mr Schofield**"), Mr Timothy Knowles ("**Mr Knowles**") and Mr Mark Adams ("**Mr Adams**"). Witness statements were also filed on behalf of Ms Joanne Mills, Mr Boris Alexander Byrne and Mr Alexander James Wolfenden. However, their evidence was peripheral to the main issues in relation to the position of the boundary and the putative acts of trespass. They did not give evidence orally.
37. Mr Schofield was interposed and gave his evidence before the Defendants' other witnesses. He was born in the local area in 1950 and has resided there for the whole of his life. He is a farmer, as indeed, was his father. Over the years, Mr Schofield and his father have owned and farmed substantial areas of land, including the Development Land. His father bought this land in the early 1970s. It was subsequently sold to one Dr Naqvi before passing into the ownership of GHIL. However, Dr Naqvi and GHIL let the land to Mr Schofield and he continued to farm it until relatively recently. He thus has an intimate knowledge of the land and the uses to which it has historically been put. Although he was, until recently, a tenant of GHIL and has apparently been acquainted with Mr Knowles for some thirty years, he was essentially an independent witness. I am also satisfied his evidence was generally reliable.
38. He gave evidence that, whilst he had erected livestock fencing on the south side of the Ditch, he had historically treated the Ditch as part of his holding, cleaning it out on at least two occasions. He also stated that there may historically have been a wooden fence north of the Ditch, albeit south of the position in which Mr Bootle's palisade fence is now erected. At one point, he also accepted that there were also trees on the north side of the Ditch. This may have included the self-seeded ash which he identified at one point of his cross examination. He also confirmed that there was a hedge on the top of the Ditch. I took this to be a reference to land on the northern side since this was

said to be in the ownership of the Dickinson brothers who once owned Little Knowley Farm.

39. Mr Timothy Knowles gave evidence as managing director of GHIL and FI. He referred to his family background and his business interests in the local area culminating in the acquisition of the Development Land and the development project. Initially planning permission was obtained for a residential development but the current project involves industrial warehousing at a value of £100 million.
40. He accepted that, following the incidents in April 2024, in which the Defendants had cut down some trees, he offered to pay for new trees as a gesture of goodwill. He also accepted that, on 31 July, there was an incident on site at which he swore at Samuel Bootle. However, he allegedly did so after Mr Samuel Bootle arrived at the site without a hard hat or high visibility jacket. He was said to have squared up to Mr Knowles provocatively stating that “you are on our f-ing land”. He later met Stephen Fells and they agreed to proceed with a re-landscaping programme for which the Defendants would pay.
41. Mr Knowles’ evidence was in places vague. He appeared to have only a vague understanding of the sequence of events and progress of the works stating that he was busy with other aspects of his business and had thus left matters in the hands of Mr Adams. No doubt, Mr Adams was accorded responsibility for the development project and left in control of the day-to-day management of the project. However, having had the opportunity to assess their evidence as a whole, it is in my judgment inherently unlikely Mr Knowles was content to cede overall control to Mr Adams or leave it to him to make the critical decisions on his own, including decisions in relation to works on the boundary and the evolving dispute with Mr Bootle. The boundary dispute potentially had serious financial ramifications owing to its impact on the enabling works for the first stage of the project, including the construction of a retaining wall at the northern end of the site. In all likelihood, Mr Knowles was more actively involved than he suggested, when giving evidence, in determining the progress of work on the northern boundary. Mindful of the financial implications, it is likely that Mr Knowles himself made the decisions in July and August 2024 to press ahead with the project on the northern boundary notwithstanding the burgeoning dispute with Mr Bootle. On the more contentious aspects of the dispute, I have thus treated Mr Knowles’s evidence with caution.

42. Whilst he is not recorded as a director of FI, Mr Adams gave evidence that he is employed by the company as Head of Development and Head of Construction and, in this capacity, he had responsibility for the project. He confirmed that he had attended one meeting only with Mr Bootle, on 10 June 2024. On this occasion, Mr Bootle had asked him whether “any other trees were coming out along the boundary” and he had replied to confirm “they were staying”. He attended further meetings with Mr Fells on 11 and 18 July 2024. On the first of these occasions, Mr Hainsworth was also present. He disagreed with Mr Hainsworth’s view about the position of the boundary stating that the boundary was as shown on the Land Registry title plan. He accepted that, on the first occasion, Mr Fells was advised that the Defendants agreed not to carry out further work on the boundary until he had obtained his own survey. However, according to him, this related to building work only. However, when asked by email timed at 14:42 on 12 July, to confirm it was agreed “no work” would be carried out along the line of the boundary, he replied by acknowledging the email and stating that he would “respond when closed out our work”. In his first statement, he provided some clarification as to what this was intended to mean, stating that “by ‘closed out our work’, I meant by investigating the boundary”.
43. Contrary to the impression Mr Fells says he was given on 11 July, FI continued to carry out clearance works on the boundary. Mr Adams accepts that, at the meeting on 18 July, there was a dispute between them about the assurances Mr Fells had previously been given. Mr Adams suggests that his assurances were limited to building work and did not include works of clearance.
44. In cross examination, Mr Adams confirmed that, on 29 July, he went away on holiday. He did not give details as to precisely when and over what period FI instructed a tree surgeon to carry out works on the boundary clearing vegetation from the land. He stated that such instructions were given by the company’s operations manager, Mr Lohan. However, in all likelihood they would have been given some time before Mr Adams left to go on holiday and they were not withdrawn before his departure. There is nothing to contradict Mr Adams’ evidence about the role of Mr Lohan. However, it cannot reasonably be suggested, in view of the sensitivity of this issue, that Mr Adams was unaware of the tree surgeon’s instructions at the time. Indeed, Mr Adams gave evidence about such instructions.

45. According to Mr Adams, the tree surgeon was instructed not “to cross the boundary line as per the Land Registry Title Plans”. However, the Land Registry Title Plans were drawn to a small scale and Mr Adams would have been well aware that the position of the boundary was disputed when such instructions were given.
46. In cross examination, Mr Adams was cautious and defensive. He was not a dishonest witness. However, aspects of his testimony were not fully explained and, on the contentious issues, I preferred the evidence of Mr Fells. At the meeting on 11 July 2024, he allowed Mr Fells to form the impression that no further works would be carried out on the boundary until he had obtained a survey and this included site clearance works. He chose not to clarify the position following Mr Fells’ email on 12 July. During June and July, he was well aware of the sensitivity of the boundary and, from Mr Bootle’s perspective, the amenity afforded by the trees. However, he was also well aware that any delay to the project could have serious financial implications for the Defendants. It is inconceivable that he did not discuss these aspects with Mr Knowles. More likely than not, they decided to make such progress as they could without allowing Mr Bootle the opportunity to cause significant delay. This involved clearing trees and vegetation along the full length of the boundary regardless of the precise position of the boundary on the ground.

(5) The Site

47. Shortly before trial, I attended a site visit with the parties’ legal representatives. This took place in wet conditions; it rained during the site visit itself and much of the site was saturated with water. During the course of the visit, we walked the full length of the disputed boundary to the south side of the Ditch, crossing Blackburn Road to view the land east of the properties. We viewed the whole area from each side of the boundary and took in the views from Mr Bootle’s house. Upwards of two thirds of the distance from Millennium Way to Blackburn Road, we viewed a water outlet pipe north of the Ditch. This was discharging water into the Ditch from Little Knowley Farm.
48. The land slopes upwards from west to east on a rising gradient. Towards the eastern end of the site, it also slopes sharply upwards to the north.
49. At the time of the site visit, works were in progress on the Development Land. This included excavating land to the east of the site and relaying the soil so as to flatten the Development Land and create an embankment south of the Ditch. At the western side

of the site, part of the watercourse has been culverted. Land to the side of the Ditch has also been cut away. However, it can reasonably be surmised that, prior to the works, the Ditch meandered within a relatively narrow margin and, whilst partly shaped by a natural hollow in the land, it appears to have been cut and reshaped over time by people working on the land. To the east, it accommodates the site of a disused sand quarry. The watercourse is culverted below Blackburn Road before passing west along the Ditch. Eventually, it passes under Millennium Way as it heads towards the Leeds and Liverpool Canal. At the site visit, we did not view the land to the west of Millennium Way. No doubt, the Ditch continues in this direction and passes west beneath the Canal.

50. The Defendants have installed a series of ranging posts to demarcate the boundary on the ground. These were *in situ* at the time of the site visit although doubt has been expressed as to whether all of the posts were in precisely the position in which they were originally installed.
51. There is a substantial walled garden around Mr Bootle's house but, at first floor level, the house has been built so as to take advantage of the views to the west and south of the house as the land slopes downwards. Some of the views are far reaching. To the west of Little Knowley Farm, Millennium Way rises along an embankment which slopes downwards towards the bottom of Mr Bootle's property. The embankment is within the ownership of the local highway authority. Trees have recently been removed from this area in order to extend the visibility splay for vehicles entering and exiting the Development Land. Trees have also been removed from land along the disputed boundary. By the time of the site visit, Mr Bootle's house was no longer screened by such trees from vehicles travelling for much of the length of Millennium Way although there are issues between the parties as to whether this arises from wrongdoing on the part of the Defendants and, if so, to what extent.

(6) The Title Documents

52. Mr Bootle's freehold title to Little Knowley Farm is registered at HM Land Registry under Title No. LA561274. He was first registered as proprietor on 24 September 2007. The registered title plan, at **Appendix 1**, is based on an OS Map which pre-dates Millennium Way.

53. GHIL's freehold title to the Development Land is registered at HM Land Registry under Title No. LAN24705. It was registered as proprietor on 4 January 2018. The registered title plan is at **Appendix 2**.
54. It is not possible to trace the devolution of title to a point in time when the properties were in common ownership.
55. The earliest available title document in respect of Little Knowley Farm is a conveyance dated 22 November 1929 ("**the 1929 Conveyance**") between Nuttalls Breweries Limited ("**the Brewery**"), Barnard Eyre Greenwell, Charles Eastwood and Albert Nightingale ("**Mr Nightingale**"). The parcels to the 1929 Conveyance ("**the Parcels**") were significantly more extensive than Title No. LA561274 but they did not and cannot have included any of the land now comprised in Title No. LAN24705.
56. Prior to the 1929 Conveyance, the Parcels were marketed for auction on 17 July 1929 as part of the Whittle Springs Brewery Estate.
57. The Parcels encompassed "all that farm known as Little Knowley Farm situate in Whittle-le-Woods in the County of Lancaster and containing thirty two acres one rood thirty seven and a half perches or thereabouts together with the farm house shippens barns outbuildings garages petrol pump and tanks stabling range Dutch Barns and cottage house on the same which premises are bounded on the northerly side by Moss Lane on the westerly side by Sandy Lane and on the westerly side by the Leeds and Liverpool Canal and are delineated and surrounded by green lines on the plan drawn on these presents". This plan is at **Appendix 3**. For the avoidance of doubt, Sandy Lane has been re-named Blackburn Road and it can be seen that the area comprised in Title LA561274 was subsequently entered on the plan.
58. By clause 5 of the 1929 Conveyance, the Brewery covenanted with Mr Nightingale, as purchaser, to execute, at his request, a statutory undertaking for the safe custody of certain title documents, including a conveyance dated 3rd March 1874 between William Lyon, John Yates, Thomas Mangnall, James Kirk, Thomas Gardner, James Thompson and James Bryham Cardwell. No copy of the 1874 conveyance is available and it was certainly not admitted in evidence. However, if it can be inferred this was a conveyance of Little Knowley Farm, it is the earliest available evidence on the devolution of the title.

59. The earliest available title document in respect of the Development Land is a conveyance dated 4 March 1930 (“**the 1930 Conveyance**”) between Robert Grey Tatton, John Jasper Payne, Thomas Arthur Tatton, Robert Henry Grenville Tatton, as vendors, and Herbert Barnes, as purchaser. It is apparent from the recitals to the 1930 Conveyance that the vendors (“**the Vendors**”) were the personal representatives of Reginald Arthur Tatton (“**Reginald Arthur Tatton**”), late of Cuerden Hall. They entered into the 1930 Conveyance in their capacity as his personal representatives. Having died after 31 December 1925, Reginald Arthur Tatton’s real estate would have devolved on his personal representatives with his personal estate under the provisions of the *Administration of Estates Act 1925*.
60. By the 1930 Conveyance, the Vendors conveyed to Herbert Barnes the freehold title to “all those closes or pieces of land situate at Chorley in the County of Lancaster of which particulars are set forth in the First Schedule hereto and which for the purpose of identification only are delineated and described in the plan drawn hereon and therein edged red...”. This plan is at **Appendix 4**.
61. The First Schedule provided as follows.

Number on Plan	Name of Field	area acres
87	Dick Filed Meadow	3.903
86	Little Calf Croft	.797
pt. 84	Nearer Calf Croft	2.505
Pt. 85	Great Calf & Further Calf Croft	4.907
50	Canal Meadow	5.952
49	Horse Pasture	7.137
		25.201

62. The boundaries are imprecisely marked on the plans appended to the 1929 and 1930 Conveyances. However, on the 1929 Conveyance plan, the southern boundary of the conveyed land appears to be aligned with the northern of two continuous parallel lines. On the 1930 Conveyance plan, the northern boundary of the conveyed land appears to

be aligned with a series of dots to the south of a continuous line bearing T marks to the north.

63. Following an Assent dated 14 October 1958, the freehold title to the land comprised in the 1930 Conveyance became vested in George Herbert Barnes who subsequently conveyed part of the land to Lancaster County Council. The land comprised in the 1929 Conveyance subsequently became vested in Harold and John Dickinson who also conveyed an area of land to the County Council. The conveyances to the County Council were on 2 September 1971 and 4 December 1972. Each conveyance was of land on the western side of their respective titles. Having acquired the land, the Council built Millennium Way.

(7) The historic Ordnance Survey Maps

64. A series of ordnance survey maps were admitted as evidence commencing with a map published in 1849 following a survey of 1844-47. There is a copy extract of this map at **Appendix 5(1)**. It appears to show the full length of the Ditch east to west, from Sandy Lane (now Blackburn Road) to the area known as Gale Moss. It thus incorporates land well beyond the disputed area in these proceedings, to the east and west of the Leeds and Liverpool Canal. The Ditch is specifically shown. To the West of the Canal, the Parish boundary (“**CP Boundary**”) is represented by two parallel lines made up of a series of dashes and dots to each side of the Ditch so as to show that the CP Boundary ran along the centre of the Ditch. To the East of the Canal, the CP Boundary is represented by a single line, again made up of dashes and dots, immediately to the north of the Ditch. For material purposes, the Ditch is itself the only significant physical feature save for the pond (“**the Pond**”) shown immediately to the north of the CP Boundary a short distance west of Sandy Lane.
65. At **Appendix 5(2)**, there is a copy extract of the OS Map published in 1894 following the 1893 survey. By this stage, the surveyor appears to have identified, as his points of reference for the CP Boundary, a continuous series of physical features standing proud of the land, in places a hedge and elsewhere a fence. This time the CP Boundary was shown as a line of dots. Consistently with surveying practice, the Ditch was no longer shown as a separate physical feature. However, the Defendants rely on documentation obtained from the National Archives – the Boundary Remark Books from 1889 – in which the OS Surveyor appears to have entered, by hand on a copy of the 1849 OS

Map, a continuous line to the north of the CP Boundary so as to suggest the physical feature marked on the subsequent OS Plan was the north of the Ditch. In any event, in the area between the Sandy Lane and the Canal, the CP Boundary was shown marked “4ft RH” and “4ft FF” to the south of the relevant physical feature with two dumbbell symbols entered at the southern edge of the Pond. No doubt, this was intended to show that the CP Boundary was 4 feet to the south of the roots of hedge (or as the case may be front of fence) save where the hedge was interrupted by the southern end of the Pond. To the South of the pond, the letters “S.P” may have been intended to mark the emergence of an outlet or sewer pipe. This is also shown in the 1911 and 1928 maps.

66. At **Appendix 5(3)**, there is a copy extract of the OS Map published in 1911. Again, the CP Boundary is marked “4ft RH” so as to show it was 4 feet to the south of the roots of the hedge. On this plan, there are also brace symbols along the hedge line, shaped as an elongated “S”. These project from the hedge line into fields 9 and 10 to the north so as to tie to such fields to the land between the hedge and the CP Boundary. The two dumbbell symbols again mark a change of the designated feature at the southern edge of the Pond.
67. The OS Maps published in 1928, 1947 and 1965 were also admitted as evidence. These did not show any material change until 1965 when the Pond ceased to be shown as a feature. More likely than not, the Pond was drained and infilled during this period.

(8) Expert evidence

68. In support of his case at the hearings of Mr Bootle’s application for interim relief, Mr Bootle initially sought to rely on Mr Hainsworth’s expert reports. Mr Hainsworth is a chartered land surveyor. At one stage, GH and FI challenged the admissibility of Mr Hainsworth’s reports on the basis they were inadmissible for the purpose of determining the alignment of the boundary. They also contended, through counsel, that Mr Hainsworth’s reports should be excluded on the basis they were inconsistent and misleading. Notwithstanding these submissions, I admitted Mr Hainsworth’s reports in evidence and took them into consideration when reaching my conclusions on Mr Bootle’s application for interim relief. This was for the reasons given in my judgment, *[2024] EWHC 2989 (Ch)*, at [40]-[47].
69. There has been no appeal of this judgment. At trial, however, Mr Bootle did not seek to rely on Mr Hainsworth’s reports. His reports were placed before the court as

contextual and explanatory evidence only. They are also relevant in connection with the Defendant's application for an order setting aside, for want of full and frank disclosure, the 22 August Order. Mr Hainsworth gave evidence as a witness of fact at trial.

70. In contrast to their earlier stance with regard to the admissibility of expert evidence, the Defendants subsequently consented to a direction for the parties to be at liberty to rely on such evidence at trial. Following the sequential delivery of reports, the parties each called expert witnesses in relation to the position of the boundary. Mr Bootle called, as his expert, Mr Damian Strangwick, of Malcolm Hughes Land Surveyors Limited. GHIL and FI together called Mr Paul Lovelock, of Hollis Global Limited.
71. Mr Strangwick is an associate member of the RICS with upwards of 19 years experience in mapping and geospatial surveying. Between April 2004 and March 2013, he was employed by HM Land Registry. Mr Lovelock qualified as a chartered surveyor in March 1988 and has worked in private practice as a chartered building surveyor for some 36 years. In giving his evidence, he relied on plans prepared by his colleague, Mr Brian Meggitt.
72. Whilst not in issue, I am satisfied that the expert evidence of Messrs Strangwick and Lovelock was properly admitted for the purpose of assisting the court in determining the alignment of the dispute boundary at trial. Their evidence has assisted me in reaching my conclusions. No doubt, their narrow views about the interpretation of the 1929 and 1930 conveyances and the conveyance plans were and are inadmissible for this purpose. This can be seen from the guidance of Sir Martin Nourse in *Kuligowski v Kenward* [2003] EWCA Civ 1896, at [12], and Zacaroli J in *Charlton v Forrest* [2024] EWHC 1014 (Ch), at [16]. Zacaroli J's observations have a particular bearing on the status of agreements between surveyors about the line of a boundary. However, he was astute to observe that "expert evidence may be of assistance insofar as it consists of matters of 'scientific, technical or other specialist knowledge which are outside the judge's expertise' (*TUI UK Limited v Griffiths* [2023] UKSC 48...)".
73. In the present case, the two experts each gave evidence pertaining to the 1929 and 1939 Conveyance plans. However, their evidence at trial was primarily directed to the OS Maps and the physical configuration of the land. They were able to give technical evidence with respect to symbols, annotation and measurements. Mr Strangwick was

also able to deploy his expert knowledge of historic OS practice based, in part, on his experience working for the Land Registry. For this reason, his evidence was more comprehensive and, in some respects, more helpful than Mr Lovelock's evidence. However, the evidence of both experts was moderate and carefully considered.

74. Mr Strangwick confirmed that the 1929 Conveyance Plan appears to be based on the OS map published in 1894 with the line of dots reshaped as a continuous line parallel to the line of the boundary. However, the Conveyance Plan was not drawn to scale since the gaps between the two lines measured some 2.5m. Once compared with the 1894 OS map, the boundary appeared to follow the line of a hedge on the north side of the Ditch. The Ditch was not clearly discernible from any of the symbols or annotations on the 1894 map. However, the field braces on the OS map indicated that the strip of land between the hedge and the centre of the Ditch formed part of the two fields to the north of the hedge. Mr Lovelock agreed the Ditch was not clearly discernible from the relevant symbols and annotations on the 1894 OS Map and, in his Report, Mr Lovelock was generally more equivocal about the position of the Ditch, observing simply, at [6.3.4] that the parallel line to the south of the boundary was indicative of a physical feature or features to the south. These could have included the Ditch.
75. Obviously, the critical issue in the present case is as to the position of the boundary between the two properties rather than the location of the CP Boundary. However, the two experts were both of the view that the location of the CP Boundary was an important factor in determining the position of the property boundary since the CP Boundary was defined on the OS Maps with reference to physical features on the site which also have a bearing on the position of the title boundary, including the hedge. The position of the hedge is not the only factor to be taken into consideration in determining the historic position of the boundary but obviously it is a consideration of some importance and the experts recognised that this was so. Following exchange of their reports, they made a joint statement confirming, at [1.6.1 (b)], that whilst “the administrative boundary is not itself the contested boundary, ... the position and line of the administrative boundary is of fundamental importance to formulation of the experts’ opinions as to the location of the contested boundary; this is because the location of the administrative boundary in the real-world landscape determines the location of the hedge in 1929”.

76. With this in mind, Mr Strangwick accepted that the 1849 OS Map showed the dot-dash line of the CP Boundary on the north side of the Ditch. However, he took the view that, when, in 1893 and 1894, the new OS Maps were revised and republished, the position of the CP Boundary was altered and should thereafter be taken to follow the centre of the Ditch. It is apparent to the naked eye that, at least in places, the line of the CP Boundary in the 1893 and 1894 OS Maps is slightly different from the 1849 OS Map. This includes a subtle curve in the line immediately to the East of the Canal and the alignment of the CP Boundary immediately south of the Pond. However, the Ditch is not shown on the 1893 and 1894 OS Maps and it is thus not possible, in these Maps, to determine the position of the CP Boundary *vis-à-vis* the Ditch. It follows that this part of Mr Strangwick's evidence is based on inference only. Mr Lovelock took a different view. He stated that the Surveyor did not have authority to change the position of the CP Boundary and there was no reason to believe he had done so
77. To understand Mr Strangwick's analysis, it is important to bear in mind that, at each stage, the position of the CP boundary would have been identified and verified during a process in which the surveyor attended the site with a meresman, to determine the line of the boundary on the ground. In cross examination, it was put to Mr Strangwick that when, as a function of this process, the surveyor drew a continuous red line north of the CP boundary on a copy of the 1849 map so as to show the position of the hedge, he did not move the CP line rather he simply mered it to the hedge. This was on the basis that, by then, the hedge was regarded as a more reliable physical feature than the Ditch. Mr Strangwick did not fully accept this proposition. He said that "when you are [performing such an exercise] you cannot necessarily replace the original lines on the maps so you have to annotate on or to one side of a particular line". When it was put to Mr Strangwick that "there is no feature which would have prevented the surveyor from drawing the red line whichever side of the pecked line he wanted" and the decision to draw the red line north of the pecked line was "a deliberate decision", Mr Strangwick stated that, "if the line was to be drawn with a note showing that the CP Boundary was four feet to the south, this would be confusing to a draftsman...".
78. Mr Strangwick's answers to these questions were carefully considered. No doubt, it was not open to the surveyor, as part of the subsequent reviews, to unilaterally change the position of the CP boundary when the OS Maps were reviewed. Mr Strangwick did not suggest otherwise, at least not in simple terms. The substance of his evidence was that,

as part of the review process, the OS Map was updated and improved. This required the surveyor to take into consideration changes in the landscape, including the formation of new physical features. On this basis, Mr Strangwick took the view that, once the OS Map was modified by mereing the CP Boundary 4 feet to the south of roots of the hedge or tree line, the CP Boundary should be taken to follow the centre line of the Ditch. However, in my judgment, this is a *non-sequitur*. In consultation with the meresman, the surveyor appears to have taken the position of a new hedge as his physical line of reference for identifying the position of the CP Boundary. However, it does not follow that, once he had done so, the CP Boundary should be taken to follow the centre line of the Ditch. Ultimately, the problem with Mr Strangwick's analysis is that he did not have – and certainly did not provide - a convincing explanation as to why, and on what basis, the CP Boundary should thereafter be deemed to follow the centre line of the Ditch, particularly given that it had originally been marked to the north of the Ditch in the 1849 Map.

79. In the absence of anything on the face of the 1893-4 OS Maps to show that the CP Boundary followed the centre line of the Ditch, there can be no good reason to assume it did so or should be treated as such. It can be seen from the 1849 OS Map that, to the west of the Canal, the CP Boundary was indeed shown to follow the centre of the Ditch. However, to the east of the Canal, the CP Boundary was shown differently. There is no reason to believe this was an error nor is otherwise to be disregarded for the purpose of identifying the historic line of the CP Boundary. When it was put to Mr Strangwick that, on the current MasterMap, the CP Boundary line is still shown north of the Ditch, Mr Strangwick stated that it had not been mapped accurately to the real world features. Conversely, however, there is no convincing evidence to show that the CP Boundary is aligned or should be taken to be aligned with the centre of the Ditch nor, indeed, that it has shifted so that is no longer north of the Ditch.
80. In cross examination, Mr Lovelock accepted that, had the hedge been upwards of six feet north of the Ditch, it would have been shown separately on the 1893-94 OS Maps as a function of OS mapping practice.
81. Messrs Strangwick and Lovelock agreed that the elongated “S” brace symbols on the 1911 OS Map (Appendix 5(3)) were deployed so as to tie boundary land to Fields 9 and 10. These are replicated in an OS Map published in 1928. Mr Strangwick took the view that the brace symbols tied to Fields 9 and 10 to the entirety of the land between the

hedge and the Ditch. Mr Lovelock accepted only that they tied the hedge to the Fields. In any event, he submitted that they were irrelevant for the purpose of determining the extent of the land conveyed in the 1929 Conveyance.

82. Since the enclosed space can be taken to have encompassed the entirety of the land between the hedge and the Ditch, there can have been no obvious reason to limit the tie to the area of the hedge only. No doubt, the brace symbols were deployed so as to tie to the Fields the whole of the land enclosed by the hedge and Ditch. However, Mr Strangwick accepted, in cross examination, that it would have made sense to brace the hedge land between the hedge and the ditch to the Fields north of the hedge so as not to cross the CP Boundary and it can thus be inferred this was an important part of the exercise. There is nothing to suggest that the land was braced to the Fields to reflect land ownership or possession.

83. Messrs Strangwick and Lovelock agreed that, whilst the boundary stone marked “BS” on Blackburn Road was intended to mark the position of the administrative boundary, it had apparently been replaced in a different position which was not indicative of the historic position of the CP Boundary.

(9) Position of the Boundary between Little Knowley Farm and the Development Land

84. Since the title to both properties is registered and the exact line of boundary has not yet been determined, the General Boundaries Rule applies. On this basis, the registered title plans show the general position of the boundary only, *LRA 2002 s60(1)*. The provisions of the *2002 Act* supersede *Rule 278(2)* of the *Land Registration Rules 1925* without effecting any change to the substantive law. *Rule 278(2)* provided that “in such cases the exact line of the boundary will be left undetermined – as, for instances, whether it includes a hedge or wall and ditch, or runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it, or whether or not the land registered includes the whole or any portion of an adjoining road or stream”.

85. The registered title plans are at **Appendix 1** (LA561274) and **Appendix 2** (LAN24705). They are based on different versions of the OS Map. If, as in the present case, the boundary line is marked by a hedge, the boundary itself is the centre of the hedge, *Fisher v Winch [1939] 1 KB 666 at 672*. However, where the General Boundaries Rule applies, the precise line of the boundary must then be established by topographical and

other evidence, *Alan Wibberley v Insley* [1999] 1 WLR 894 at 897B-C, subject to established legal presumptions such as the Hedge and Ditch presumption.

86. I shall start with the topographical features and historical evidence. The disputed land slopes steeply down from east to west, particularly at the eastern end of the site, and the Ditch plainly carries substantial amounts of water, during the wetter months of the year, from the site of the disused sand quarry, east of Blackburn Road, to the land below. The watercourse is culverted below Blackburn Road, Millennium Way and the Canal; eventually discharging into the River Chor. West of Blackburn Road, the Ditch appears to follow a natural hollow in the land. However, it has almost certainly been cut and artificially shaped over the years. At least to this extent, it is an artificial watercourse. Evidence was not adduced as to when the quarry was first worked and for how long this continued. Although the Leeds and Liverpool Canal as a whole was built between 1770 and 1816, it is unclear when works commenced on this local section of the Canal if, indeed, this section of the Canal was not derived from an earlier canal. However, it can be surmised that the works post-dated the Ditch.
87. There was also limited evidence only in relation to the historical ownership of the land. It is unclear when and how the land first became enclosed, whether by informal agreement or under an Act of Parliament. However, the Development Land was plainly owned separately from Little Knowley Farm – at least the freehold title to each property was owned separately - prior to the death of Reginald Arthur Tatton on 6 August 1926. Reginald Arthur Tatton was apparently from a landed family and, at the time of his death, he was the freehold owner of extensive areas of land in addition to the Development Land. This included the Cuerden Hall Estate. Conversely, Little Knowley Farm was marketed for auction on 17 July 1929 as part of the Whittle Springs Brewery Estate and, on 22 November 1929, the freehold title to Little Knowley Farm was conveyed by the Brewery (See Paras 55-56 above). It is notable that the Brewery's statutory undertaking in relation to its title documents commenced with a conveyance dated 3 March 1874 between parties with no obvious connection to Reginald Arthur Tatton or his family. More likely than not, the properties were thus in separate ownership as long ago as 1874.
88. Conversely, until 1893-94, no physical barrier between the two properties is shown on the OS Maps. The only boundary feature on the 1849 Map is the Ditch. On the 1849 OS Map, no more than four trees are shown along the boundary for the full distance

between the Canal and Sandy Lane, three of which appear to have been aligned with a fence shown on the 1894 Plan. Since the 1894 Plan followed the mereing exercise between 1889 and 1893, it can thus be surmised that the fence and hedge, shown on the 1894 Plan, first came into existence between 1849 and 1889.

89. Mr Blaker and Mr Rainey both accept that, in the present case, there is no room for the hedge and ditch presumption. To the extent that the Ditch is an artificial feature, it appears to have been cut, many years ago, to drain water from the sand quarry. There is a significant possibility that the hedge grew and emerged sporadically over time. However, if and to the extent it was planted in a row after the title was severed, it is inherently unlikely to have been planted in the way envisaged by Lawrence J in *Vowles v Miller (1810) 3 Taunt. 137,138*, by planting the hedge on soil subsequently dug out. This displaces the hedge and ditch presumption, *Alan Wibberley v Insley (supra)* at 897F-G.
90. Following severance or enclosure, there is no suggestion that the parties' predecessors sought to retain a ransom strip or, indeed, that the operative conveyances were apt to exclude land on the boundary. In the absence of the title documents under which ownership was first severed or enclosed, the line of the boundary is to be inferred from the topography of the land, the history of the site and the historical devolution of the title together with the available title documents.
91. Mr Bootle's title is derived from the 1929 Conveyance. No earlier conveyance has been admitted in evidence. On its face, the 1929 Conveyance encompassed the whole of the land "delineated and surrounded by green lines" on the appended plan. The relevant land, as defined, appears to include only the upper parallel line on the southern boundary. On the basis this was intended to denote the hedge north of the ditch, the 1929 Conveyance was not apt, on its face, to convey any land to the south of the hedge.
92. However, it appears from the OS Maps that, as late as 1849, the Ditch was the only feature physically identifiable on the site. The hedge did not come into existence until some time afterwards. This is significant because the two relevant properties appear to have been in separate ownership as long ago as 3 March 1874 (See Para 36 above), no more than twenty five years later. If the properties were in separate ownership in 1849, the Ditch would have been the obvious boundary feature at this time. It would also have been the only barrier for persons and livestock passing between the two properties

although there would have been nothing to prevent the freehold owners letting or licensing the use of their properties to a single third party. In all likelihood, the properties were let or licensed for the use of tenant farmers during this period.

93. It is also notable that, whilst their plan was expressed to be for the purpose of identification only, the parties to the 1930 Conveyance defined the boundary to the south of the relevant hedge. In this plan, the boundary was a dotted line aligned with the CP Boundary although there were “T” marks on the continuous line to the north. This line can be taken to represent the hedge. Such marks are generally indicative of an understanding or intention in relation to the ownership and maintenance of a boundary feature. In this case, they are indicative of an understanding that, whilst it was a boundary feature, the owners of Little Knowley Farm owned and were responsible for the maintenance of the hedge. However, this is no more than one consideration to be taken into account when construing the 1930 Conveyance as a whole, *Lanfear v Chandler [2013] EWCA Civ 1497*, and, as Mr Rainey submitted, they are difficult to reconcile in the present case with a boundary marked, at one point, some distance to the south of the putative boundary feature itself.
94. The boundary between the Development Land and Little Knowley Farm is based on physical features prior to 22 November 1929 which have, of course, disappeared. In my judgment, it was historically defined by the hedge north of the Ditch save for a short distance where the hedge was broken by the Pond. Where broken by the Pond, the boundary was defined by the southern edge of the Pond. For the avoidance of doubt, where the boundary was defined by the hedge, it can be taken to have followed the centre of the roots of the hedge. In the absence of any subsequent conveyance or other disposition to re-shape the boundary since 1929, the boundary remains as it was.
95. I have reached this conclusion on the basis that, whilst the 1929 Conveyance plan, was imprecisely drawn, the hedge appears to have been intended to represent the line of the boundary and the parties can be taken to have understood this reflected the full extent of the vendors’ title. The 1929 Conveyance and the 1929 Conveyance plan appear to have been professionally prepared and the parties’ conveyancers can reasonably be taken to have obtained full and proper instructions from their clients when preparing the relevant documentation and satisfied themselves, from the title documents available to them, that the line of the boundary was as shown on the Plan. No doubt, for several years prior to 1929, the Development Land and Little Knowley Farm were in separate

ownership and the hedge did not come into existence until after 1849. However, there is no substantial evidence on which I can draw inferences about the devolution of the title to the properties prior to 1874 and I cannot simply assume there was no hedge between the properties when ownership was initially severed, if indeed, it was severed following enclosure.

96. The boundaries have been defined differently in the 1930 Conveyance plan so as to follow the line of the CP Boundary. However, I can see no good reason why the owners would have chosen to divide the title with reference to the CP Boundary based on its unmarked position north of the Ditch. Moreover, defining the boundary in this way is inconsistent with the “T” marks on the hedge to the north. The 1929 Conveyance plan is thus more reliable than the 1930 Conveyance plan.
97. In any event, whilst the 1929 and 1930 Conveyance plans are inconsistent with one another and the Ditch was not separately marked on the 1893 and 1894 OS Maps, it is not without significance that the boundary is shown north of the Ditch on each of the relevant conveyance plans. In the case of the 1929 Conveyance plan, this is apparent from the appended plan. In the case of the 1930 Conveyance plan, it is implicit since the CP Boundary was north of the Ditch.
98. Having determined that the boundary follows the centre of the roots of the hedge in its historic position north of the Ditch and, for a short distance, the southern edge of the Pond, it remains necessary for the boundary to be entered on a plan updated with respect to the current physical configuration of the site. Since the Pond was removed prior to 1965 and the Defendants have now removed almost the entirety of the vegetation to each side of the Ditch (including the hedge), it is no longer possible to define, with precision, the historic position of the original hedge. Moreover, as Mr Strangwick observes, the position of the CP Boundary in the OS MasterMap is not precisely the same as shown on the historic OS Maps. However, imperfect as it is, the OS MasterMap provides the best available evidence of the historic CP Boundary and, based on the historic OS Maps, it can reasonably be inferred that the hedge, in its original position, was some 4 feet north of the CP Boundary. It is also possible to surmise that, where the boundary followed the southern end of the Pond, it was indented slightly to the north although this indentation is *de minimis*. Bearing in mind these considerations, the blue line on Mr Meggitt’s plan at Appendix 7 has been plotted to define the Boundary. In my judgment, it is consistent with the historic alignment of the boundary based on the

available evidence and, in my judgment, it defines the line of the boundary with sufficient accuracy for a court declaration. It yields a similar but not identical outcome to the blue line on Mr Strangwick's plan at Appendix 6. Whilst I shall hear further from counsel before making the final court order pursuant to this judgment, I am minded to make a formal order or declaration providing that, for its full distance between Blackburn Road and Millennium Way, the Boundary is accurately represented by the blue line on Mr Meggitt's plan ("**the Established Boundary**").

(10) Mr Bootle's drainage rights

99. Mr Bootle claims a declaration that he is entitled to (1) the right of natural drainage into the Ditch along the entire length of the southern boundary of Little Knowley Farm; and (2) "a right of drainage from the outlet pipe [on Little Knowley Farm] into the half of the Ditch within the ownership of [GHL]". This outlet pipe shall be denoted as the "**Outlet Pipe**".

100. Since I have determined that the Established Boundary is not contiguous with the Ditch, no issues arise as to whether the Ditch should be regarded as a natural watercourse and Mr Bootle treated as a riparian owner.

101. However, the plans at Appendix 6 and 7 each accurately show the position of the Outlet Pipe which discharges water on land within the boundary of Little Knowley Farm, some distance to the north of the Ditch.

102. Mr Bootle is entitled to allow water that comes naturally onto his land to pass naturally onto his neighbours' lower land, including the Development Land. This is an incident of ownership rather than an easement, *Palmer v Bowman* [2000] 1 WLR 842. Mr Bootle is thus under no obligation to prevent such water passing naturally onto the Development Land and into the Ditch.

103. Conversely, in the entirely hypothetical event that it was to arise for consideration, he "...has no right (a) to discharge on to his neighbour's land water which he has artificially brought on to his land or water that has come naturally on to his land which he has artificially, even if unintentionally, accumulated there; or (b) by artificial erection on his land, to cause water to flow onto his neighbour's land in a manner in which it would not, but for such erections, have done so", *Gale on Easements* (22nd edn) Para 6-24, approved by the Court of Appeal in *Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd* [2019] Ch 331 at [83].

104. Mr Bootle's putative rights in respect of the Outlet Pipe raise different issues since a right to discharge water onto neighbouring land through a defined channel is capable of subsisting as an easement. This includes drainage through a pipe. The Outlet Pipe was clearly visible at the site visit, discharging water onto land within the boundary to Little Knowley Farm. It appears to have been installed on behalf of Mr Bootle in 2010 or thereabouts. However, it is within the area once marked as a pond on the OS Plans prior to 1965 and it is notable that, on the 1911 and 1928 OS Plans, the letters "S.P" have been marked at the southern end of the Pond to denote a pipe or outlet pipe of some kind. On this basis, Mr Blaker submits that it can be inferred there was historically an outlet pipe in essentially the same position for many years, discharging water into the Ditch and that, as freehold owner of Little Knowley Farm, Mr Bootle is thus entitled to a prescriptive easement to discharge water into the Ditch through the Outlet Pipe.
105. Although the evidence and argument on this aspect was limited, Mr Bootle's case was not implausible. It can be inferred there was historically an outlet pipe at the southern end of the Pond and, although the quality and character of user is obscure, it is conceivable the original pipe was an overflow pipe through which water was periodically conveyed from the Pond to the Ditch. Whilst Mr Bootle did not acquire Little Knowley Farm until 2007 and did not install the Outlet Pipe until later, he would be entitled to rely, in principle, on the user of his predecessors in title if it was of the required character and quality in addition to his own user. This is significant since the qualifying period is a minimum of twenty years user as of right and, interruption for a significant period does not necessarily preclude the acquisition of an easement under the doctrine of the lost modern grant.
106. For user to be as of right, it must be *nec clam*, ie open, *Gardner v Hodgson's Kingston Brewery Co [1903] AC 229 at 238 (Lord Davey)*. Mr Rainey submitted that this is, in itself, fatal to the claim. However, although the burden of proof is squarely on Mr Bootle to establish the essential elements of his case, including the requirement of open user, there is at least an initial evidential burden on GHL to put this requirement in issue. In my judgment, GHL has not done so. The original pipe was repeatedly marked on OS Maps, which are publicly available documents. In its current form, the Outlet Pipe was conspicuous on the occasion of the site visit immediately before trial and it is hardly open to GHL to suggest this was not the case before it elected to remove the surrounding vegetation itself. In cross examination, Mr Hainsworth accepted that,

on the occasion of his visit on 13 June 2024, he could not see the Outlet Pipe from the Development Land. However, in my judgment, this is insufficient, in itself, to raise an issue as to whether the historic user was as of right.

107. On balance, however, I am not persuaded, Mr Bootle has done enough to show he is entitled to a prescriptive easement. Firstly, no evidence of historic user has been admitted in respect of his predecessors in title. Mr Bootle's case in relation to such user is based on inference and supposition only. There is thus no evidence in relation to the character, quality and regularity of user. Nor, indeed, is there evidence that the Outlet Pipe performs the same function as the original pipe. "S.P" may have been apt to describe a sewer pipe. It appears to have been situate immediately to the south of the Pond. No doubt, it is possible to draw inferences about the uses to which it was put. However, the Pond had already gone by the time of the 1965 OS Map, if not before.

108. Secondly, the Outlet Pipe discharges water onto land at Little Knowley Farm, north of the boundary. From there it passes into the Ditch and does so, by gravity, down the slope to the north. However, the Outlet Pipe does not discharge water directly into the Ditch and, at the time of the site visit, it was not possible to identify a defined channel for the putative easement into the Ditch from Little Knowley Farm. In appropriate circumstances, this might have given rise to an easement analogous to the right of eavesdrop. However, in the absence of specific evidence about the character of user before Mr Bootle acquired Little Knowley Farm, no convincing conceptual and evidential basis has been established for the acquisition of such an easement for the full period required.

(11) *Trespass and encroachment*

109. The Established Boundary is north of the Ditch and, from Mr Bootle's perspective, it falls short of the position he has sought to advance in these proceedings. To the extent that the Defendants have carried out works flattening land to the south of the Ditch, building an embankment and culverting parts of the Ditch itself, they have not encroached on Little Knowley Farm.

110. However, during the course of their works, the Defendants have repeatedly entered Little Knowley Farm without Mr Bootle's consent and committed acts of trespass on his property. This includes removing substantial amounts of the vegetation and cutting down bushes and trees north of the boundary. Such works commenced in late April

2024. There were further acts of trespass in June, July and August 2024. The progress of such works can be seen from the drone footage obtained on Mr Bootle's behalf together with the video and photographic images exhibited to the evidence of Mr Hainsworth. It is also supported by the evidence of Mr Bootle and his witnesses, including Messrs Hainsworth and Fells. Of course, the precise line of the Established Boundary is not specifically ascertainable from the drone footage and the witnesses did not purport to define the acts of trespass with reference to such a boundary.

111. Much of the clearance work was on the Development Land and on land east of Millennium Way in the ownership of the highway authority. To a significant extent, this was required for a visibility splay in connection with access to and from the Development Land from Millennium Way. However, the Defendants' acts of trespass involved removing vegetation from Little Knowley Farm for the full length of the Established Boundary. Mr Rainey submitted that, from the plans and video images, it was not possible to identify more than three trees that might have been wrongfully cut down during the works. In reality, whilst there is a substantial amount of drone footage together with video and photographic images taken at ground level, it is not possible to identify and specifically enumerate each tree wrongfully cut down in this way north of the Established Boundary. Trees and bushes appear to have been cut down along the full length of the Established Boundary. No doubt, a substantial number of these were south of the Established Boundary. However, in my judgment, it is likely to have included a substantial number of trees and bushes – significantly more than three trees - liberally spread north of the Established Boundary.

112. It can be seen from the plans at Appendices 6 and 7 that most, but not all, of the Defendant's ranging posts were positioned south of the Established Boundary when the land was surveyed for the preparation of the parties' reports. To the extent the Defendants placed the ranging posts north of the line of the Boundary, they technically committed acts of trespass. At the site visit before trial, it was observed that one or more of the posts may subsequently have been moved. However, nothing turns on this. For this reason, it was not addressed in evidence.

(12) Damages

113. Mr Bootle claims damages for trespass. This is not merely a claim for nominal damages. There is a specific claim for "loss and damage including (amongst others)

the cost of replacing mature trees that have been felled by the Defendants and a diminution in value to the Claimant's Property". In his Particulars of Claim, Mr Bootle also "reserves the right to plead a claim for exemplary and/or aggravated damages". However, to advance such a claim, he would require permission to amend. There is no pleaded claim for negotiating damages.

114. By my order on 9 September 2024, quantum was expressly hived off. It does not fall for determination at this stage. However, I am satisfied the Defendants have committed substantial acts of trespass on Little Knowley Farm, including the removal of trees and bushes from land north of the Boundary. Mr Bootle is *prima facie* entitled to damages for the recovery of his attendant losses and, in the absence of agreement, his losses will have to be assessed at a further hearing.

(13) Injunctive relief

115. Mr Bootle also seeks an injunction restraining the Defendants from trespassing on Little Knowley Farm or interfering with his rights of drainage and an order requiring them to remove the ranging posts they have placed on the land to demarcate the boundary.

116. I can deal briefly with the relief sought in respect of Mr Bootle's rights of drainage and the ranging posts. Mr Bootle is not entitled to injunctive relief in respect of his drainage rights. For the reasons given, I am not persuaded he is entitled to an easement of drainage. Conversely, whilst he is entitled, as an incident of ownership, to allow water to pass naturally from his land onto the Development Land, it is not contended the Defendants have acted inconsistently with such rights to do so or, indeed, that they intend to do so in connection with their development project. Had it formed part of Mr Bootle's case that the intended development is likely to interfere with his natural rights in this way, he could reasonably have been expected to set out the factual basis for this. He has not done so.

117. I shall hear further submissions in relation to the ranging posts. If any of the ranging posts are currently positioned north of the Established Boundary, the Defendants can be expected to remove them. No doubt, in doing so, they will consider whether it would be sensible to re-align them with the Established Boundary or, indeed, build a new boundary fence. However, I anticipate a satisfactory solution can be achieved without a specific court order. There will, of course, be permission to apply.

118. Mr Bootle's more general claim for injunctive relief raises more substantial issues.

119. The Court's jurisdiction to grant such relief is plainly engaged. As Millett LJ observed in *Jaggard v Sawyer* [1995] 1 WLR 269 at 284C-D, the Court of Chancery historically had jurisdiction to grant relief where no cause of action had yet accrued at law. Following the *Judicature Acts*, this was subsumed in the jurisdiction of the higher courts and is exercisable on a *quia timet* basis where there is perceived to be a significant risk of future wrongdoing. In the present case, I have determined the Established Boundary to be further north than Mr Bootle contends. However, in my judgment, there remains such a risk in view of the Defendants' historic conduct and the inconvenience to which they will be put if their project is confined to the area south of the Established Boundary.

120. The Defendants have repeatedly committed acts of trespass on Little Knowley Farm, clearing the land of vegetation and cutting down trees. Between June and August 2024, they continued to do so in the face of requests to the contrary. They only ceased to do so when the Court granted Mr Bootle interim injunctive relief. It might be argued that, having cleared all vegetation from the land immediately north of the Established Boundary, there is no longer good reason for the Defendants to enter such land. No doubt, if they are circumspect, they will be able to build their embankment and retaining wall without entering Little Knowley Farm. For almost the entire length of the Established Boundary, the watercourse in the Ditch runs south of the Established Boundary. However, if the Defendants can carry out the works without committing acts of trespass, there is all the more reason to grant Mr Bootle an injunction preventing them entering Little Knowley Farm.

121. Conversely, this court has jurisdiction to award damages in substitution for an injunction in respect of *future* wrongdoing under *Section 50* of the *Senior Courts Act 1981*. The origins of the statutory jurisdiction can be traced back to *Section 2* of the *Chancery Amendment Act 1858*.

122. When exercising this statutory jurisdiction, the courts have historically applied the following guidance of AL Smith LJ in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, namely that:

“In my opinion, it may be stated as a good working rule that – (1) If the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being

estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:- then damages in substitution for an injunction may be given”.

123. However, in *Jaggard v Sawyer (supra)*, Millett LJ emphasised, at 287H, that “AL Smith LJ’s check-list” is “only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction”.

124. In *Coventry v Lawrence [2014] AC 822*, the Supreme Court took the opportunity to provide more authoritative guidance on the application of Smith LJ’s “working rule” whilst leaving it for the courts to lay down rules, as Lord Neuberger put it at [121], for determining the factors to be taken into account.

125. At [121], Lord Neuberger confirmed that “the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not”. He also re-affirmed a passage from Lord Macnaghton’s speech in *Colls v Home and Colonial Stores Ltd [1904] AC 179 at 193*, stating that an injunction will be necessary if the injury cannot fairly be compensated in money or the defendant has acted in a high-handed manner or endeavoured to steal a march or evade the court’s jurisdiction. However, at [122], Lord Neuberger sought to emphasise that, in other cases, where there is no question as to whether the obstruction is legal or not or whether the defendant has acted fairly or in an unneighbourly spirit, it remains necessary to consider, without preconception, the evidence and argument as a whole when determining whether to award damages in lieu of an injunction.

126. Consistently with this analysis, Lord Neuberger concluded, at [123] that, whilst it would normally be right to refuse an injunction if each part of AL Smith LJ’s fourfold test was satisfied, it did not follow that the court should grant an injunction if they were not all satisfied. Endorsing the view of Romer LJ in *Fishenden v Higgs and Hill Ltd (1935) 153 LT 128*, he stated that AL Smith LJ’s test should not “be a fetter on the exercise of the court’s discretion”.

127. Lord Neuberger’s guidance was in the context of an application for an injunction restraining the owners and operators of a stadium and motocross track from causing or permitting a nuisance through the issue of excessive noise. The Supreme Court restored

the first instance judgment of HHJ Richard Seymour QC in which injunctive relief had been granted. Lord Sumption and Lord Mance agreed that the appeal should be allowed for the same reasons as Lord Neuberger but they each took the opportunity to provide collateral guidance with Lord Sumption stating, at [161], that *Shelfer* was now out of date, an observation with which Lord Clarke, at [171], agreed. At [239], Lord Carnwath also stated that the time had come “to signal a move away from the strict criteria derived from *Shelfer*...”

128. The appeal in *Coventry v Lawrence (supra)* did not specifically involve remedies for trespass. However, the Supreme Court took the opportunity to provide authoritative guidance on the award of injunctive relief or damages in lieu of an injunction and I can see no good reason why it should not apply *mutatis mutandis* to an action for trespass to land.

129. Once the court’s jurisdiction has been engaged, an injunction should *prima facie* be granted and the legal burden is then on the defendant to show why not, see Lord Neuberger at [121]. This applies with particular force in the case of an action for trespass, especially where, as Lord Macnaghton put it in *Colls (supra)*, the defendant is seen to have acted in a high-handed manner.

130. Applying this guidance, I am satisfied that Mr Bootle should be awarded an injunction restraining the Defendants from entering or otherwise trespassing on Little Knowley Farm at least for the continued duration of the development works.

131. I have reached this conclusion for the following reasons.

132. Firstly, whilst I have determined that the Established Boundary is north of the Ditch, the Defendants have repeatedly trespassed north of the Established Boundary during the course of the development project and, in doing so, shown a casual disregard for the true line of the boundary. It can reasonably be surmised that they will continue to do so unless restrained by injunction. When Mr Bootle took issue with them about the works on the boundary, they did not – as might reasonably have been expected - take immediate action to engage a boundary surveyor and pause such work pending a satisfactory solution. They maintain that they were content to rely on the registered title plan notwithstanding that the boundary had not been fixed and the title plan was self-evidently drawn to an inadequate scale. However, they repeatedly trespassed on land

to the north of the boundary shown in the registered title plan, cutting down trees and bushes. The acts of trespass continued until they were restrained by injunction.

133. As yet, the enabling works are incomplete. If the Defendants perceive it to be convenient for them to trespass on Little Knowley Farm during the rest of the development project, there is every reason to believe the Defendants will do so unless restrained by injunction.

134. Secondly, I have determined that the Established Boundary is generally north of the Ditch. For the most part, it is also well north of the area allocated for the Defendants' enabling works, in particular their work excavating and flattening the land, and building a retaining embankment. No doubt, the Defendants will be required to exercise caution to ensure they do not commit acts of trespass when carrying out their works along the Ditch. This includes culverting part of the Ditch. However, the injunction will not preclude them from continuing such work. It may occasion them inconvenience and, in places, it may be necessary for them to modify their scheme of works. However, this would be to put the Defendants' case at its highest and it would not warrant withholding injunctive relief.

135. In view of the Supreme Court's observations, it is no longer appropriate to rigidly apply AL Smith LJ's working rule in *Shelfer (supra)*. However, if an injunction were to be withheld in the present case it is by no means obvious that Mr Bootle would be adequately compensated by a small money payment. Moreover, whilst the boundary has not been fully determined until now, the Defendants must be taken to have been aware, from the outset, of the limits on their rights of ownership. As it happens, the Defendants will generally be able to carry out their scheme of works without trespassing on Little Knowley Farm. In these circumstances, it would not be oppressive to grant Mr Bootle an injunction. This is not a case in which it would have been appropriate to withhold injunctive relief by applying the so-called working rule in *Shelfer (supra)*.

136. Contrary to Mr Rainey's submissions, I am not persuaded that I should withhold injunctive relief and award damages in lieu under *Section 50* of the *Senior Courts Act 1981*. I shall make an order restraining the Defendants, by injunction, from entering or otherwise trespassing on Little Knowley Farm. However, this shall be limited, in time, to the anticipated duration of the development works since I can see no good reason for

the Defendants to trespass on Little Knowley Farm once the works are complete. I shall hear further submissions on the length of the period.

(14) *The Defendants' Cross Application*

137. The hearing before HHJ Cadwallader on 22 August 2024 was conducted remotely. Mr Bootle was represented by leading and junior counsel, Ms Caroline Shea KC and Mr Wilson Horne. Whilst Mr Bootle's solicitors gave the Defendants' solicitors advance notice of the hearing, this could have been no more than four hours in length. During this period, they were able to instruct Mr Rainey to attend on their clients' behalf. However, in the short amount of time available, Mr Rainey had only a limited opportunity to acquaint himself with the issues and factual background and was unable to participate, in a substantial way, at the hearing.

138. At the end of the hearing, HHJ Cadwallader fixed a return date and granted an interim injunction prohibiting the Defendants from entering Mr Bootle's property, defined so as to include a strip of land to the South of the Ditch. The return date was listed for hearing before me. On 9 September 2024, I made an order again prohibiting the Defendants from entering Mr Bootle's property but the boundary was re-defined. This order prohibited the Defendants from entering land to the north of the boundary shown on the registered title plan. The prohibition was thus limited to land north of the Ditch and well north of the prohibition in the 22 August Order.

139. The Defendants' Cross Application was issued on 23 September 2024. It is based on a series of scheduled allegations. However, in his submissions at trial, Mr Rainey narrowly focussed the Cross Application on one allegation only, namely leading counsel's submission that the Defendants had *refused*, prior to the hearing, to provide Mr Bootle with information about their development plans. He submits that this was critical because it was deployed to persuade the judge that the hearing should proceed without sufficient notice. He also submits that the submission was incorrect since the Defendants did provide Mr Bootle with such information as was requested. He says that, prior to the hearing on 22 August 2024, the Defendants were not asked to provide information about their development plans. In the absence of a request for such information, it could hardly be suggested they refused to provide it.

140. In my judgment, this part of the Cross Application is essentially correct.

141. The Rules provide for applications to be made by written notice. Under *CPR 23.7(1)*, service must generally be effected as soon as practicable and at least three days before the hearing. Service may be dispensed with in cases of exceptional urgency or where the overriding objective is best furthered by doing so, *PD23A Para 3*. However, injunctive relief on a without notice application is itself an exceptional remedy, *Moat Housing Group-South Ltd v Harris [2006] QB 606*. When disposing of an appeal, from Jamaica, on an application for injunctive relief, the Privy Council has thus observed that without notice applications should not be entertained unless notice would enable the defendant to defeat the purpose of the injunction or there is literally no time for notice, *National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] UKPC 16*. Mindful of this observation, Silber J concluded, in *CEF Holdings v Munday [2012] EWHC 1524*, at [255], that it is prudent in such cases for the applicant to provide the court, at the outset, with a full and honest explanation as to why proper notice could not be given.
142. In any event, applicants must show the utmost good faith and disclose their case fully and fairly, *Siporex Trade SA v Comdel Commodities [1986] 2 Lloyds Rep 428 at 437* (Bingham J). This remains the case if they provide notice to the respondents but such notice is shorter than the Rules provide unless the respondent or his lawyers is manifestly able to deal with all factual and legal issues at the hearing, *CEF Holdings v Munday (supra)*, at [182].
143. In the present case, the Defendants were only given short notice of the hearing because it was perceived the need for relief was too urgent to await three days' notice bearing in mind that the following weekend and Bank Holiday would be excluded. It is not suggested that they would have been in a position to pre-empt the relief or defeat the purpose of the injunction. It was Mr Bootle's case that, in the absence of immediate relief, irreversible damage would be caused and there was thus no time for the Defendants to be provided with sufficient notice under the Rules.
144. However, by the time of the hearing, the Defendants' works on the boundary had been in progress for some time. The parties' solicitors had entered into correspondence about the works in late July 2024. In the absence of something unusual about the development scheme itself, it was inherently unlikely that giving the Defendants full notice under the Rules would have afforded them the opportunity to hasten their scheme of work so as to cause substantial and irreversible damage.

145. A transcript of the hearing has been obtained from which it can be seen that HHJ Cadwallader was alive to the need for Mr Bootle to show real urgency. This includes the following exchange.

HHJ Cadwallader: “...what is it about the urgency that means that the usual notice could not be given? Because, you know, there is a difference between needing to crack on – having decided that things have got to that point - and needing to crack on without the usual amount of notice, is this a matter where a day, two days, three days are going to make a difference?”

Leading Counsel: “Well, it might well do. We don’t know. And the Defendants have refused to share what their development plans are. We did not think that such serious works would be done in the interim between our correspondence/between our drone surveys but they continue to be done. And if it were a matter of another three days- and, as your Lordship will appreciate, on an injunction of this kind it has taken us all our might at our end to get the papers ready for this injunction – another three days, we do not know what extensive works could be done in those three days”.

HHJ Cadwallader: “OK, so it is precautionary, I understand”.

Leading Counsel: “It is precautionary but with justified grounds for our fears”.

146. As leading counsel for the Defendants, Mr Rainey was later given the opportunity to respond. Having emphasised that he had not been provided with bundles of evidence and was in no position to participate properly at the hearing, he took issue with the proposition that the application required urgent disposal without notice, asking rhetorically at one point “what is going to happen in the next three days?” However he did not take issue with the allegation that his clients had refused to share their development plans, no doubt because he had not had the opportunity to take full instructions on the information his clients had provided prior to the application.

147. In his judgment, HHJ Cadwallader did not mention the Defendants’ putative refusal to share their development plans. However, when considering whether damages were an adequate remedy, he stated that he was “concerned...given that this application is made without notice if it had been made with notice it would have been heard no more than about three days later than today, during which there is a question in my mind as to how much additional work would realistically have been done”. The Judge confirmed that he had “hesitated over this”. However, he then stated that “there is every

sign - reading between the lines of such correspondence as I have seen – that this is a case in which the Defendants are taking a strong and firm stance and are proceeding at pace with development in the area which is subject to this dispute”. He also noted, from photographs of the development that substantial works were being carried out. On this basis, he was implicitly persuaded to entertain the application. Having done so, he granted Mr Bootle interim injunctive relief.

148. Whilst the Judge did not mention, when giving judgment, the Defendant’s putative refusal to share their development plans with Mr Bootle or his legal advisers, it is apparent from his judgment that he hesitated on whether to grant relief without sufficient notice. This is an issue to which he returned at the very end of his judgment when he stated that “I have been very concerned...at the making of the application effectively without notice”. He concluded by saying “but it seems to me that, for present purposes, I am satisfied enough to grant an injunction over until the return day”. Whilst the question did not yield an unequivocal answer, he thus decided, on balance, that he should entertain the application and grant interim relief. Although the Defendants’ case cannot be put any higher than this, it is conceivable that leading counsel’s submission about the refusal of the Defendants to share their development plans had a bearing on the judge’s final conclusion.

149. This is significant since, prior to the hearing, the Defendants were not asked to provide Mr Bootle with information about their development plans. This can be seen from the witness statements of Joanne Elise Mills, the Defendants’ solicitor. Following the hearing, Ms Mills confirmed, in her witness statement dated 28 August 2024, that “no development plans, timescales or programme of works has ever been requested by [Mr Bootle] and [whilst] site surveys in respect of the boundary have been requested [these have been] provided in full”. When Ms Mills asked Mr Bootle’s solicitor for evidence of any material request, he referred her to an earlier request for due diligence documents including surveys to the boundaries”. This request was contained in a letter dated 26 July 2024 to the Defendants’ previous solicitors and amounted to a request for due diligence and survey documentation rather than the Defendants’ plans for development. Once the request had been relayed to Ms Mills, she had provided Mr Bootle’s solicitors with a copy of three survey documents, namely a Utilities Survey dated August 2022, an existing site plan dated November 2022 and North Boundary Set Out Plan dated May 2024. Ms Mills had not been requested to provide development

plans or information about such plans. Whilst she had been asked to provide the due diligence and survey documentation, she had not refused to provide Mr Bootle or his solicitors with such documentation. There is no evidence that, when providing them with such documentation, Ms Mills omitted to provide them with all the information requested but, if this is the case, such an omission would not, in itself, amount to a refusal.

150. In my judgment, there can be no question in the present case of a deliberate intention, on the part of counsel or their solicitors, to mislead the court. If the court was misled, this was inadvertent. It is not suggested otherwise by the Defendants. However, this is no excuse for the unfair presentation of a party's case, see for example *Brink's Mat v Elcombe* [1988] 1 WLR 1350.

151. Putting Mr Bootle's case before HHJ Cadwallader at its highest, he did not know the Defendants' development plans and the Defendants had not provided him with details of such plans. In these circumstances, he was anxious to obtain relief at the earliest opportunity. No doubt, this is the impression counsel sought to convey. Moreover, it is consistent with the judge's stated observation that relief was being sought on a "precautionary" basis. However, his counsel allowed the impression to be created that the Defendants had *refused* to provide Mr Bootle and his legal representatives with information about their development plans and the time-scale in which the constituent works were to be carried out. It matters not whether this was primarily down to an error on the part of counsel, their solicitors or client.

152. It is unusual for counsel's submissions to be subject, retrospectively, to careful and minute analysis in this way. Unfortunately, however, this is the territory of a hearing for injunctive relief on an application without sufficient notice. In the present case, leading counsel's submission that the Defendants had *refused* to share their development plans was incorrect. The submission was made without qualification or explanation and it was made in answer to a question which was troubling the judge. Viewed objectively, the submission was *material* in the sense that it was *potentially* capable of having a bearing on the outcome of the application. In my judgment, this is enough to satisfy the test of materiality. As it happens, it is not possible to conclude that the relevant submission swung the Judge's decision or even that it is likely to have done so. For the sake of completeness, however, it is at least conceivable that it influenced the Judge when he arrived at this conclusion.

153. Having determined that counsel's submission was misleading and involved a material breach of the duty of fair presentation, the next question is whether I should exercise my discretion to set aside the 22 August Order. The breach was inadvertent and, whilst it may have affected the outcome of the hearing, there is nothing on the face of HHJ Cadwallader's judgment to suggest it did so. In my judgment, however, these considerations are outweighed by the policy reasons for enforcement and the prejudice occasioned to the Defendants. At the hearing on 22 August 2024, HHJ Cadwallader was persuaded to make an order prohibiting the Defendants from crossing a boundary measured upwards of four feet to the south of the Ditch. This prohibited them from carrying out work in or on the Ditch itself and an extensive area south of the Ditch, including an important part of the enabling works for their development project. This injunction continued in effect until 9 September 2024 when I made an order aligning the prohibition with the boundary shown on the registered title plan north of the Ditch.
154. The boundary in the 22 August Order was based on Mr Hainsworth's expert report dated 21 August 2024. Following the hearing on 22 August 2024, the Defendants filed evidence to challenge his conclusions, including a copy of the 1849 OS Map. Once this evidence was referred to Mr Hainsworth, he recanted his earlier view and presented a further report with the boundary four feet south of the hedge on the northern side of the Ditch. My order dated 9 September 2024 was based, in part, on the evidence admitted after the hearing on 22 August. Had Mr Bootle elected to proceed, at the outset, on a full notice basis, the Defendants would have been provided the opportunity to file their evidence earlier. It can reasonably be inferred he would then have obtained an injunction on essentially the same terms as my order dated 9 September 2024. However, on this basis, the prohibition would have been to the north of the Ditch. It would thus have enabled the Defendants to continue with their scheme of enabling works on the Development Land.

155. I shall thus make an order setting aside the injunction in the 22 August 2024 Order.

(15) *Inquiry as to damages*

156. The 22 August Order was made subject to Mr Bootle's cross undertaking in damages. This provided, in the usual way, for the Defendants to be compensated for losses sustained owing to the order. In view of the fact that the 22 August Order prohibited the Defendants from entering land within GH's ownership, well to the south

of the Established Boundary, and they were thus prohibited from carrying out works on such land between 22 August and 9 September 2024, the Defendants have *prima facie* sustained loss and damage for which they are entitled to be compensated.

157. There shall be thus be an inquiry as to damages.

(16) Disposal

158. I shall make an order or declaration determining or confirming the position of the Established Boundary. This is most accurately represented by the blue line on Mr Meggitt's plan at Appendix 7.

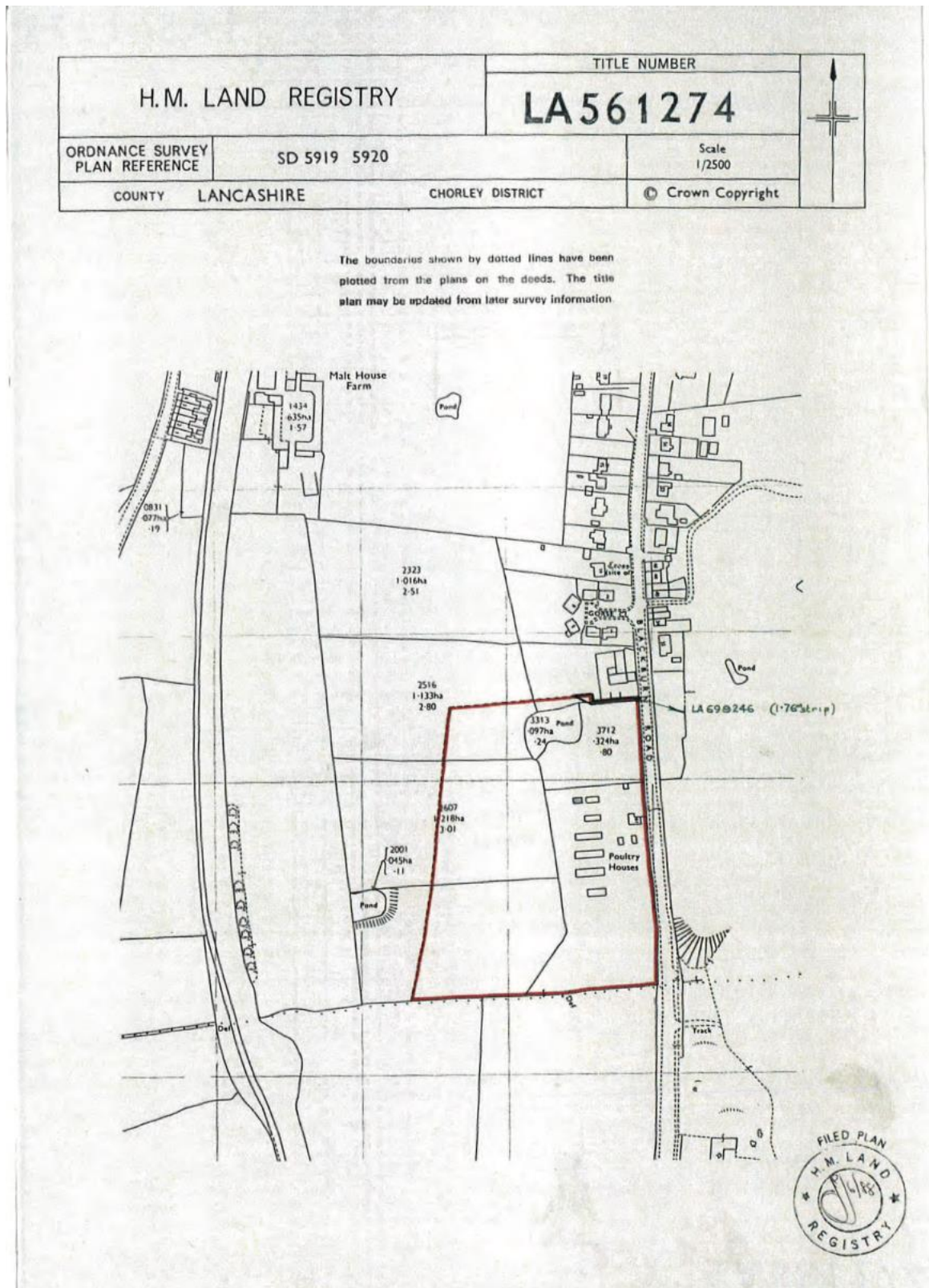
159. Mr Bootle is entitled to an order for damages for trespass to be assessed.

160. The Defendants shall be restrained, by injunction, from entering or otherwise trespassing on Little Knowley Farm.

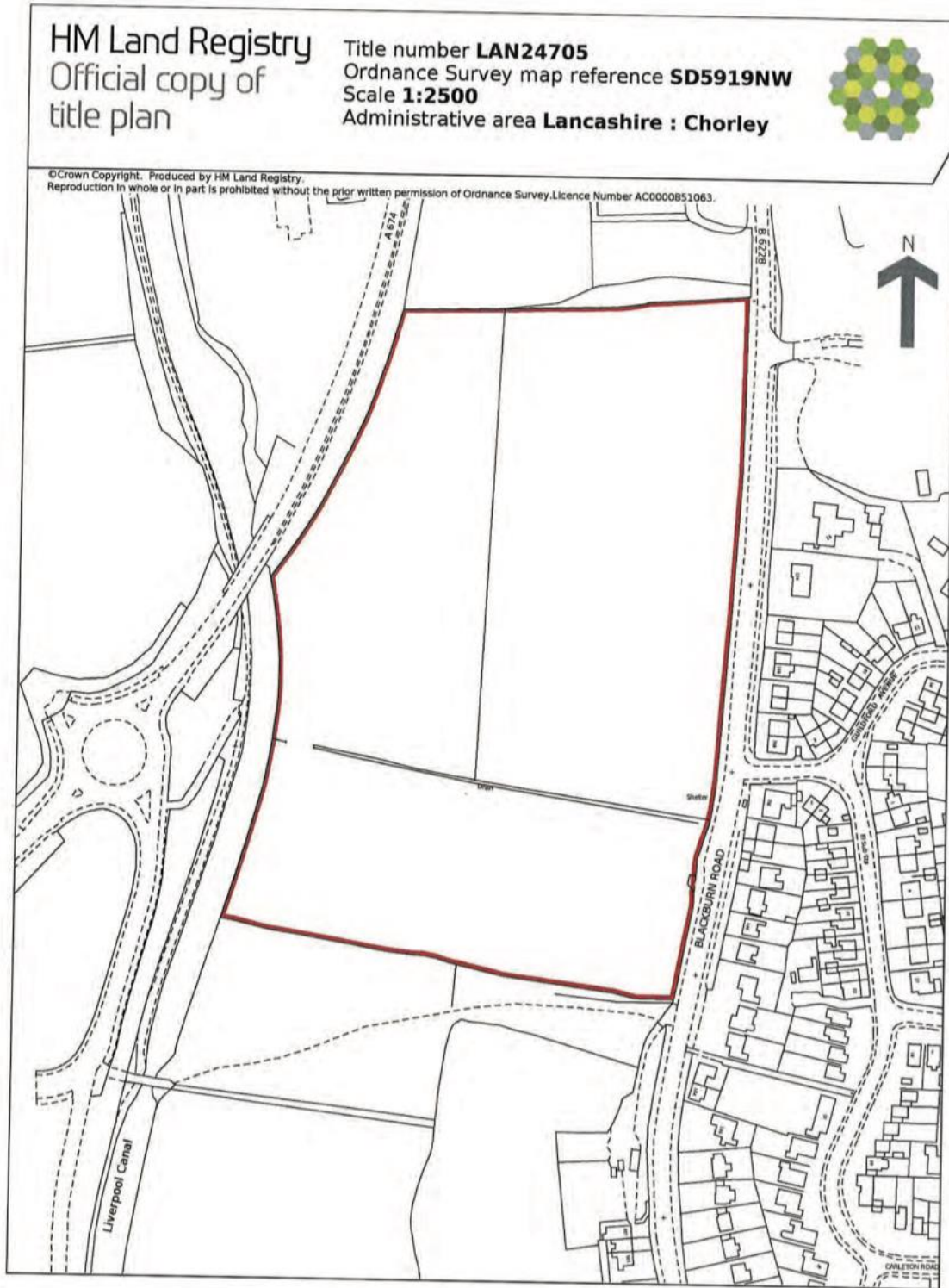
161. The interim injunction in the 22 August 2024 Order shall be set aside.

162. The Defendants are entitled to an inquiry as to damages on Mr Bootle's cross undertaking in damages in the 22 August 2024 Order.

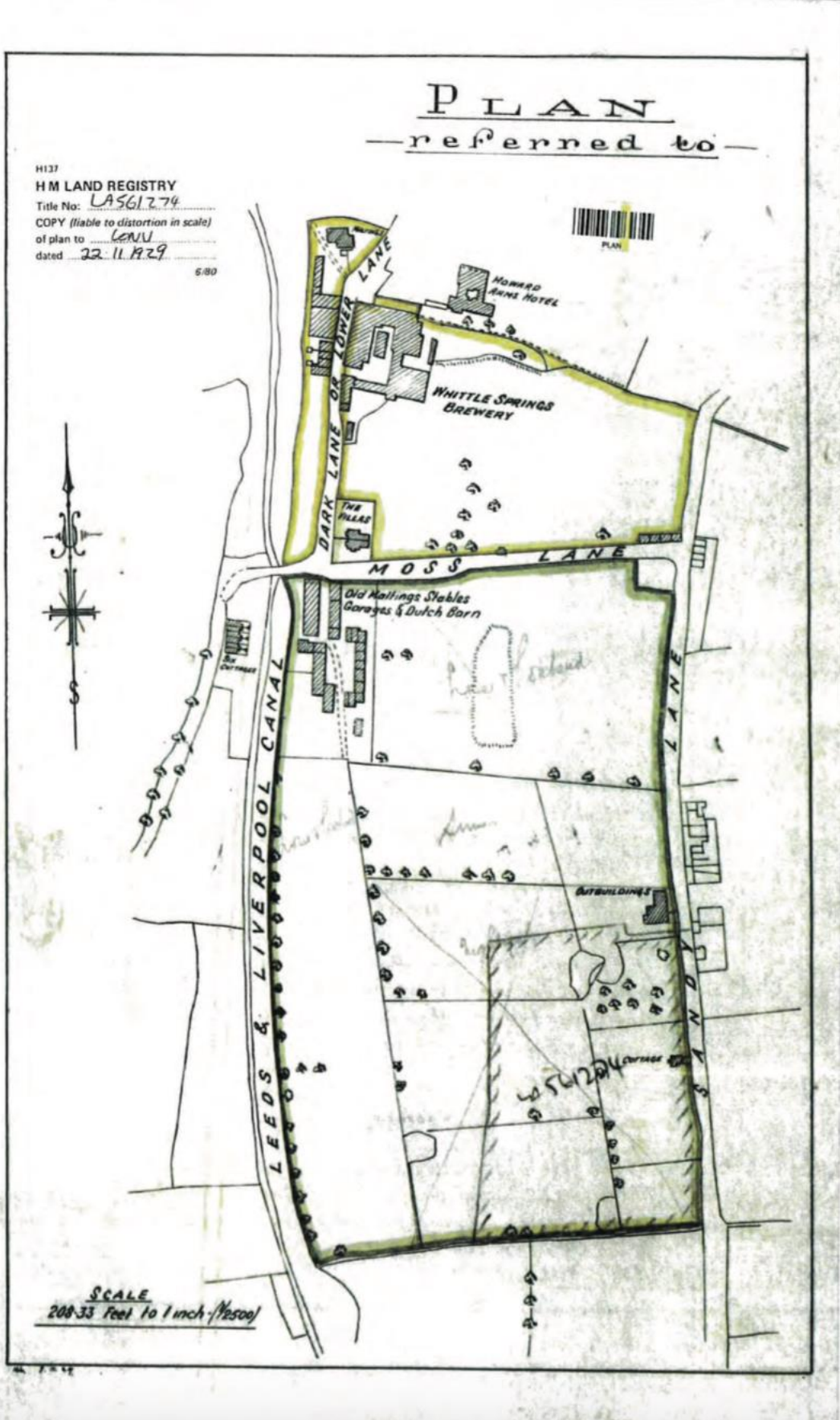
Appendix 1



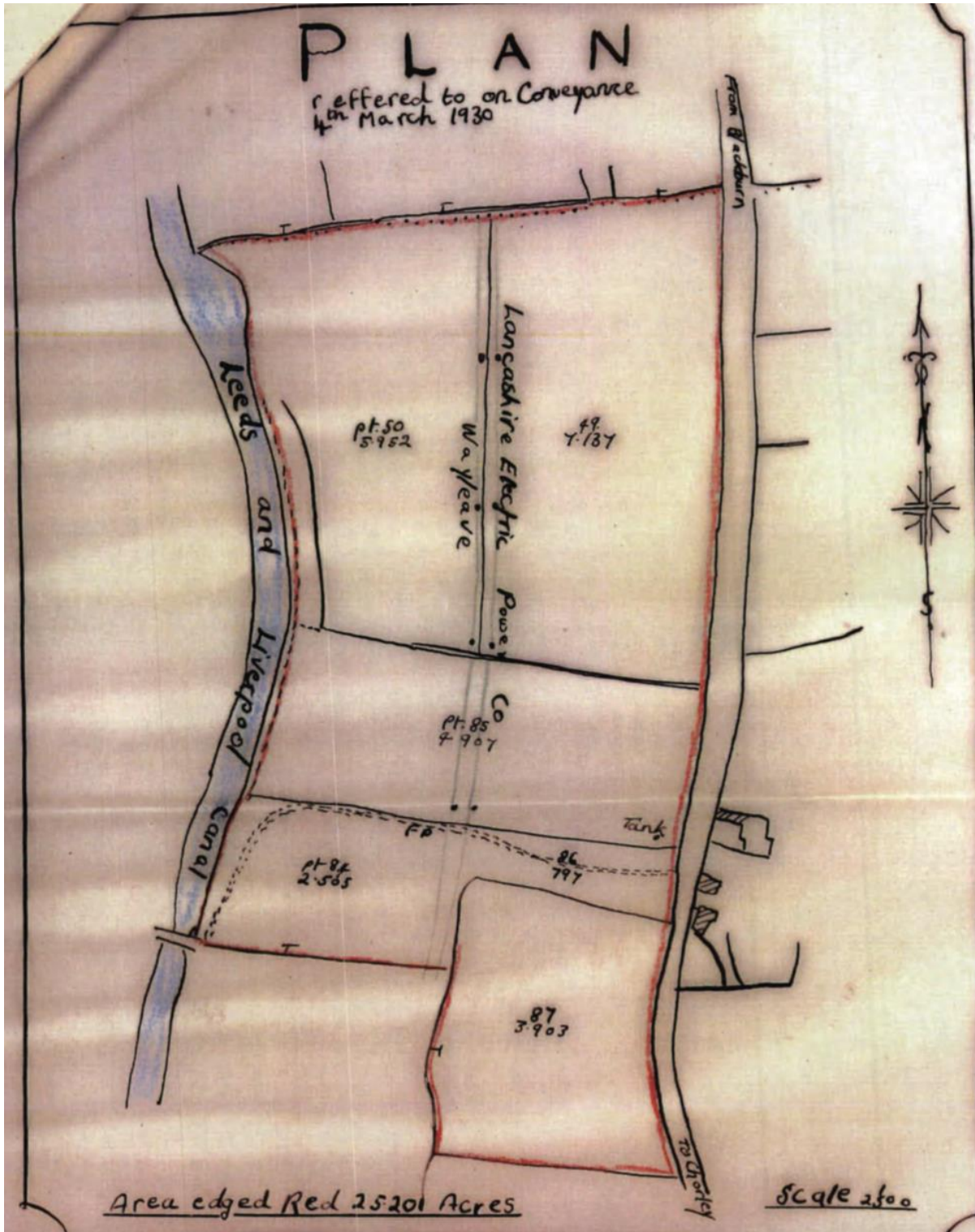
Appendix 2



Appendix 3

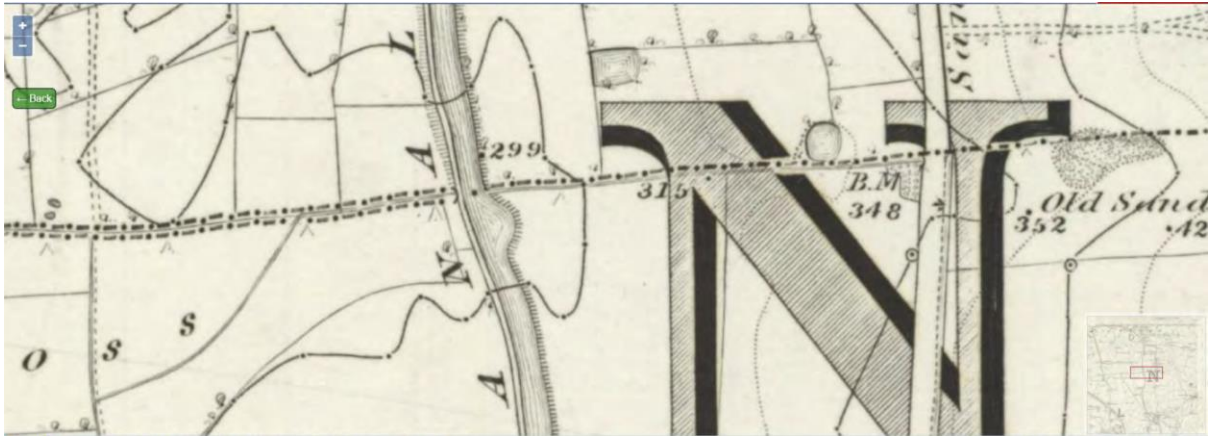


Appendix 4



Appendix 5

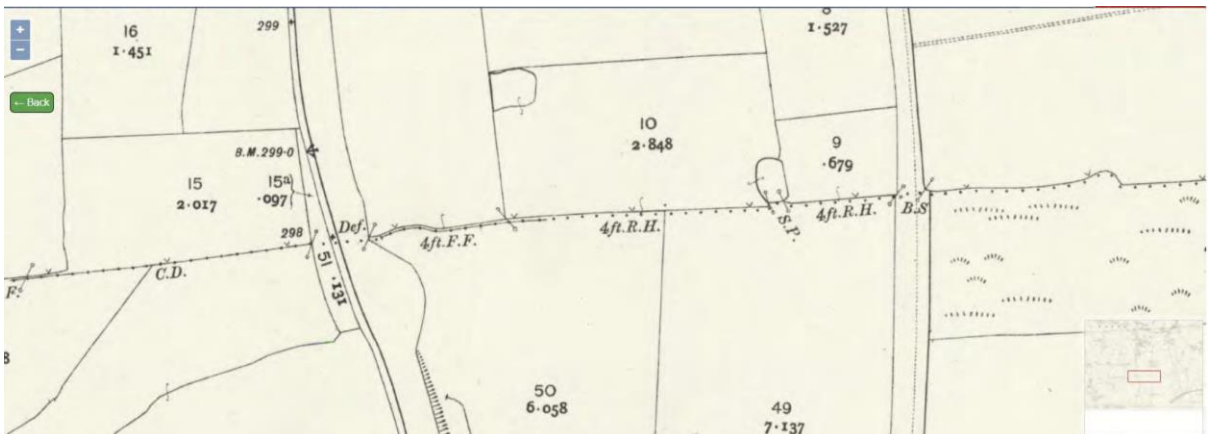
(1) OS Map surveyed 1844-47; published 1849



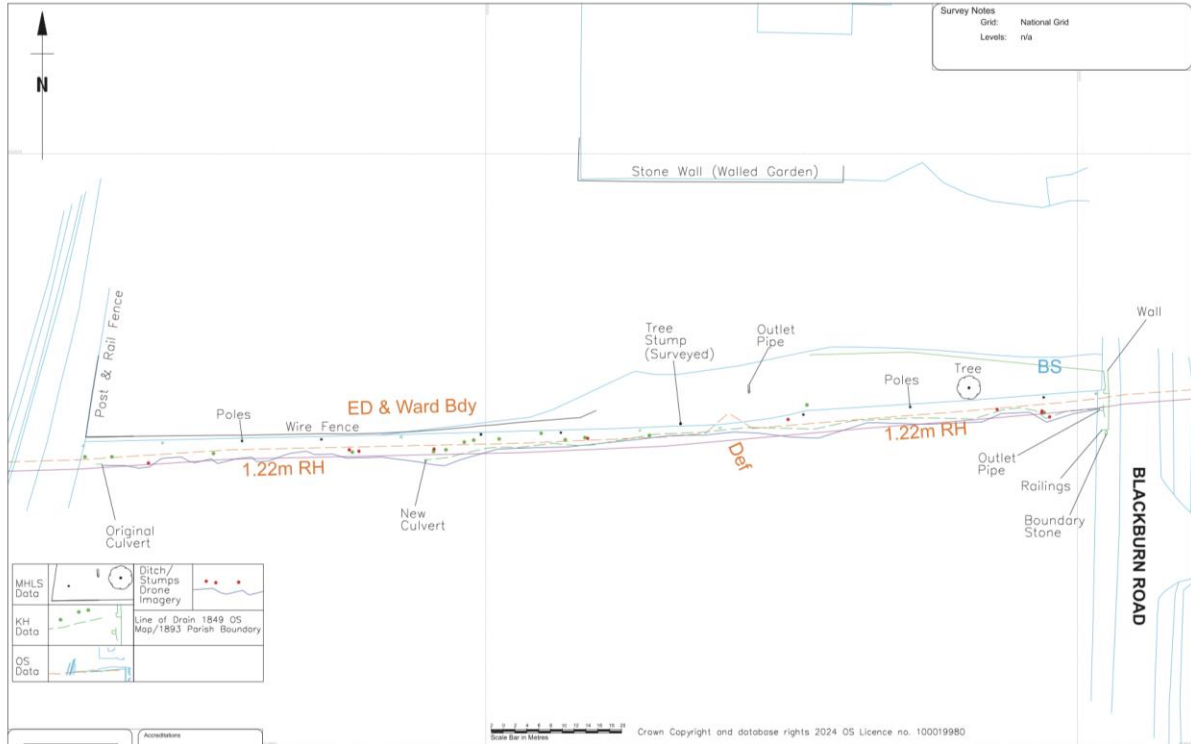
(2) OS Map surveyed 1893; published 1894



(3) OS Map revised 1909; published 1911



Appendix 6



Appendix 7

