

REF/2014/0790

**PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL**

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

UFFE LEINUM

APPLICANT

and

**(1) ROBERT JOHN CRAWFORD
(2) CHANTAL THERESE CRAWFORD**

RESPONDENT

**Property Address: (i) Seven Springs, De Walden Road, Malvern WR14 4BL
(2) The Old Vicarage, 230 West Malvern Road, Malvern WR14 4BD
Title Number: (1) WR147728 (2) HW142077**

Before: Judge Orr

**Sitting at: Kidderminster Magistrates Court
16th, 17th and 18th November 2015**

**Applicant Representation: Mr McCracken of counsel, instructed by SME Solicitors
Respondent Representation: Mr Haynes of counsel, instructed by R.R. Williams & Son**

DECISION

Cases referred to:

ACCO Properties v Severn [2011] EWHC 1362

Batt v Adams [2001] 2 EGLR 92

Chambers v London Borough of Havering [2011] EWCA Civ 1576

Ecclesiastical Commissioners of England and Wales v Rowe (1880) 5 App Cas 736

Fairweather v St Marylebone Property Co [1963] AC 510

Hounslow BC v Minchington (1997) 74 P&CR 221

Inglewood Investments v Baker [2002] EWCA Civ 1733

JA Pye (Oxford) Ltd v Graham [2003] AC 419

Joyce v Rigolli [[2004] EWCA Civ 79

Liaquat Ali v Lane [2006] EWCA Civ 1532

Neilson v Poole [1969] 20 P&CR 909

Norman v Sparling [2014] EWCA Civ 1152

Pennock v Hodgson [2010] EWCA Civ 873

Powell v McFarlane (1977) 38 P&CR 452

St Edmundsbury and Ipswich etc v Clark (No2) 1973 1WLR 1572

1. By an application in form DB dated 30 April 2014 Mr Leinum sought the determination of the boundary between his property, Seven Springs, and the Respondents' property, The Old Vicarage. The line of the boundary contended for by Mr Leinum was drawn in red by his surveyor, Mr R.S. Jones, on a survey plan at a scale of 1:200 prepared by Laser Surveys ("the Laser Survey plan"). Given that the application plan has been accepted by HM Land Registry it can be taken to meet the requirements of para 7 of Land Registry's Practice Guide 40. The Respondents, the owners of The Old Vicarage, objected to the application and it was referred to the tribunal for disposal.
2. The disposal of the application requires two matters to be addressed. Firstly there is the question of where the legal boundary between the properties now is. Secondly there is the question whether the application plan correctly records the boundary. The application might be disposed of by considering the correctness of the plan in relation to part only of the boundary. In order to resolve the differences between the parties, however, it is plainly desirable that there should be a determination, so far as possible, of the correct line of the boundary throughout its length. I observe that that approach accords with the observation of Megarry J in *Neilson v Poole* [1969] 20 P&CR 909 to the following effect:

"As to any particular parcel of land, either the conveyance conveys it, or it does not; the boundary between what is conveyed and what is not conveyed must therefore be proclaimed. The court cannot simply say that the boundaries are uncertain, and leave the plot conveyed fuzzy at the edges, as it were."

Background

3. The land occupied by Seven Springs (together with other land subsequently sold off) formed part of the garden and paddock of The Vicarage, as it was known, having been conveyed by the Incumbent to Mr and Mrs Serjeant by a Conveyance dated the 6th February 1968. It was described as “containing approximately 2,150 square yards or thereabouts more particularly delineated on the plan annexed hereto and thereon edged red.”. The plan was to a scale of 1/32” to 1’ (or 1:384) and showed the northern boundary, with which I am concerned, as comprising two lines meeting at a very wide angle, one passing to the south of a tree and the other to the south of two garages. The Conveyance contained a covenant on the part of the purchasers “forthwith to erect to the satisfaction of the Incumbent or his surveyor... a fence consisting of reinforced cement concrete posts at 10 feet intervals with 4 feet high cleft chestnut fencing secured with two strands of plain wire and... to plant... a double row quick and privet hedge”.
4. Mr and Mrs Serjeant, he being an architect, subsequently built Seven Springs. In 1974 they sold off a plot in the southwest corner of the land they had purchased on which the house known as Highlow now stands. That transaction did not affect the boundary in issue.
5. The retained part of The Vicarage was sold as The Old Vicarage in 1984 by a Conveyance dated the 19th November 1984 and made between (1) The Worcester Diocesan Board of Finance and (2) Mr and Mrs Clarke in which the land was described as having an area of 1.125 acres or thereabouts and being “for the purpose of identification only” edged in red on the attached plan. The plan on which the boundary was drawn was an Ordnance Survey plan and, in common with all other OS plans of the properties up to 2014, shows the physical boundary between them running up to and along the southern end of the westerly garage, the red edging following that line. The effect was that the boundary was shown as comprising three lines.
6. Seven Springs was conveyed to Mr Leinum by Mrs Serjeant and a new trustee by a Conveyance dated the 1st June 1990. He lived there for some years with his wife but they separated and from 1995 to 2009 he worked abroad. Seven Springs was let during that period, the first letting commencing on the 1st April 1995 for a term of 17 months. He has lived at Seven Springs since his return to the United Kingdom. His title was registered with the Land Registry in the 25th July 2013 under Title No. WR147728.

7. The Old Vicarage was transferred to the Respondents by a Transfer dated the 28th April 1994 and title to the property was registered on the 8th June 1994 under Title No. HW142077. It is common ground that they moved into the property in about October 1994, having worked on it over several months. They remain resident there.
8. The Laser Survey plan shows, among other things, the physical boundary between the properties as recorded on the OS plans up to 2014 and used by the Land Registry to show the boundary on its plans. The latter boundary is, of course, merely a general boundary and I note that the Laser Survey, while giving the current position of the paling/netting fence, gives only a schematic or general position of the conifer and beech hedges marked on it. Where I refer to points below I do so by reference to the letters on the Laser Survey plan, save where otherwise stated. In June 2014, following the application, the boundary was again surveyed by the Ordnance Survey at the request of the Land Registry ("the OS survey") and it was noted among other things that the easterly end of the boundary feature on West Malvern Road had been incorrectly positioned in the original OS map by about 2.5 metres.
9. The following features are present on and in the vicinity of the boundary at present. Their presence and location are apparent from both the OS survey and the Laser Survey plan as I was able to confirm on my site visit before the hearing:
 - 9.1. From point B to shortly beyond point C there is a ranch style fence. There is a slight change of direction in the fence shortly before point C (at point F on the OS survey plan). It is common ground that the present fence was erected, wholly or substantially, by the Respondents after their purchase of The Old Vicarage and replaced an earlier fence, although there are disputes as to the line of the former fence and the date of the erection of the present fence;
 - 9.2. Between points C and E there is a retaining wall about 2 metres in height which ends with a "nib" projecting to the north by about 30 cm. At point C the retaining wall continues to the south, permitting the creation of a level parking area in front of the garage of Seven Springs, its back garden and the land beyond the retaining wall being at a higher level. To the north of the retaining wall the concrete bases of the two adjacent garages can be seen. The distance between the retaining wall and the westerly garage base at their closest is 1.24 metres. There is now a greenhouse on the westerly base and a carport extends over the easterly base;

- 9.3. From point F along the north side of the drive of Seven Springs there is a conifer hedge which, after a bend at point K, ultimately becomes a beech hedge. The trunk of the most easterly conifer can be seen on the north side of the nib. The Laser Survey also indicates that there is a slight bend to the south at the western end of the beech hedge which itself ends about 5 metres before the end of the drive. There are a number of trees between the end of the hedge and the highway, including an ash adjacent to the frontage and a conifer between the ash and the hedge, neither of which appears to have been planted in line with the hedge;
- 9.4. Also commencing at point F is a split paling and wire fence, as it is described in the OS survey. While the end of the fence is in now in line with the trunk of the most easterly conifer the remainder runs to the north of the conifer and beech hedges. The supports of the fence which I saw are not concrete but wooden posts which now terminate at ground level and the result is that the fence is now effectively supported by the hedge and in places rests against the trunks of the conifers. After reaching the beech hedge the paling fence deteriorates, although its remains continue to be seen at various points within the hedge, and the effective barrier is afforded by sections of chicken or pig netting or similar supported by a variety of posts including some former palings which tends to run close to the trunks of the hedging plants. There is a section of such netting running from the end of the hedge to the road frontage where the netting is secured to the uprights using cable ties. This section tends to the south of the general line of the fence so as to pass to the south of the conifer referred to above before turning to the north, reaching the road frontage at a point ("Hi") to the south of the ash tree at point H on the Laser Survey plan;
- 9.5. The tree shown on the plan to the 1968 Conveyance has been cut down but its trunk remains relatively close to the north side of the hedge;
- 9.6. Towards the western end of the conifer hedge the Respondents have recently erected a log store to accommodate the roof of which they have cut back to the trunks all the branches on their side of the conifers over a distance of about 3 metres.

The Parties' Claims

10. In relation to the above features the boundary contended for by Mr Leinum starts at the easterly end of the ranch fence, point B, and runs in a straight line to point D on the Laser Survey plan which is 0.75 m to the north of point C, it being alleged that the ranch fence from West Malvern Road had been erected by the Respondents in a different position. From there it continues in a straight line through point F, 0.85 m to the north of the nib, to point K and thence to point H. Between points F, K and H the boundary contended for roughly follows the line of the pig-netting/paling fence save towards the road where the alleged boundary continues in a straight line as the hedge and fence tend to the south.
11. The Respondents' statement of case largely addresses only the easterly end of the boundary in relation to which it was said that the retaining wall was built up to the boundary and that the 1968 Conveyance, which was described as ambiguous and unclear, should be construed by reference to extrinsic evidence, specifically the paling fence between points B and C which was alleged to have been replaced by the Respondents with a ranch fence erected along the same line in 1994. In the alternative it was alleged that the Respondents had acquired title by their adverse possession of the disputed land for a period of not less than 12 years prior to the coming into force of the Land Registration Act 2002 relying on the construction of the retaining wall and the current position of the fencing
12. The Respondents' statement of case makes clear their position as to the boundary between points B and E on the Laser Survey plan but does not otherwise identify the disputed land, merely referring to the hedge and the adjacent fence without identifying an alternative boundary. Having regard to the conduct of the Respondents it is apparent that they consider that the boundary lies on their side of the trunks of the hedging plants and the same understanding was reflected in their evidence.
13. The period between the Respondents' purchase and the coming into force of the Land Registration Act 2002 in October 2002 is rather less than 12 years. Mr Leinum's title was not, however, registered until July 2013 with the consequence that the adverse possession regime under the Limitation Act 1980 on which the Respondents applied to his title until then giving a potential period of adverse possession of over 18 years. No point was taken by the Applicant as to the manner in which the Respondents' case was pleaded in this regard.

14. Mr Leinum's answer to the Respondents' assertion that they were in adverse possession is that the Respondents had taken possession before the 1st April 1995 when Seven Springs was first let and that he did not resume possession until he returned to live at Seven Springs in 2009. During that period there had been a number of lettings and the Respondent had returned to the property for about 6 weeks in total in order to tidy it between lettings.

The Law - Boundaries

15. Before turning to Mr Hayne's submissions as to the original line of the boundary between the properties I observe that I do not understand Mr Leinum's case to be that the boundary he contends for is necessarily that shown by the plan endorsed on the 1968 Conveyance. Thus, although the Laser Survey plan shows the boundary feature as shown on the OS plan and the line of the netting/paling fence, no attempt has been made to show where the boundary on the Conveyance plan would fall. In his own words the boundary line contended for by Mr Leinum is a compromise.
16. Mr Haynes' first submission is that the 1968 Conveyance plan is unclear, its accuracy is uncertain and its scale is small having regard to the area of land being conveyed. Consequently it is not to be relied upon. Accordingly Mr Haynes submits that I should have regard to extraneous evidence in the manner described by Mummery LJ in his judgment in Pennock v Hodgson [2010] EWCA Civ 873 at paras 7-12. Relying on that approach Mr Haynes submits that the retaining wall could be regarded as representing part of one of the lines on the Conveyance plan.
17. I consider that there are serious difficulties in Mr Haynes' submission. The first is that the Conveyance plan, unlike the plan being considered in Pennock v Hodgson, is not referred to for the purpose of identification only. Secondly the scale of the Conveyance plan is rather larger than commonly encountered in conveyances and there is no expert evidence that it is of insufficient accuracy to enable the boundaries to be determined by reference to it. Thirdly the process described by Mummery LJ. Is concerned with construing the conveyance plan in the light of the facts available at the relevant date so that whether the retaining wall was a material fact would depend on whether it existed or, at least, had been planned by that date. Mr Haynes did not identify any other feature in existence at the date of the 1968 Conveyance which ought to be taken into account.

18. Mr Haynes' next submission, with which Mr McCracken agreed, was that events subsequent to the 1968 Conveyance could be taken into account, relying on Liaquat Ali v Lane [2006] EWCA Civ 1532 where Carnwath LJ said at para 36:

"In the context of a conveyance of land, where the information contained in the conveyance is unclear or ambiguous, it is permissible to have regard to extraneous evidence, including evidence of subsequent conduct, subject always to that evidence being of probative value in determining what the parties intended."

19. Liaquat Ali v Lane has subsequently been considered and applied by the Court of Appeal in Norman v Sparling [2014] EWCA Civ 1152 where there was expert evidence that the relevant plan lacked the detail necessary to determine the boundary. At para 26 Elias LJ said:

"I would accept that the boundary indicated by subsequent conduct cannot be at odds with the description of the parcel of the land; it must be consistent with it. But in my view, taking the boundary to be the top of the bank is within the limits of tolerance permitted by the description itself. There would appear to be no purpose in Mr Birch constructing this boundary anywhere other than where he intended the boundary to be, and his own evidence confirms that this is what he was intending to do. He was not intending to refix the boundary."

20. Mr Haynes also submitted that subsequent conduct may be taken to indicate that the parties have arrived at an agreement which affects the boundary. Mr Haynes referred me to the judgment of Megarry J in St Edmundsbury and Ipswich etc v Clark (No2) 1973 1WLR 1572 where he said:

"...where for some 25 years or more parties have acted on the footing that the disputed strip had passed to Mr Clark then... this seems to me to be a good reason for tending to construe the 1945 conveyance as having done what the parties appears to have treated it as having done."

21. Such an understanding is more commonly encountered as a boundary agreement. In relation to such an agreement it is not necessary for there to be uncertainty as to the correct line of the boundary. It is significant that an agreement by which the parties agree the line of a boundary will not fall within Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 even if the parties are consciously exchanging or giving up land provided that the area disposed of was very small. In Joyce v Rigolli [[2004] EWCA Civ 79 Arden LJ said at para 32:

"In those circumstances, I do not consider that Parliament, which after all enacted section 2 against the background of Neilson v Poole, could have intended section 2 to apply to transfers of land pursuant to boundary agreements of Megarry J's latter type ("demarcating" agreements) simply because a trivial transfer or transfers of land were consciously involved."

In Neilson v Poole Megarry J had described the latter type of boundary agreement in the following terms:

“But there is another type of boundary agreement. This does no more than identify on the ground what the documents describe in words or delineate on plans. Nothing is transferred, at any rate consciously; the agreement is to identify and not to convey.”

22. In an appropriate case a boundary agreement may be inferred; see ACCO Properties v Severn [2011] EWHC 1362 at para 11.9.

The Law – Possessory Title

23. Section 15 of the Limitation Act 1980 provides that no action shall be brought by any person to recover land after the expiration of twelve years from the date when the right of action accrued to him. It is provided by Section 17 that at the end of the twelve year period the title of the former owner shall be extinguished. Schedule 1 contains provisions as to when a right of action to recover land will accrue. Paragraph 8 requires that the land must be in the possession of some person in whose favour time can run, introducing the concept of adverse possession.
24. The meaning of adverse possession under the Limitation Act 1980 has been settled by the decision of the House of Lords in JA Pye (Oxford) Ltd v Graham [2003] AC 419. There Lord Browne-Wilkinson at paragraph 36 said that there was no need for a squatter to act adversely to the paper owner and that “the question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.” At paragraph 40 he identified possession as involving two elements, factual possession and an intention to possess.
25. As to what factual possession involved Lord Browne-Wilkinson adopted the following passage from the judgment of Slade J in Powell v McFarlane (1977) 38 P&CR 452 at 470:

“Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been

dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.”

26. As to intention to possess Lord Browne-Wilkinson rejected those cases where the intention to possess had been treated as involving an intention to own or an intention to exclude the owner and continued at paragraph 43:

“Slade J reformulated the requirement (to my mind correctly) as requiring an ‘intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.’”

27. At paragraph 71 Lord Hope said in relation to the intention to possess:

“..it is reasonably clear that the [intention] which is required is the intent to exercise exclusive control over the thing for oneself The important point for present purposes is that it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor. The word 'adverse' in the context of section 15(1) of the Limitation Act 1980 does not carry this implication. The only intention which has to be demonstrated is an intention to occupy and use the land as one's own... So I would hold that, if the evidence shows that the person was using the land in the way one would expect him to use it if he were the true owner, that is enough.”

28. In his judgment at paragraph 76 Lord Hutton observed that, where a squatter made full use of the land as if he were the owner, his use would normally make it clear that he had the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention. Such a person would not need to adduce additional evidence to establish that he had the intention to possess. In cases, however, where the acts in relation to the land of the person claiming title by adverse possession were equivocal and open to more than one interpretation, those acts would be insufficient to establish the intention to possess. At paragraph 77 he cited with approval Slade J’s formulation of the intention to possess referred to by Lord Browne-Wilkinson at paragraph 43.

29. There have been a number of subsequent cases on the question whether the erection of a fence demonstrates an intention to possess in situations where there may have been a limited objective, for instance to keep in animals. Apparently differing views were expressed in Hounslow BC v Minchington (1997) 74 P&CR 221 and Inglewood Investments v Baker [2002] EWCA Civ 1733. In the former Millett LJ said at page 233 that motive was irrelevant and continued:

“They wanted to keep their dogs within the boundaries of their own land. That was a perfectly understandable usage, but the enclosure which it made necessary was inconsistent with any continuance of possession of the council. The defendant and his predecessors in title had to keep the council out if they were to keep their dogs in.”

30. In the latter case the Court of Appeal adopted the following passage in the judgment of Laddie J in Batt v Adams [2001] 2 EGLR 92 at page 95:

"The only factor that appears, at first sight, to point in the direction to exclude anyone, is the fact that Mr Higgs maintained and repaired the fence separating the disputed land from Rushymead. ... A fence is a barrier. It keeps things in and it keeps things out. No doubt it is reasonable to assume in many cases that a person who maintains a fence is doing so for both purposes, but that is not necessarily so. Having read all the evidence and the transcript of the cross-examination, there is nothing in this case that suggests that Mr Higgs was doing anything other than putting up a sufficient barrier to keep his livestock in. This also is not unequivocal evidence of an intention to exclude others."

Dyson LJ said at para 30 of Inglewood:

"In this particular case, the purpose of the fence appeared to be, and Mr Baker said it was, to keep sheep in. It does not seem that he would have put that fence up if he had been grazing cattle rather than sheep. In those circumstances it was open to the judge to conclude that there was no intention of Mr Baker to possess the land."

31. In Chambers v London Borough of Havering [2011] EWCA Civ 1576 after considering Minchington and Inglewood Etherton LJ concluded that there was no difference of approach in principle and that the cases turned on their facts. He observed at para 40 that "Each case turns on its own particular facts. In a case of adverse possession, where the defendant relies upon the existence of fencing, the Judge will plainly have to consider its significance". Lewison LJ preferred Mitchington.
32. In relation to the effect of the tenancies Mr McCracken submitted that time would not run against his client by virtue of the tenancies he had granted, the first being said to have preceded the erection of the ranch fence. He referred to Fairweather v St Marylebone Property Co [1963] AC 510 but the rule is in essence statutory being set out in paragraph 4 of Schedule I to the 1980 Act whose effect is that, where property has been let, the cause of action will be treated as having accrued on the date on which the land fell into the possession of the landlord by the determination of the tenancy. Mr McCracken continued by submitting that the grant of a new tenancy would restart the clock against the new tenant and, by inference, that time would cease to run against Mr Leinum.
33. Mr Haynes submitted that the effect of paragraph 4 is that, even if the tenancy commencing on the 1st April 1994 prevented time running against Mr Leinum, his cause of action would have accrued when that tenancy came to an end and that the subsequent grant of a new tenancy did not bring an end to the cause of action, there

being no statutory provision to that effect. In support of that submission he relied on the judgment of Lord Selborne in Ecclesiastical Commissioners of England and Wales v Rowe (1880) 5 App Cas 736 at 741-742 which was concerned with the provisions of the Real Property Limitation Act 1833. There the cause of action was held to have accrued where the surrender of a lease and the grant of a new one occurred simultaneously and time was regarded as running despite the grant of the new lease.

34. Consistently with Rowe I do not consider that the grant of a new tenancy by Mr Leinum after his cause of action had accrued by virtue of paragraph 4 would affect the running of time against him. Certainly Mr McCracken has not taken me to anything which would satisfy me that by granting a new tenancy Mr Leinum would have deprived himself of the cause of action which was vested in him. I would add that, even if Mr McCracken was correct, in his submission as to the law, it would be necessary to consider whether any subsequent tenancy granted by Mr Leinum purported to extend to land of his which was in the possession of the Respondents.
35. Mr McCracken also referred to the effect of the Land Registration Act 2002 in relation to adverse possession against a lessee. I do not, however, consider that that has any bearing on the present position. Section 96 of the Act provides that Sections 15 and 17 of the Limitation Act 1980 shall not run against any person in relation to an estate the title to which is registered. It follows that those Sections and the other provisions of the 1980 Act to which I have referred would continue to apply until title to Seven Springs was registered on the 25th July 2013. The question to be determined therefore is whether Mr Leinum's title was extinguished before his title was registered on the 25th July 2013.
36. Accordingly I conclude that the adverse possession claim will succeed if the Respondents can show that they were in adverse possession either before the 1st April 1995 or at the time of the expiration of the first tenancy on the 31st August 1996 or at any other time before the 25th July 2001 when Seven Springs was not let and that that they remained in adverse possession for the period of 12 years.

The Evidence

37. Each of Mr Leinum and the Respondents were cross-examined at some length in relation to their evidence. The main area of difference was related to the line of the former paling fence which ran between West Malvern Road and the retaining wall, the

date when the ranch fence was erected and the date or dates when new conifers were planted by Mr Leinum along this section of the boundary. I shall set out below my findings in relation to those and other matters and my reasons. Mr Leinum was recalled largely at my request to give evidence as to the relationship between the paling fence and the hedging plants and was cross-examined on that issue. The evidence of the Respondents dealt with, among other matters, the erection of the existing ranch fence and the subsequent use of the land to the north of that fence and the retaining wall. There was little challenge to that evidence save in relation to the date of the erection of the ranch fence.

38. The only witness for Mr Leinum who attended the hearing was Colin Tandy who did odd jobs for Mr Leinum and gave evidence about seeing someone, who he concluded to have been Mr Crawford, in about April or May 2011 putting in stakes and moving the fencing from the north side of a conifer tree in the deciduous hedge to the south side.
39. Mr Leinum also relied on the witness statement of Meriel Serjeant, one of the purchasers of Seven Springs in 1968 but who, being 89 years of age, did not attend the hearing. Mrs Sejeant referred to the construction of the retaining wall and the planting of a row of leylandii on Seven Springs' land. The retaining wall was said to have been inside the fenced boundary of Seven Springs by about a foot. There had been no coping stones on the wall. When she sold Seven Springs in 1990 there was fencing along the whole boundary so that the beech hedge was on the land belonging to Seven Springs, the fencing involving wire netting with palings made of chestnut with a strong post at intervals. The fencing had originally been put up by her and her husband to mark the boundary and was in the same position as the original battered boundary fence between the properties.
40. The Respondents relied on a witness statements signed by Philip Drake and his wife, of whom Mr Drake was called to give evidence. They had knowledge of The Old Vicarage for over 15 years. Their evidence was that the features forming the boundary had not changed since 1999 and referred to the beech hedge, the ancient paling fence and the brick wall. Mr Drake also referred to the conifer (or leylandii hedge).
41. I derive little assistance from this evidence by reason of its very general nature. It is also notable that Mr and Mrs Drake appear not to have observed the substantial leylandii hedge on any view stood along the northern side of the retaining wall having

been planted by the Respondents and which was first reduced in height and then removed in its entirety.

42. The Respondents also called Leslie Jean Hollis, formerly Leslie Jean Clarke, who had sold The Old Vicarage to the Respondent in 1994. Her evidence was that apart from vegetation growth and the style of fencing the boundary was the same as when she became owner in 1984. She had viewed the Land Registry plan to Title No. HW142077 and it was her belief that it showed the true boundary. In cross-examination she said that the fence did not reach the garages, that there had been coping stones on the retaining wall and that from the bottom of the conifers there had a continuous beech hedge and a netting fence which the hedge had grown around. At the back there was a scrappy fence. She did not know if it came to the retaining wall. On being shown photographs she recalled that the paling fence had run alongside the beech hedge as the photographs showed. In answer to my questions Mrs Clarke said that the area between the remaining garage and the retaining wall had been accessible and her children had played hide and seek there, though she did not like them to do so because of the drop.
43. Again I can derive little assistance from Mrs Clarke's evidence. The title plan certainly does not correspond with what is on the ground in that it does not show the retaining wall. Her evidence as to the coping stones is inconsistent with photographs taken by Mr Leinum and his evidence, which I accept, that he installed them in 1994 and her memory of the extent of the beech hedge and of the paling fence was limited. I do, however, accept her evidence that the area between the garages or their bases and the retaining wall was accessible from her property and that her children played there.
44. Three further witness statements were relied upon by the Respondents but the witnesses did not attend. The witness statement of Mr and Mrs Webb, who had known the Respondents from before they moved into The Old Vicarage, referred to a beech hedge as having formed the boundary up to the remaining garage and concluded that the boundary had never changed, although the style of fencing had been replaced in parts.
45. The witness statement of Mr and Mrs Mast did not say how long they had known the Respondents but said that they were absolutely confident that that they had not altered the boundary, to the best of their knowledge. The latter qualification rather diminishes the value of the statement as evidence.

46. Michael and Debra Hottinger, both citizens of the USA, provided witness statements to which helpful photographs were attached. They said that they had resided at Seven Springs with their family from July 1995 to June 1996 under a tenancy taken out by his employer and that the retaining wall and fence [the ranch fence] shown in the photographs had only been the only boundary features along the line of the boundary photographed [that between the retaining wall and West Malvern Road].

Findings

47. The first and, perhaps, the most important difference between the evidence of the parties concerns whether in the period between 1990 and 1995, when it was replaced by the Respondents' ranch fence, the fence running beyond the retaining wall and West Malvern Road was in line with the retaining wall or abutted it, as the Respondents say, or ran on a different line with a gap to the north of the wall, as Mr Leinum says. Associated with this are differences as to who erected the replacement and when and as to whether or not Mr Leinum planted conifers along the line of the fence after it had been replaced, those questions having relevance to the issue of when any cause of action would have accrued to Mr Leinum. I am also concerned to make a finding as to the line of the remainder of the paling fence as it was originally erected.
48. As to the line of the original fence running from West Malvern Road Mr Leinum's evidence was that the cleft chestnut fencing originally present between the properties overlapped the retaining wall by 0.5 to 1 metre and that there was a gap of about 1 metre between the fence and the wall. He had gone through the gap to carry out maintenance, including the laying of coping stones. Mr Crawford had asked for and been given permission to close the gap in order to keep his dogs in and had done it with some boards. Mr Leinum said that he and his wife had separated when she moved out in November 1994 and that he had moved out in December 1994. In relation to the photograph (page 304 of the bundle) showing Mrs Leinum in the back garden of Seven Springs he said that he had erected the posts in the far corner of the garden, apparently along the line of the fence, and planted the conifers on the Seven Springs side of the posts. He accepted that he had not built the ranch fence itself but denied that he had planted further conifers after the fence had been completed. The presence of flowering daffodils and the buds on the trees in the photograph it can be concluded that it was taken in the spring of 1995.

49. The Respondents denied that there had been any gap between the paling fence and the wall and also did not accept that Mr Leinum had been able to enter their property for the purpose of installing the coping stones in 1994, Mrs Crawford referring to the presence of a Russian vine close to the end of the ranch fence. Indeed Mrs Crawford questioned whether he had laid them at all. Mr Crawford denied that there had been any arrangement about closing a gap between the retaining wall and the paling fence but made it clear that the erection of the new fence had been necessary since it was a requirement in relation to their new dog or dogs that their property should be properly fenced. In relation to the photograph Mr Crawford identified the materials in the background as being for the fencing he was erecting.
50. There is a certain amount of documentary evidence bearing on these matters. Firstly the OS map shows a feature, which, as it seems to me, could only be the paling fence, leading up to the base of the westerly garage. As plotted on the Laser Survey plan that fence would have been 0.75 m from the retaining wall.
51. Secondly there is a building plan prepared by Mr Serjeant and dated April 1968 which appears to have been among his documents handed over to Mr Leinum at the time of his purchase. It was relied upon by Mr McCracken throughout the trial without objection and my understanding is that it is accepted to be admissible under Section 1 of the Civil Evidence Act 1995 subject to the provisions as to the weight to be attached to it. The plan shows a straight line from West Malvern Road along the line of the OS boundary feature, although stopping short of the western garage base. Another line, marked 'fence' runs from the direction of De Walden Road to the corner of the western garage base. Although it does not show the retaining wall, which appears to have been built after the erection of the fence, it provides some support for the accuracy of the OS map. Thirdly there is a photograph (at page 340 of the bundle) of which I now have a new enlarged print and which is taken from a point fairly close to the retaining wall. I conclude that it was taken at the time when the coping stones were laid both from the presence of building materials and from the absence of the Russian vine which would have needed to be cut back. I am satisfied that the paling fence, as it appears in the photograph is not following a line which would take it clear of the wall in the manner described by both Mr Leinum and Mrs Serjeant.
52. It is accepted by the Respondents that the retaining wall was built on Seven Springs' land, as is hardly surprising since its function was to enable the car parking area to be

constructed without risk a fall of soil from The Old Vicarage. Two matters point to the wall being set back from the line of the boundary. Firstly I note and it can be seen from the photograph at page 93d of the bundle that the nib of the retaining wall is to the south of the conifer planted adjacent to it which would itself have been planted inside the paling fence. Secondly the construction of the retaining wall, as described by Mr Leinum in his witness statement, would have involved digging out land beyond the wall so as to permit the installation of the 0.5m drain pipes and the backfilling of the void with gravel. The fact that the retaining wall had to be built some distance within Seven Springs' land points to there having been a gap between the eastern end of the wall and the fence. I also bear in mind that, if the ranch fence did not turn as it now does at point F on the OS survey plan, it would have continued to point D.

53. There are aspects of Mr Leinum's evidence as set out above which I do not think can be accurate. While it is clear from documentary evidence he has produced that he was in the process of moving out of Seven Springs, the photograph of his wife in the garden indicates at least that he and his wife visited the property in the spring of 1995. Further it does not make sense to me that he would have erected a few fence posts and then done no more. The photograph at page 304, which shows materials stacked in the garden of The Old Vicarage, satisfies me that the erection of the ranch fence must have been undertaken by the Respondents alone, as Mr Crawford asserts.
54. Notwithstanding these matters, I am satisfied that there was a gap between the paling fence and the retaining wall as appears from the documents referred to, the need for the construction of the retaining wall within Seven Springs' land and the evidence of Mr Leinum and Mrs Serjeant. I also find that when the coping stones were laid on the retaining wall he used that gap to obtain access to the land on the other side of the wall and that the Russian vine must have been cut back for that purpose.
55. I set out below my findings as to the material events in relation to the boundary. Where appropriate I refer to the evidence I rely upon in reaching my finding.
56. It is common ground that a chestnut paling fence was erected by Mr and Mrs Serjeant and there is no evidence of any dispute in relation to its line at the time of its erection. It appears, however, that the covenant in the 1968 Conveyance was not complied with in that the supports were not concrete and that a hedge was not a double row quick and privet hedge, though Mr Leinum indicated that some of the planting of the hedge was in a double row.

57. The evidence of Mrs Serjeant is that the fence originally ran along the whole line of the boundary and that the retaining wall was constructed inside the fenced boundary, though that is disputed by the Respondents who say that the retaining wall was an original boundary feature. The Respondents have no direct evidence on these issues and rely substantially on an assertion that the feature shown on the OS map was the retaining wall.
58. In relation to the order in which the fence and the retaining wall were erected I accept the evidence of Mrs Serjeant. Her evidence is consistent with what is shown on her husband's April 1968 building plan, showing the fence and a wall to the east of the parking area but not the retaining wall, and I have no reason for not following it.
59. For the reasons set out above I find that the paling fence ran from point B to a point north of the retaining wall. Mrs Serjeant describes the gap between the fence and the wall as being about a foot. Mr Leinum's application asserts a gap of 0.75m between the wall and the original paling fence as shown on the application plan and his evidence was that there was a gap of about 1 metre. I consider that there must have been rather more than 0.30m between the end of the nib and the paling fence given the position of the conifer adjacent to the nib and the fact that the paling fence would have run outside the conifer. Bearing in mind that it is common ground that the paling fence overlapped the retaining wall as the ranch fence now does, I do not consider that it would have been possible to build the retaining wall in the manner described within a foot (0.30m) of the fence. A gap of 0.75m as claimed by Mr Leinum between points C and D seems to me to have been likely and appears consistent with both the OS plan and Mr Serjeant's building plan and with the need for a sufficient distance between the fence and the retaining wall when the latter was built.
60. In relation to the section of the boundary between points D and F I have to reconcile what is said by Mrs Serjeant, the April 1968 building plan and the OS map. The latter's scale means that it is of limited value in fixing the precise position of features but I consider that, where it shows a continuous line, it should be concluded, in the absence of evidence to the contrary, that a feature ran along that line. I conclude that there was initially a continuous fence between the properties as the covenant required. As to the line of the fence, I consider on the balance of probabilities that it from point K up to the south west corner of the western garage where it met a fence running from point D.

61. As to the position of the paling fence in relation to the hedge, Mr Crawford accepted when questioned that a distance must have been left between the fence and the plants. He suggested a distance of a foot. Both he and his wife pointed out that the fence is now closer in many places but he also accepted that the paling fence would originally have been further from the trunks in the hedge than it is at present. Mr Leinum's evidence was that in about 1990 he had planted additional beech trees in the hedge 0.5m from the fence and, when recalled, he said that there would have been about the same distance between the paling fence and the original plants forming the hedge. Given that an English gardener in 1968 would have been working in feet and inches, as did Mr Serjeant, an English architect as appears from his 1968 building plan, I consider it most likely that the hedge would have been planted 1.5 feet (0.45m) from the paling fence.
62. Accordingly I find that the fence at point F would have been 0.45m from the centre of the trunk of the conifer adjacent to the nib and would have continued though point K and to the west at the same distance from a line through the centre of the trunks of the hedging plants or, where there was a double row, from a line through the centre of the northerly row.
63. There seems no doubt that over the years as the bases of the uprights have rotted there have been changes in the fence and the line it has followed. Mrs Serjeant mentions netting having been used to replace the original battered boundary fence by which I understand her to be referring to wire netting being used replace sections of the original paling fence, though I confess that paragraph 6 of her statement is not easy to follow. Certainly as Mr and Mrs Crawford have indicated that that process has continued during their ownership of The Old Vicarage. It seems to me, very understandably, that, in order to keep the remaining parts of the paling fence upright, the tendency has been to push the fence into the hedge so as to ensure that it remained upright. The sections of netting also appear to be closer to the centre line of the hedge than the distance given above generally standing under the branches of the hedge.
64. As the hedge ends it is no longer possible to fix the line of the original paling fence by reference to by the means given above. Indeed there is relatively little to assist in determining the boundary. Mr McCracken submitted that I should apply the line terminating at point H as shown on the OS plan. It seems to me that the western end of the boundary is point Hi where the netting fence currently reaches the frontage on De Walden Road. I do not consider that the OS map should be regarded as prevailing in

the absence of direct evidence that the end point of the fence has been changed. In that area I can see no reason why the netting fence should have diverted somewhat to the south so as to go round the conifer tree, which, in any event, Mr Leinum claims to have planted, before turning north to the road frontage. I find that the original fence line is more likely to have passed to the north of the conifer, effectively running parallel to the OS line. Accordingly I find that the original fence line ran from point Hi in a straight line to the north of the conifer and from there to the line described above which, I anticipate, it will reach somewhere to the north of point N.

65. The principal changes which have taken place in relation to the paling fence and the land around it are as follows:

65.1. At some time before 1984 the fence behind the retaining wall was removed to a point close to point D on the Laser Survey plan;

65.2. After purchasing Seven Springs Mr Leinum planted additional beeches and one or more conifers in the hedge to replace plants which had died or not thrived;

65.3. In 1994 Mr Leinum laid coping stones on the retaining wall and planted some conifers on his side of the fence between the retaining wall and West Malvern Road;

65.4. In 1995 the Respondents replaced the section of paling fence leading to West Malvern Road with the ranch fence, changing the line of the fence between point F on the OS survey plan and the retaining wall so as to leave no gap between them. The date on which the fence was erected is in issue as is the question whether Mr Leinum subsequently erected further conifers on his side of the fence and I shall return to those issues below;

65.5. In about 1995 the Respondents took down the western garage. A greenhouse was subsequently erected on its base. The land between the garage bases and the retaining wall was used as part of the Respondents' garden as appears from its use by the Respondents' children and dogs in the Hottingers' photographs. In order to stop his sheepdogs from jumping into the back garden of Seven Springs Mr Crawford erected a further section of fence higher than and extending beyond the end of the ranch fence;

65.6. On the 1st April 1995 Seven Springs was let for a term of 17 months to Mr Hottinger's employers. There were further lettings at intervals until 2009 when

Mr Leinum returned to live permanently at Seven Springs. In the meantime he had spent about 6 weeks at the property, although his evidence was that it would have been empty for about 18 months during the entire period;

- 65.7. In about 1997 the Respondents planted a row of leylandii between the retaining wall and the garage bases. Mrs Crawford said that they were about a foot from the wall which would appear consistent with the photographs I have seen. By 2010 they had become quite tall and by arrangement with the Respondents and using their scaffolding Mr Leinum reduced their height. They were subsequently removed in their entirety by the Respondents who have now placed some racking against their side of the retaining on which they keep plant pots.
66. The Respondents' pleaded case and evidence was that the ranch fence was erected in 1994 and Mr Crawford made the point that he was obliged to erected fences to contain his dog or dogs. The photographic evidence, however, shows that the fence was in the course of construction in the spring of 1995, demonstrating the inaccuracy of both parties' evidence as to the date of events. In cross-examination Mr Crawford initially said that the fence was completed before the late summer of 1995, saying that it might have been in March, April or June before finally saying that it had been completed before the 1st April, that is the date of the letting of Seven Springs. Mrs Crawford's evidence in cross-examination was that the fence had been erected before Mr Leinum went abroad in 1995 and that it had been there before April, though she could not give a precise date and the basis upon which she could be certain was by no means apparent.
67. My conclusion is that the Respondents' statements that the fence had been erected before the 1st April 1995 were based on speculation rather than knowledge. They have not satisfied me on the balance of probability that the fence had been erected by that date. I am also not persuaded that Mr Leinum planted further conifers after the erection of the ranch fence. In that regard there is considerable documentary evidence to show that he was not resident at Seven Springs during the early part of 1995, although he clearly visited it on at least one occasion with his wife, and it is uncertain whether the fence had been completed before the first letting.

Conclusions – The Original Boundary

68. I do not consider that the Pennock v Hodgson approach is of any assistance in the present situation. The evidence points to the paling fence and the retaining wall having

been erected by Mr and Mrs Serjeant after the 1968 Conveyance. There is no suggestion that any of the other features on the ground at the date of the Conveyance has a bearing on the boundary.

69. As to conduct after the Conveyance, I have found that the first material event was the erection of the paling fence which ran the length of the boundary and that the retaining wall was subsequently constructed to the south of the fence. Having regard to that order of events, I do not consider that the construction of the retaining wall could be regarded as probative of the location of the boundary which was shown on the Conveyance plan as running between the two highways in two straight lines. Having regard to what was shown on the Conveyance plan and the fencing covenant, it would be manifest that the paling fence was intended and understood to represent the legal boundary. While the boundary line between points B and K would not have been a straight line, it was substantially so to the extent that it could be regarded as having been within the limits of tolerance.
70. What is problematic when it comes to taking events after the Conveyance into account is the absence of any evidence that the line of the boundary could not have been determined adequately using the Conveyance plan. While both parties ask me to determine the boundary by reference to the Liaquat Ali v Lane approach, I am not minded to take that approach in view of that lack of evidence and in the absence of any obvious difficulty in laying out the boundaries using the 1968 Conveyance plan.
71. I have no difficulty, however, in inferring that the line of the paling fence erected by Mr and Mrs Serjeant was agreed and that the issue can be approached on the footing that there was a boundary agreement. The matter which substantially warrants the inference being drawn is the covenant in the 1968 Conveyance which required the boundary to be marked by a fence to the satisfaction of the Incumbent or his surveyor. In the absence of any indication in the evidence of Mrs Serjeant or otherwise that the line of the paling fence was objected to, it must be concluded that the Incumbent was satisfied as to the line of the fence and its construction from which agreement between the parties can be inferred.
72. In the circumstances I conclude that following the erection of the paling fence the boundary ran from point B, through point D to the south west corner of the westerly garage, from there to points F and K (both located 0.45m to the north of the centre of the hedge or, in the event of there being two lines of hedging plants, from the centre of

the northern line) and continuing 0.45m to the north of the centre line of the hedge to the end of the beech hedge. The western end of the boundary is to be found as described in paragraph 64 above.

73. I have no doubt that the roof of the log store recently erected by the Respondents falls within the above boundary and that the branches they have removed were cut back beyond the line of the boundary.

Conclusions – Adverse Possession

74. As to the adverse possession claim, Mr McCracken put forward a number of arguments as to why I should find that adverse possession was not taken by the Respondents. The first is that the purpose for the erection of the ranch fence was to keep in the Respondents' dog and that the Respondents did not have the intention to possess the any of Mr Leinum's land. The second argument is that the planting of the leylandii hedge by the Respondents on their side of the retaining wall in about 1997 was intended to delineate the boundary. While that argument was not developed, it could be said that, if that was the intention of the Respondents, they had neither actual possession not the intention to possess the land between the hedge and the wall.
75. The third argument was that the Respondents could not demonstrate that they had taken possession before erecting the ranch fence, that that had not occurred before the 1st April 1995 and that time would not thereafter have run against Mr Leinum until 2009. While I am not satisfied that the Respondents had erected the fence before the 1st April, I have not accepted Mr McCracken's argument as to the effect of a series of tenancies on the running of time. Accordingly I conclude that the adverse possession claim will succeed if the Respondents can show that they were in adverse possession at the time of the expiration of the first tenancy on the 31st August 1996 or at any other time before the 25th July 2001 when Seven Springs was not let and that that they remained in adverse possession for the period of 12 years.
76. I consider that the ranch fence erected by the Respondents went some way beyond what might have been required to keep in a dog, being a fence whose appearance and nature was such as would normally be employed to delineate a boundary between the gardens of houses. Furthermore the erection of the fence on Mr Leinum's own case both occurred after an apparently effective dog barrier had already been erected and involved altering the line of the fence so that it abutted the retaining wall, there being no

suggestion that the Respondents had permission to alter the fence line. Both of those matters indicate that something more than a dog barrier was intended. I conclude that the erection of the fence both resulted in the Respondents being able to control of the land enclosed, including the area behind the retaining wall, and demonstrated an intention to possess that land.

77. The area in question was a relatively small and narrow strip which was not readily accessible and for which there could have been limited use. The Hottingers' photograph at page 93d of the bundle shows the land being used by the Respondents' children in 1995 or 1996 and the storage of items such as a dustbin and a stoneware sink. That is the typical of the use which an occupying owner might have been expected to make of the land. Taking into account that use of the land and the clear act of enclosure I am satisfied that both elements of adverse possession are established.
78. In relation to the planting of the leylandii hedge in about 1997 I consider that other than inference there is no basis for concluding that the Respondents had the alleged intention of delineating the boundary. Bearing in mind my finding that the Respondents had taken control of the land on their side of the retaining wall by erecting the ranch fence, I conclude that the inference to be drawn from the planting of the hedge is that it was simply use being made by the Respondents of land in their possession. Indeed I regard it as reinforcing the conclusion that the Respondents had taken possession and were using the land as their own.
79. The Hottingers' photograph referred to above, which shows both the ranch fence and the use of the land alongside the retaining wall satisfies me that adverse possession had been taken by the Respondents prior to the end of their tenancy and I find that they were in adverse possession on the expiration of that tenancy which would have been on the 31st August 1996. In the absence of evidence that they subsequently gave up possession I find that the title of Mr Leinum to part of his land was extinguished 12 years thereafter.
80. Accordingly I find that the boundary between the properties between points B and F runs along the ranch fence to point D and that from there it runs along the north side of the retaining wall to the nib where it turns north to point F which is 0.45 to the north of the centreline of the hedge as described in paragraph 74 above. Title to the retaining wall remains vested in Mr Leinum.

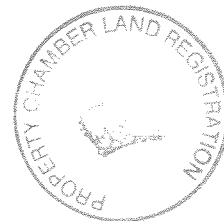
81. There is, I consider properly, no assertion that the boundary between points F and Hi has been altered since it was originally established and it remains as described in paragraph 72.

Disposal

82. The consequence of my findings is that the line contended for by Mr Leinum in his application is not the boundary and consequently I have directed the Chief Land Registrar to cancel the application.

83. In relation to costs the Respondents are overall successful, though there are issues on which Mr Leinum has himself been successful and there may be other factors to consider. In the circumstances the direction contained in the substantive order is for Mr Leinum to serve on the Tribunal his submissions as to why he should not pay the Respondents' costs and any application for costs he wishes to make and for the Respondents to serve submissions in reply. It is not necessary at this stage for either party to lodge a schedule of costs.

Dated this 14th day of December 2015



BY ORDER OF THE TRIBUNAL

Nicholas Orr

