FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
LAND REGISTRATION DIVISION

REF/2014/0573

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

B E T W E E N:

WILLIAM DAVIS LIMITED

Applicants

and

(1) GRAHAM LESLIE LOWE
(2) MARILYN ELIZABETH LOWE

Respondents

Property Address: Land to the rear of 10 Fishpond Way, Woodthorpe, Loughborough, Leicestershire.
Title Numbers: LT301726 & LT314291

Before: Mr Max Thorowgood sitting as Judge of the First-Tier Tribunal

Sitting at: Leicester Employment Tribunal
On: 18th, 19th & 20th November 2015
And sitting at: Leicester Magistrates Court
On: 3rd May 2016

Applicant's representation: Stephanie Tozer of Counsel
Respondents' representation: Jonathan Small of Counsel

1. Introduction

1.1. Before its sale at auction in December 1946 all the land with which this reference is concerned formed part of the Beaumanor Estate.

1.2. But even prior to 1946 the boundary in question divided two separate parcels of land, namely, Grange Farm, which was let to Mr J H Shuttlewood, and Parks Grange Farm, which was let to Mr A Moss.

1.3. Messrs Shuttlewood and Moss acquired the freehold titles to their respective farms upon the completion of their purchases in 1947 and in due course they, or their families, sold them (or parts of them) on in the manner which I shall describe.

1.4. The Applicant is a property company. In 1992 it took an option to acquire a part of Grange Farm, Woodthorpe, Loughborough from Mr and Mrs Shuttlewood. It exercised that option and title number LT301726 was conveyed to it on 16th March 1998.

1.5. In 1988 another property company, Fairmeadow Limited, bought the adjoining land from the Moss Family and, by a conveyance dated 5th July 1996, conveyed the development site on which the Respondents' home, 10 Fishpond Way, was subsequently built to Birch Homes Limited. Birch then built out the site and sold 10 Fishpond Way to the Respondents.

1.6. By its application in form DB dated 24th April 2014 the Applicant sought to determine the boundary between its property and the rear, eastern, boundary of the Respondents' land by reference to the plan which is at p. 8 of the Trial Bundle ("the Application Plan"). The area in question is perhaps best illustrated in its broadest context by the plan at p 482.

1.7. I viewed the site in the morning of 18th November 2015 and insofar as the conclusions which I record below relate to the topography of the site and its impact on the intentions of the parties to the relevant conveyances, they are informed by my observations on that occasion.

2. The approach which I should take to the application

2.1. Before proceeding to consider the substantive matters with which I am concerned, I am afraid that it will be necessary for me to consider in some detail the exact nature and extent of my powers in relation to the application which has been referred to the Tribunal by HM Land Registry.

2.2. I don't think that I would be doing the parties or their advisers a terrible disservice if I were to say that this application proceeded initially without enormous thought being given by either party to the precise nature and extent of the Tribunal's jurisdiction to determine the position of the disputed boundary.

2.3. The case was adjourned part heard after the Applicant's expert, Mr Maynard, had finished giving his evidence and I canvassed with counsel at that point the need for me to direct them to file submissions in relation to that question and it was agreed that no such direction was necessary.

2.4. It was then some time before the matter could be re-listed. In the intervening period the decision of HHJ Dight in *Murdoch v Amesbury* [2016] UKUT 3 concerning the jurisdiction of the First-Tier Tribunal in relation to applications pursuant to s. 60 LRA 2002 and rules 118 & 119 LRR 2003 was handed down.

2.5. In *Murdoch v Amesbury* it was common ground before the Judge that the Applicants' plan was not within the tolerances prescribed by the Land Registry Practice Guidance. and that that fact was, in itself, sufficient to determine the matter against the Applicants. The question was whether despite having necessarily reached that conclusion, the Judge had jurisdiction to go on to determine the position of the boundary.

2.6. So far as material, it seems to be the *ratio* of HHJ Dight's decision that once the Tribunal Judge had concluded, as she was bound to do, that the line shown on the plan by reference to which the application was made did not accurately identify the boundary line she had no further jurisdiction to go on to determine the true position of the boundary. He gave a number of reasons for that conclusion but they amount I think to this. The Tribunal's jurisdiction is narrowly circumscribed by the scope of 'the matter' referred to it by the Land Registry for determination. On the true construction of section 60 and the rules made pursuant to it, in the case of an application for a determined boundary, 'the matter', is: the accuracy of the plan which identifies the boundary line claimed; not the true position of the boundary. Thus, whilst logically in many if not most circumstances it is likely to be necessary to reach some general conclusions as to the position of the boundary in order to determine whether the plan accurately depicts the line claimed, once it is established that the line shown on the plan is inaccurate that is an end of the matter. The Tribunal ceases to have jurisdiction as soon as that point is reached.

2.7. Judge Dight's decision in *Murdoch v Amesbury* has since been considered in two decisions of Judge Cooke: *Bean v Katz* [2016] UKUT 168 and *Smith v Davies* Ref: 2015/0447-50. In *Bean v Katz* [2016] UKUT 168, a decision of the Upper Tribunal of equal authority to *Murdoch v Amesbury,* Judge Cooke explained her view of the position as follows:

> "18. The decision in the present case was quite different from the decision at first instance in *Murdoch v Amesbury*. The plan submitted by the Applicants was technically satisfactory. As to the position of the boundary, it was found to be accurate, save for one small section. The Chief Land Registrar was directed (pursuant to Rule 40(2)(a)) to give effect to the application in accordance with the First-tier Tribunal's direction that the boundary was determined to be on the line on the application plan save for the small Front Section, as to which a different line was prescribed (by reference to letters on a plan). Similar orders have been made routinely by the First-tier Tribunal and are not, in my judgement, within the scope of the deciding principle of *Murdoch v Amesbury* [2016] UKUT 3 (TCC), set out in paragraph 13 above.
>
> 19. However, HH Judge Dight also discussed the nature of determined boundary applications and the ability of the First-tier Tribunal to examine matters of title. At paragraph 62 he said:

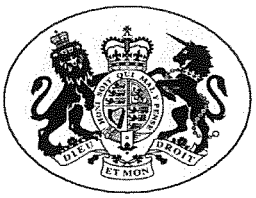
> "it is the accuracy of the identification of the line, rather than title to the line, which is the focus of the application according to the rules."

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

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

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

2.8. Thus, Judge Cooke, in *Bean v Katz*, was at pains to distinguish *Murdoch v Amesbury* on the ground that the objection in her case was made only on grounds of title and not to the accuracy of the plan; whereas the objectors in *Murdoch* had raised both grounds. However, she also held that insofar as it might appear to be authority for the proposition that in determining a referred boundary application the Tribunal can never be concerned to determine the true position of the boundary HHJ Dight's remarks were certainly *obiter* because such a pronouncement would be substantially wider than that which was necessary to determine the case with which he was concerned. I respectfully agree with that view but I also do not think that that is what HHJ Dight was saying in *Murdoch v Amesbury*. His references in paragraph 62 to the "*focus* of the application



according to the rules" and to, "... the *principal* criterion in a determined boundary application," in paragraph 79 make it clear, I think, that all he was saying was that once it became clear that the plan was defective that was enough to require the Tribunal to direct the Chief Land Registrar to cancel the application and so its jurisdiction ceased at that point.

2.9. Judge Cooke's in *Bean v* Katz, however, is that even where the objection to an application to determine a boundary includes an objection to the accuracy of the plan, it is almost inevitable that the Tribunal will need to make findings about the position of the boundary in order to explain its decision.

2.10. Again I respectfully agree with Judge Cooke that in most, if not all, cases where an application to determine a boundary is referred it is likely to be necessary, even in what must be the very rare (if not completely unheard of) case in which the Registrar is satisfied as to the accuracy of the plan but the objection taken relates only to the accuracy of the plan as opposed to the true position of the boundary claimed, to make findings in relation to the position of the boundary if only to explain a decision that the plan is not accurate.

2.11. This case gives rise to a different aspect of the problem of determining the scope of the 'matter' referred to the Tribunal in the case of an application to determine a boundary ? The problem arises in this way. The Respondents' objection to the application related fairly and squarely to the position of the boundary. There is no suggestion in their letter of 2nd April 2014 that the plan relied upon by the Applicant is deficient in any other respect. Nor would the possible deficiency, or inaccuracy, in the plan which has since emerged have been obvious from the terms of the application which refers simply to the line drawn on the Application Plan between the points marked "X" and "W". It contains no verbal description of the boundary or commentary upon the reasons for the positioning of the line claimed.

2.12. As I have already intimated, when the matter first came before me in November of 2015 the argument focussed upon the Applicant's claim, on the one hand, that the boundary was the mid-line of the hedge which formerly divided the land which is now the rear of the Respondents' property from the Applicant's land, as set out in the Applicant's Statement of Case, and the Respondents' various counterclaims as to the true position of the boundary the high point of which was the easternmost edge of the ditch which they allege was formed beyond that hedge. It was only in the course of Mr Maynard's answers to questions from me about the accuracy of the Application Plan, after he had been cross examined by Mr Small, that Mr Maynard conceded that the line of the boundary shown on the plan did not exactly coincide with the notional mid-line of hedge as marked on the Application Plan. He estimated that the discrepancy at point X was approximately 50mm but much smaller at point W. That evidence is uncontested but it is right also to note that Mr Maynard also said that the pecked line which depicts the centre line or mid-point of the hedge was subject to a considerable degree of imprecision arising from the depth of the hedge and consequent difficulty and approximation of the original surveyors in identifying points from which to plot that mid-point. I have no reason whatever to doubt Mr Maynard's

evidence on either of these points. I would also note that part of the problem here arises from the curvature of the line of the hedge which means that the apparent discrepancy between the claimed line and the centre of the hedge is greater in the middle of the line than at either end. However, given the inherent inaccuracy of the plotting of the centre line of the hedge it also seems to me to be possible that the line claimed could, theoretically at least, be the correct one.

2.13. These circumstances, in light of the decisions to which I have referred above, give rise to two starkly opposing submissions. Miss Tozer, for the Applicant, contends that, "the matter," referred is defined by the scope of the Respondents' objection. She says that the Respondents had the opportunity to object to the accuracy of the plan when they filed their objection, that they did not do so and that it is too late for them to do so now. She maintains that I have no jurisdiction even to consider the accuracy of the plan because no objection to her client's application has been made on that account. She says that I must decide simply whether the true line of the boundary is that now claimed by the Applicant, that is to say, the centre line of the hedge, or not.

2.14. Mr Small, for the Respondents, on the other hand, maintains, in reliance upon *Murdoch v Amesbury*, that Mr Maynard's concession that the plan is not accurate to the 10 mm tolerance prescribed by the Land Registry's guidance means that the application must inexorably fail and that I am, as Judge Dight held, unable either to investigate or make any findings in relation to the position of the boundary.

2.15. It seems to me that the stark aridity of both these positions is inconsistent, first, with the Overriding Objective as stated by the Tribunal's rules of procedure which impose upon the Tribunal the duty of:

> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal; and
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;

I accept, of course, that the broad scope of the objective cannot create jurisdiction if none has been conferred by the Land Registration Act 2002 and that the rules are not directly relevant to the construction of the Act. However, I do think that I must approach this problem in the spirit of the Overriding Objective as it is stated by the Tribunal's rules. Secondly, and most significantly, it is inconsistent with the decision of Rimer LJ in *Silkstone v Tatnall* [2012] 1 WLR 400 which it seems to me is fundamentally at odds with the submissions of both parties. Rimer LJ was there concerned with the submission of the Land Registry that the Adjudicator had no discretion or jurisdiction to investigate or rule upon the merits of a claim once the Applicant had given notice of his wish to withdraw is application. He said this:

"**35** Mr Morshead submitted further that the right of a party so to withdraw his case, and so terminate the reference, can be exercised at any stage in the course of the reference—including, as in the present case, on the morning of the first day of the final hearing. He accepts that the adjudicator can in such circumstances deal with costs and, I understand, that in a case like the present he may also give a direction to the registrar that the objection to the cancellation application is no longer sustained. He cannot, however, proceed to rule on the merits of the objection. There can and will therefore be no decision creating an estoppel between the parties. If the withdrawing party is the objector, he is moreover free the day after his unilateral notice is cancelled to apply for the registration of a like notice on the basis of like evidence as supported the previous one. The registrar will have no choice but to register it; the registered proprietor will be entitled to apply once again to cancel it; and a like reference to the adjudicator will or may follow. If it does, and there is a like withdrawal, that too would bring the second reference to an end. In theory, as Mr Morshead accepted, the same merry-go-round could start all over again. The only way in which the registered proprietor might hope to prevent such apparently abusive conduct by the objector would by recourse to the courts for an injunction.

36 If that really is how the Act is in this respect supposed to work, there is something seriously wrong with it. With respect to Mr Morshead's argument, which was advanced with care and moderation, I regard its foundation as counter-intuitive. Its sense is that it is not the adjudicator who is in control of the reference but one or other of the disputing parties. The logic of the argument is that one of the parties can unilaterally, at any stage, bring the reference to a halt and avoid a decision on the merits. It would, in my view, be surprising if the scheme of the Act is to reduce the adjudicator's role to one as supine as Mr Morshead would have it. In my judgment, it is not.

37 The first point is that, in a case like the present, "the matter" referred to the adjudicator was one that required him to decide the underlying merits of the objection. He was not concerned simply to decide whether the Silkstones had an arguable case to a prescriptive right of way over No 3. He was required to decide substantively whether they did have such a right of way. He had, therefore, to consider the merits of their claim and his determination of that question would provide the answer as to whether the objection was or was not well founded. It appears to me obvious from the legislation that the adjudicator's jurisdiction requires him to decide the underlying substance of the objection on its merits. Mr Brilliant so held in para 45 of his decision in the *Blackraven Developments* case. Floyd J so held in para 29 of his judgment under appeal. It is also supported by the decision of Briggs J in *Jayasinghe v Liyanage* [2010] 1 WLR 2106, at paras 16–19 (a decision in respect of which Lord Neuberger of Abbotsbury MR refused permission to appeal on the papers on 14 June 2010, a refusal I endorsed at a renewed oral application on 7 September 2010)."

He then summarised his conclusions as follows:

> "**48** I would summarise the position in my own words as follows. A reference to an adjudicator of a "matter" under section 73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, *a jurisdiction that includes the determination of* ***the underlying merits of the claim that have provoked the making of the application.*** If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself. In the case of an application under section 36 to which an objection has been raised, the relevant issue will be the underlying merits of the claim to register the unilateral notice." (My emphasis)

2.16. It seems to me that Rimer LJ's observations are of general application to the definition of the scope of 'matters' referred by the Land Registry to the Tribunal pursuant to section 73(7), as this matter was, and that it is clear from his observations that the scope of 'the matter' is not limited by the scope of the objection. Certainly, I cannot see that it should be limited by the scope of the objection as it is originally expressed as Ms Tozer submitted. Why else would the Tribunal's rules of procedure make provision for the filing by the parties of Statements of Case or require that those Statements of Case should identify the applicant's reasons for making or objecting to the application and/or enable the amendment of those Statements of Case if not to enable the objector to supplement the reasons initially given for objecting to the application so as to ensure (so far as possible) that the whole of the matter giving rise to the dispute of which the application is evidence is laid before the Tribunal and determined as part of a single application ?

2.17. However, unlike the case of withdrawals with which Rimer LJ was concerned, in this case both Land Registration Act 2002 and the Rules made under it do offer some guidance as to the scope of the matter where an application to determine a boundary is referred. Section 60(3) provides as follows:

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

The rules made pursuant to that power, rules 118 & 119, also lay great stress upon the need for the applicant and the Registrar to determine the ***exact*** line of the boundary:

118 Application for the determination of the exact line of a boundary

(1) A proprietor of a registered estate may apply to the registrar for the exact line of the boundary of that registered estate to be determined.

(2) An application under paragraph (1) must be made in Form DB and be accompanied by—

(a) a plan, or a plan and a verbal description, identifying the exact line of the boundary claimed and showing sufficient surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map, and

(b) evidence to establish the exact line of the boundary.

119 Procedure on an application for the determination of the exact line of a boundary

(1) [Subject to paragraph (2), where] the registrar is satisfied that—

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

(b) the applicant has shown an arguable case that the exact line of the boundary is in the position shown on the plan, or plan and verbal description, supplied in accordance with rule 118(2)(a), and

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

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

[(2) The registrar need not give notice of the application to an owner of the land adjoining the boundary to be determined where the evidence supplied in accordance with rule 118(2)(b) includes—

(a) an agreement in writing with that owner as to the line of the boundary, or

(b) a court order determining the line of the boundary.]

(3) Subject to paragraph (4), the time fixed by the notice to the owner of the land to object to the application shall be the period ending at 12 noon on the twentieth business day after the date of issue of the notice or such longer period as the registrar may decide before the issue of the notice.

(4) The period set for the notice under paragraph (3) may be extended for a particular recipient of the notice by the registrar following a request by that recipient, received by the registrar before that period has expired, setting out why an extension should be allowed.

(5) If a request is received under paragraph (4) the registrar may, if he considers it appropriate, seek the views of the applicant and if, after considering any such views and all other relevant matters, he is satisfied that a longer period should be allowed he may allow such period as he considers appropriate, whether or not the period is the same as any period requested by the recipient of the notice.

(6) Unless any recipient of the notice objects to the application to determine the exact line of the boundary within the time fixed by the notice (as extended under paragraph (5), if applicable), the registrar must complete the application.

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

2.18. I conclude that I have jurisdiction and must determine the underlying merits of the claim which provoked this application. It seems to me that the underlying merits of the claim giving rise to the Applicant's application to determine this boundary and the terms in which the application and the Applicant's Statement of Case are couched require me to consider the following matters:

2.18.1. The accuracy with which the Application Plan maps the features on the ground by reference to which the boundary is defined;

2.18.2. The accuracy with which the Application Plan identifies the boundary line claimed; and

2.18.3. The extent to which the boundary line claimed is consistent with the true position of the boundary.

I find it inconceivable, given the stress laid by the statute and the rules upon the accuracy of the plan in identifying the exact line of the boundary (the statement within the Land Registry's practice guidance that the plan must be accurate to within 10 mm is simply its gloss on what is meant by 'exact'), that if it should come to my attention that the plan is inaccurate in some respect I should not bring that to the attention of the Registrar either by imposing a condition in respect of

the entry to be made on the Register should I make an order that the application be given effect to or by rejecting the application but I do not consider that that is the whole of the matter which is referred or the only matter which I need to determine.

3. The factual background to the dispute

3.1. It will be convenient for me to describe first the more recent background which has given rise to the dispute and the evidence given by the parties about it before moving on to consider the expert evidence in relation to the mapping of the site and the conveyancing history on which the parties' primary cases are based.

3.2. The Applicant called two factual witnesses: Mr Adrian McInnes and Mr John Caunter. Mr McInnes is the Applicant's Land and Technical Director and has been familiar with this site since his inspection of it in company with the Shuttlewoods' agent, Mr Tapper, in 1991/2 before the Applicant took its option. He said that on the occasion of his visit in 1992 he noted a number of open accesses from Mucklin Lane to the Shuttlewoods' land but said that it would have been obvious that the land was owned because it was being cultivated. He said that the boundary in question was formed by a large mixed species hedge and that there was no unused field margin. He said that he was told by Mr Tapper that the boundary in question was the middle of the hedge and that that was what the conveyance to the Applicant in 1998 eventually showed.

3.3. 10 Fishpond Way was conveyed to the Respondents in 1999 but Mr McInnes said that it was not until 2008 that the Respondents and a number of other residents of Fishpond Way and Oak Close moved their fences beyond the mid-line of the hedge and began to encroach upon the Applicant's land. The Applicant was alerted to these encroachments by Mr and Mrs Shuttlewood's son, John, who was still farming the land at that time pursuant to a farm business tenancy. The prime significance of these encroachments from the Applicant's point of view was that it had entered into a s. 106 agreement with the Local Authority which required it to maintain a 10 metre wide tree planting belt between the Birch Homes development and any adjoining development.

3.4. Mr Caunter said that in 2009, as a consequence of the encroachments by the Respondents and others, he was asked to 're-establish' the centre line of the original hedge (which by then had been grubbed out in large part) using the original control stations established by Oakes detailed topographical survey of the site in 2002 ("the Oakes Survey"). By this means he said it was possible to establish an offset line using wooden pegs at distances of 3 and 5 metre distances from the plotted line of the hedge which he said correlated well with the position of the centre of the hedge where it remained intact and with the stumps that remained where the hedge was in the process of being grubbed up by the owners of Fishpond Way and Oakes Close.

3.5. Mr Lowe and Mr Tobin, the owner of 12 Fishpond Way, gave evidence for the Respondents. Mrs Lowe made a witness statement but its effect was simply to confirm the evidence of her husband. Mr Kearins, the owner of 20 Fishpond Way,

also made a witness statement on behalf of the Respondents. His evidence was admitted by the Applicant.

3.6. Both Mr Lowe and Mr Tobin said in their witness statements that they had been told by Birch Homes at the time or their purchases in 1999 that it had erected the boundary fence to the rear of their land at the nearest practicably accessible point inside the true boundary line because it had been impossible to erect it on the true boundary line which was in the waterlogged gully which formed the true boundary. However, in their oral evidence both Mr Lowe and Mr Tobin seemed to say that in fact they believed the boundary line was beyond this alleged ditch even before they obtained Mr Carpenter's first report.

3.7. That evidence falls to be considered in the light of the picture which emerges from Mr Lowe's correspondence with the Planning Department of Charnwood District Council in 2004/5. It is worth quoting Mr Lowe's letter dated 20th September 2004 in full:

> "A number of home owners of Fishpond Way have been a little concerned since moving into their new homes some 5 years ago that the boundary fence at the rear of their gardens was incorrectly positioned during construction of the properties in 1999.
>
> Plans have now been received by the Land Registry in Leicester, which confirm that the land owned by certain householders backing onto the farmland at the rear of houses No. 10, 12, 14, 16, 18 and 20, and at the side of No. 8 is in fact some 2.5 meters further back that the line of the existing line of the current fence.
>
> Outside the existing boundary fence but within this 'new' boundary is a row of trees, which under the terms of the deeds we as houseowners are supposed to maintain. We are not sure how this was supposed to have be done (*sic*), as this existing line of trees (the majority of which are now dead) is in fact the other side of our existing fence with no access to it. We at No. 10 have actually started to clear the dead trees at the back of our house, as they have been dead for over 4 years. We are currently having a soil survey undertaken to ascertain why the trees died a year or so after we moved in.
>
> All the householders as numbered above wish to now claim their land and have the fences repositioned to the boundary as shown on the 'Title Plan'. With the development of new houses not many years away and which will eventually back onto our properties, we want to act now and claim the extra land that is rightfully ours.
>
> We wish to make appointment to either meet a council official on site or at your offices as soon as possible so that the new boundary lines can be ascertained. I have made a number of telephone calls to your department over the past 4 months or so, pointing out our case, but no one at the council has shown too much concern."

3.8. Mr Lowe's reference to the obligation imposed by the conveyance to him to maintain the row of trees is apparently a reference to paragraph 17 of the schedule to the conveyance pursuant to which he covenanted:

> "To maintain the planted shrubs and trees now planted or to be planted by the Transferor within the strip of land (if any) shown coloured yellow on the said plan and if necessary replace the same should these die and furthermore not without the written consent of the Charnwood Borough Council remove any of the said planted shrubs and trees."

It is difficult to reconcile the natural construction of that covenant with the terms of Mr Lowe's letters in light of the admitted facts on the ground at the time of that letter. That is to say, there had been no planting in the yellow planting zone referred to in paragraph 17 and that a fence had been erected by Birch against the hedge which had divided Mr Moss's land from the Shuttlewoods' land. It is also very notable that there is no mention in Mr Lowe's letter of the oral representations made to him by Birch prior to the completion of his purchase as to the position of the boundary. His position at that time appeared to be that the boundary fence had been placed inside the planting zone, not that it had been placed as close to the boundary as possible.

3.9. That inconsistency between Mr Lowe's early correspondence and his witness statement and the even greater inconsistency between his original position and the oral evidence which he gave to me under cross examination is also apparent from the letter which he wrote to Charnwood Borough Council dated 1st April 2005 in which he said that that there was not really a ditch at the base of the trees. It was only after Mr Lowe and the other residents of Fishpond Way had consulted Mr Carpenter and he had reported that there was any suggestion that there was: a) a ditch beyond the hedge; or b) that it marked boundary rather than the hedge.

3.10. I regret to say that I did not feel that I could place any reliance upon Mr Lowe's evidence. It was marked by inconsistency, implausibility and aggressiveness in response to legitimate cross examination. In my view he was prepared to say whatever he believed to be necessary to justify or advance his position at any given point. Hence, his willingness to misrepresent the original position of the fence erected by Birch Homes in his letters to the Council and his acknowledgment that he had told 'a white lie' in the second letter about his not having infilled the ditch in order to explain the contradiction between the statements made in that letter and his evidence to me. I therefore have no hesitation in concluding that Birch did not make the representation about the position of the boundary which Mr Lowe claims at any time prior to his purchase and that the fence erected by Birch was positioned against the boundary hedge which Birch was bound to preserve as part of the terms of its planning permission. Had Birch given such an assurance its position would have been completely inconsistent with Fairmeadow's conveyance to it which clearly shows

the boundary to be the mid-line of the hedge and therefore of no effect so far as the Respondents' title to the disputed land and Birch's conveyance of 10 Fishpond Way to the Respondents which was obviously and naturally prepared on exactly the same basis in this respect as Fairmeadow's conveyance to it.

3.11. I do not think it is necessary for me to address much of what Mr Tobin told me about what he had done in relation to the boundary to his land but his evidence and that of Mr Lowe that there was a ditch beyond the hedge is significant because of the conclusions drawn by Mr Carpenter and the arguments advanced by Mr Small on the Respondents' behalf on the basis of that claim. I do not find that question so easy to resolve but I think it is best approached in light of the expert evidence which I shall now consider.

4. The expert evidence

4.1. The Applicant's expert, Mr Maynard is a FRICS and plainly extremely knowledgeable in relation to all matters pertaining to boundary surveying but particularly the cartographical elements of that field of expertise. Whilst I was impressed by Mr Maynard's evident expertise, I did not feel that in his conduct in the course of the site visit or in giving his evidence he was always as dispassionate as his role as an independent professional required. Too frequently he seemed to slip into the role of advocate for the Applicant and his lack of respect for Mr Carpenter, the Respondent's expert, was also too often ill-concealed.

4.2. He produced two very detailed, erudite, reports for the purposes of these proceedings. The first, dated 14th November 2012, was apparently prepared in response to the report of Mr Carpenter in which the existence of a ditch and the possible applicability of the hedge and ditch boundary presumption were first raised on behalf of the Respondents. It addresses the recent surveying and conveyancing history of the boundary between the Birch Homes site but also reports Mr Maynard's observations upon his visit to the site on 4th September 2012. Those observations include his measurement of a vertical section of the land between the position of the fence originally erected by Birch Homes and the ploughing furrow observable in the cultivated field.

4.3. The relevant conclusions of Mr Maynard's first report can be summarised as follows:

4.3.1. The plan to the 1996 conveyance to Birch Homes by Fairmeadow shows the boundary as the mid-line of the hedge.

4.3.2. Unsurprisingly, the conveyances made by Birch to the Respondents and others proceed on the same basis.

4.3.3. Likewise, the plan to the conveyance of the adjoining land to the Applicant by the Shuttlewoods in 1998 also shows that the boundary was the centre line of the hedge.

4.3.4. Although a slight depression was observed in the area to the east of the hedge the profile of the land as shown by the vertical section survey is inconsistent with the profile of a classical hedge and ditch formation.

4.3.5. The shallowness of the depression is not explicable on the basis that a previously deeper ditch has become clogged with detritus because the ground beneath it is firm.

4.4. Mr Maynard's second report dated 30th August 2015 investigated the cartographic and conveyancing history of the boundary in greater detail. It is the result of those investigations that from at least 1884 onwards there has been a feature in excess of 12" in height or depth where the Applicant maintains there has at all material times been a hedge.

4.5. The 1884 1:2500 plan shows a track passing along the western side of that feature, which it depicts as a deciduous hedge, and to the east an administrative boundary. A bracing symbol indicates that the area measurement of field no. 37 to the west of the boundary, of 14.802 acres, includes the land between the hedge and the administrative boundary.

4.6. The 1903 1:2500 plan differs from that of 1884 insofar as the feature indicated by the solid line is no longer shown to be a deciduous hedge (although there is no other reason to think that there was any change in this respect) and the bracing symbol no longer crosses the solid line, although the area measurement of what had by then become field no. 239 to the west of the hedge did not change, nor does the indication of an administrative boundary.

4.7. The 1921 1:2500 plan shows for the first time the 'mereing' applied to the parish boundary which is described as 4' from the root of the hedge. The 1938 1:10,560 plan shows that the parish boundary remained in the same position although it does not re-state the mereing.

4.8. For the purposes of the sale in 1946 the agents, John D Wood, produced a plan based on the Ordnance Survey plan which showed the various lots shaded in different colours for the purposes of identification. It is notable in my opinion, despite Mr Small's submissions to the contrary and making due allowance for the fact that the lot plan was plainly for the purposes of identification only, that the shading shows very clearly that it is the hedge rather than the administrative boundary which is intended to constitute the boundary between the two lots and that impression is confirmed by the plans subsequently annexed to the conveyances to Messrs Moss and Shuttlewood both of which clearly show that it is the solid line denoting the hedge, rather than the dotted line denoting the administrative boundary, which was intended should be the boundary.

4.9. However, the apparently clear indications as to the intentions of the parties to the conveyances to be derived from the plans are contradicted by the descriptions of the lots and subsequent the conveyances by reference to OS field numbers and their acreages, which, for the reasons explained above, include the land between the hedge and the administrative boundary.

4.10. The reports of the Respondents' expert. Mr Carpenter, are much more concise than those of Mr Maynard. His expertise is plainly of a more practical, less rarefied, quality than Mr Maynard's. It was the conclusion of his first report dated 28th July 2011, that scaling from the conveyance plans and the Land Registry Title plans indicated that the boundary line was the centre line of the hedge. However, he went on to say that it was the accepted custom in the country (which he explained in his oral evidence meant the locality in which he practises which includes Woodthorpe) that the boundary will lie on the opposite of a ditch from a hedge.

4.11. His second report, prepared for the purposes of these proceedings and dated 26th October 2015, was more detailed but to the same effect. He commented in particular on the existence of the ditch upon which he relies for his opinion and notes that the various OS plans to which Mr Maynard refers show ponds at both ends of the supposed ditch. He confirms that there is clear evidence of a ditch to either side of the relevant area and explains the apparent lack of a ditch along the material part of the boundary by the fact that it has been eroded in the areas on which it has not been protected by the hedgerow both natural processes and recent landscaping. He concludes that on balance it is likely that there was a ditch along the entire length of the boundary.

5. The drainage of the site

5.1. It will be apparent from the above that a critical aspect of the evidence in this case relates to the drainage of the site because it is the Respondents' case (based upon Mr Carpenter's opinion) that a ditch ran the entire length of the boundary beyond the hedge and that the easternmost edge of that ditch constituted the boundary.

5.2. That case is contradicted most significantly by the results of the Oakes Survey which was conducted in 2002, two years before Mr Lowe reported the death of the hedge in the vicinity of 10 Fishpond Way to the Council, and shows two unconnected ditches, one a little to the north of the contested boundary and another a little to the south but no ditch along the material part of the boundary. This is consistent with the plan to the 1998 conveyance by the Shuttlewoods to the Applicant, Mr Maynard's more recent observations on the ground and with my observations in the course of the site visit. The Respondents placed considerable reliance on the photographs at pp. 427 onwards which do appear to show some form of depression in the between the bank on which the hedge formerly stood and the edge of the cultivated part of the Shuttlewoods' field.

5.3. A brief description of the topography of the site is necessary for an understanding of the issues to which this conflict in the evidence gives rise. As a whole the site slopes gradually and fairly evenly from the north west to the south east. However, the extent of the slope as it now appears in the area with which I am directly concerned has been increased considerably by the fact that first Birch and subsequently the owners of the properties on Fishpond Way which abut the disputed boundary appear to have backfilled their land in order to create level garden areas behind their homes.

5.4. Mr Caunter told me that both Birch and Jelson, the developer of the site to the east of the Applicant's land which was in the process of being built out when I inspected, had experienced considerable problems with standing water on the site because of the nature of the soil and that it had been necessary as a consequence to construct a large balancing pond to the south of the site into which the surface water run off from both sites could drain. However, it is notable that that large balancing pond is a wholly new feature of the local drainage. Prior to its construction only the much smaller ponds to the south and that which I observed in the course of my site visit a smaller pond to the north adjoining the rear of properties in Honeysuckle Way were present.

5.5. It is not altogether easy to understand how the ditches shown on the Oakes Survey (which I also observed when I viewed the site) drained the site in view of the consistent gradient which I have described. Be that as it may, it is clear I think that there have been two ditches in the position observed and plotted on the Oakes Survey for a considerable time. The evidence for a continuous ditch, however, is weak. It was not observed by Oakes in the course of its thorough and wholly independent survey, it is not marked on any of the OS plans and aside from the slight depression which is clearly observable but nevertheless wholly distinct from the true ditches noted by Oakes and which remain in existence there is no suggestion of it on the ground.

5.6. In my view it is most likely that the observed ditches were designed to hold surface water and drain gradually into the ponds at either end. For whatever reason it was not thought expedient by whoever dug those ditches to connect them. The depression was probably caused by the effect of the slope and possibly erosion below the hedge caused by a flow of water into the more southerly ditch. I accept the evidence of Mr Maynard that the firmness of the ground in the depression effectively rebuts the suggestion that the depression is all that remains of a once more substantial ditch consistent with a classical hedge and ditch feature.

5.7. However, the question whether there was or was not a ditch in the immediate vicinity of this boundary will only be legally relevant if the first element of the hedge and ditch presumption - that the ditch was dug at a time when the boundary in question divided separate parcels of land – cannot be rebutted. Neither party led any evidence as to the date on which the ditch or ditches might first have been dug but the Applicant submitted that until 1946 the land was in common ownership and that the presumption could not, therefore, apply. That submission seems suspect to me. First, there is no evidence as to the date on which two parcels came to form part of the Beaumanor Estate. Second, as I have said there is no evidence as to the date on which the admitted ditches came into existence although it would seem to be a reasonable assumption that the presence of the two ponds on the 1884 OS plan indicates that they were in existence at that time. Third, even if the freehold title was in common ownership, it seems likely that the two parcels had been let and farmed separately for a considerable period prior to the sale in 1946. Thus, if it could be shown for the sake of argument that Mr Moss had dug the ditch whilst a tenant of the farm, it seems to me that the presumption

that he had dug the ditch at the boundary of the land demised to him would apply with no less force than if he had been the owner of the freehold title.

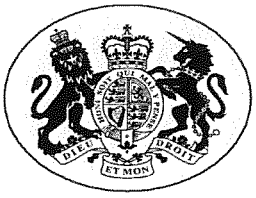
5.8. The real question here, to my mind, is why the owner of Mr Moss's land would have dug a ditch in the position of this ditch in the first place ? The work would have had no agricultural benefit to him because water would have drained naturally off his land onto the Shuttlewoods' land and he would have owed the Shuttlewoods no duty to mitigate that flow unless he had artificially channelled the water, of which there is no evidence. The only possible reason, therefore, would have been to create a boundary feature but if that were the purpose why would he not have dug the ditch along the whole boundary ? It is therefore much more likely in my opinion that the extant ditches were dug either by the Shuttlewoods or their predecessors as lessees of Grange Farm or by the owners of the Beaumanor Estate for the purpose of improving the drainage of the land to the east.

6. Approach to the construction of the conveyances

6.1. In order to determine the position of the boundary between the Applicant's and the Respondents' land I must look first at the chain of conveyances of the land within the Applicant's title and then at the chain of conveyances of the land within the Respondents' title in order to see whether they are consistent.

6.2. The proper approach to the exercise of construing a conveyance was explained by Mummery LJ in *Pennock v Hodgson* [2010] EWCA Civ 873 as follows:

> "**[7]** The opinion of Lord Hoffmann in *Alan Wibberley Building Ltd v Insley* [1999] 2 All ER 897, [1999] 1 WLR 894, 78 P & CR 327 is now regarded as the leading modern authority on the construction of the parcels in a conveyance. The rest of the Appellate Committee agreed with it. It discusses the status of an Ordnance Survey plan attached to a conveyance "for the purposes of identification" and the inferences that may properly be drawn from physical features of the land existing and known at the date of the conveyance. They are all familiar themes in boundary disputes.
>
> **[8]** Ought the judge to have ignored evidence of the presence and position of the fence, when construing the parcels clause and the attached plan? The judge should, according to the Claimants, have excluded the fact of the fence from the process of construction, because there was no ambiguity in the presence and position of the stream shown as a boundary feature on the attached plan.
>
> **[9]** *Alan Wibberley* supplies the solution. From it the following points can be distilled as pronouncements at the highest judicial level:



(1) The construction process starts with the conveyance which contains the parcels clause describing the relevant land, in this case the conveyance to the Defendant being first in time.

(2) An attached plan stated to be "for the purposes of identification" does not define precise or exact boundaries. An attached plan based upon the Ordnance Survey, though usually very accurate, will not fix precise private boundaries nor will it always show every physical feature of the land.

(3) Precise boundaries must be established by other evidence. That includes inferences from evidence of relevant physical features of the land existing and known at the time of the conveyance.

(4) In principle there is no reason for preferring a line drawn on a plan based on the Ordnance Survey as evidence of the boundary to other relevant evidence that may lead the court to reject the plan as evidence of the boundary.

[10] The long standing general principles of how to construe a conveyance underpin those points. In *Eastwood v Ashton* [1915] AC 900 at 906, 84 LJ Ch 671, 113 LT 562 Earl Loreburn said in a dispute about title to a small strip of land "We must look at the conveyance in the light of the circumstances which surrounded it in order to ascertain what was therein expressed as the intention of the parties."

[11] Lord Parker said much the same thing in different words (see p 913.) He also said:

"There is nothing on the face of the indenture to show that any one of these descriptions in any way conflicts with any other. In order, however, to identify the parcels in a conveyance resort can always be had to extrinsic evidence . . ." (page 909)

"It appears to me that of the three descriptions in question the only certain and unambiguous description is that by reference to the map. With this map in his hand any competent person could identify on the spot the various parcels of land therein coloured red. The other descriptions could only be rendered certain by extrinsic evidence . . ." (page 912)

[12] Looking at evidence of the actual and known physical condition of the relevant land at the date of the conveyance and having the attached plan in your hand on the spot when you do this are permitted as an exercise in construing the conveyance against the background of its surrounding circumstances. They include knowledge of the objective facts reasonably available to the parties at the relevant date. Although, in a sense, that approach takes the court outside the terms of the conveyance, it is part and parcel of the process of contextual construction. The rejection of extrinsic

evidence which contradicts the clear terms of a conveyance is consistent with this approach: *Partridge v Lawrence* [2003] EWCA Civ 1121, [2004] 1 P & CR 176 at 187; cf *Beale v Harvey* [2003] EWCA Civ 1883, [2004] 2 P & CR 318 where the court related the conveyance plan to the features on the ground and concluded that, on the facts of that case, the dominant description of the boundary of the property conveyed was red edging in a single straight line on the plan; and *Horn v Phillips* [2003] EWCA Civ 1877 at paras 9 to 13 where extrinsic evidence was not admissible to contradict the transfer with an annexed plan, which clearly showed the boundary as a straight line and even contained a precise measurement of distance. *Neilson v Poole* (1969) 20 P & CR 909, 210 EG 113; *Wigginton & Milner v Winster Engineering Ltd* [1978] 3 All ER 436, [1978] 1 WLR 1462, 36 P & CR 203; *Scarfe v Adams* [1981] 1 All ER 843; *Woolls v Powling* [1999] All ER (D) 125; *Chadwick v Abbotswood Properties* [2004] EWHC 1058 (Ch) and *Ali v Lane* [2006] EWCA Civ 1532 were also cited on the construction points."

6.3. Applying that approach to the chain of conveyances of the land within the Applicant's title, the colouring of the plan to the 1947 conveyance to Mr Shuttlewood indicates clearly that the parties intended that the solid line rather than the dotted line representing the parish boundary should be the boundary. That impression is contradicted, however, by the further description of the parcels by reference to the OS field numbers because the bracing symbol, to which I have referred above, indicates shows that the land between the solid line and the dotted line fell within the measured area of the adjoining field no. 239, not field number no. 20 described in the parcels clause. In order to resolve that ambiguity it is necessary to have regard to what is known about the features on the ground at the time of the conveyance. I have described my conclusions in that regard above but to summarise, they are that the solid line on the plan to the 1947 conveyance plan represented a deciduous hedge, not a ditch, and that there was no ditch in the vicinity of this boundary. For that reason, had I been on the spot in 1947 with the conveyance to Mr Shuttlewood in my hand I would certainly have concluded that the hedge was the boundary.

6.4. The parcels conveyed by the 1998 conveyance by the Shuttlewoods to the Applicant are defined solely by the red edging on the plan to that conveyance. That red edging has not been done terribly carefully but it is clear from the fact that the colourer has covered the whole of the Shuttlewoods' side of the icon which is plainly intended to represent the hedge but not the whole of the other side that it was the intention of the parties that the boundary should be the mid-line of the hedge as Mr Tapper had explained the boundary to be to Mr McInnes when they had viewed the site in 1992. That plan also apparently depicts the ditches shown on the Oakes Survey but not in the area with which I am concerned. Again, therefore, had I been on the spot with the 1998 conveyance plan in my hand, I feel sure that I would have concluded that the centre line of the hedge was the intended boundary.

6.5. The same considerations apply in reverse to the construction of the chain of conveyances of the title to the land within which the Respondents' land was comprised. The plan to the 1947 conveyance to Mr Moss appears clearly to show that the hedge was the boundary but the other description of the parcels by reference to the OS field no's contradicts that conclusion. The conveyance by Moss to Fairmeadow is not available but the conveyances by Fairmeadow to Birch and Birch to the Respondents both clearly indicate, as Mr Carpenter agreed, that the centre line of the hedge was the boundary which was actually (presumably deliberately) marked on the plan. Therefore, insofar as it might be necessary or appropriate in view of the apparent clarity of the terms of those conveyances, if I were to have stood on the spot at the times of those conveyance with the documents in my hands, again, I feel no doubt whatever that I would have concluded that the parties intended that the centre line of the hedge should be the boundary.

6.6. It therefore seems to me that until the Respondents, together with the other residents of Fishpond Way and Oak Close, took the unilateral step of moving their boundary fences out onto the Applicant's land there was a very marked degree of uniformity between the adjoining owners as to the position of the boundary in question; it was the centre line of the hedge.

7. The accuracy of the Application Plan

7.1. The remaining questions therefore are: whether the Application Plan accurately depicts the features on the ground, particularly the position of the hedge and the centre line of it; and whether the boundary line shown on the Application Plan accurately identifies the boundary line claimed.

7.2. As to the former, I think it is clear that no cartographic representation of a natural feature such as a hedge, even one vastly more detailed than could be justified for the purpose of defining a boundary such as this, can ever possibly achieve a completely accurate representation of it and certainly not one which is accurate to a tolerance of +/- 10 mm. That this is so is immediately evident from the fact that the hedge is plotted in a schematic way on both the Oakes Survey and subsequently on the Application Plan (by reference to the Oakes Survey) because the hedge no longer existed in its material part by that point.

7.3. If that is true of a hedge which can be surveyed from the air and plotted according, how much more true must it be of the centre line of such a hedge, which, whilst it might be theoretically possible to plot, is in practice impossible to plot with any real accuracy when the hedge in question is as old, large, overgrown and impenetrable as this one was when Oakes surveyed it; let alone to a tolerance of +/- 10 mm. It is certainly not as simple as drawing a line down the middle of the hedge for all manner of reasons not the least of which are that a hedge may be cut back much more assiduously on one side than the other and that the growth pattern may not be consistent due to the orientation of the hedge to the sun. Mr Maynard conceded that the mapping of the centre line of the hedge was inevitably subject to a considerable degree of imprecision.

7.4. The Application Plan is Mr Maynard's extrapolation from the Oakes Survey and I consider that it is as accurate as it is reasonably practical for a plan at this scale plotting natural features to be and so, to that extent, I find that it identifies exactly the material features on the ground.

7.5. It follows from my conclusions that: i) the true line of the boundary is the centre line of the hedge; and ii) that the Application Plan accurately identifies that centre line, that the boundary line as it is depicted on the Application Plan does not correctly identify either the true boundary line or the line of the boundary for which the Applicant has contended in its arguments on this reference; albeit the inaccuracy amounts to a small number of (almost certainly insignificant) centimetres.

8. Conclusions

8.1. My conclusions are therefore as follows:

8.1.1. That in order to determine this reference it is necessary for me to consider and determine the underlying merits of the claim which provoked the referred application and that that requires consideration of the following points in particular:

8.1.1.1. The accuracy with which the Application Plan maps the features on the ground by reference to which the boundary is defined;

8.1.1.2. The accuracy with which the Application Plan identifies the boundary line claimed; and

8.1.1.3. The extent to which the boundary line claimed is consistent with the true position of the boundary.

8.1.2. Although the Applicant's application operates solely by reference to the Application Plan, in order to approach the first two questions in a sensible way it is necessary to examine first the contention advanced by the Applicant's Statement of Case that the true line of the boundary is the centre line of the hedge.

8.1.3. Examining that claim and the Respondents' counterclaims that the true boundary is either: the eastern edge of the ditch, the bottom of the ditch or 4' from the root of the hedge, I consider that the intention of the parties to the relevant conveyances in respect of the position of the relevant boundary, when considered in light of the features on the ground, is clear; it was intended to be the centre line of the hedge. I am fortified in that conclusion principally by my conclusion that there has

never been a ditch, properly so called, along the material part of this boundary and that the depression on which the Respondents rely is not evidence of a classical hedge and ditch feature which can reasonably be said to give rise to the hedge and ditch presumption.

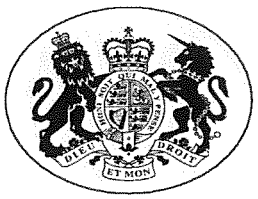
8.1.4. A large hedge such as this is almost impossible to represent exactly accurately on a map, not least because it is a living, changing, organism but I am satisfied that the Oakes Survey mapped it as accurately as it was reasonably practicable to do and that its identification of the centre line of the hedge is accurate within those same parameters.

8.1.5. Having first determined those two points it is a simple matter to say that the boundary line drawn on the Application Plan does not accurately identify either the true boundary line which is also the boundary line for which the Applicant has contended in these proceedings.

8.1.6. These conclusions mean that it is unnecessary for me to examine the Applicant's alternative claim that it and its predecessors in title, the Shuttlewoods, have been in adverse possession of the land to the east of the hedge since 1947 in any detail. However, had that been necessary I would have had no difficulty in concluding that they had been. It was the Respondents' contrary case that the Applicant was not in possession of the land because many people accessed the disputed land for the purpose of walking their dogs. Whilst I am prepared to accept that people walked their dogs around the edge of the field, and for the sake of the argument that when they did so they passed by the disputed land, such user could never be sufficient to dispossess the Applicant which was patently in control of the land and ready willing and able to prevent such user had it thought its possession to be challenged by it in any respect. I dismiss as incredible and because I felt unable to rely on his evidence Mr Lowe's claim that he used a ladder to climb over the fence for the purpose of accessing the land.

8.2. For all these reasons, I propose to direct the Chief Land Registrar to cancel the Applicant's application. In view of the reservations which I have expressed as to the accuracy of the Application Plan as a whole, not just the plotting of the boundary line, that seems to me to be the correct order, rather than to direct the Chief Land Registrar to give effect to the application (subject to conditions) as if the objection had not been made. It will be a matter for the Applicant and, should a further application be made, the Chief Land Registrar to consider whether an application to determine the boundary by reference to a correctly plotted boundary line is capable of satisfying the Land Registry's requirements in relation to the accuracy of the plan required for this purpose.

8.3. So far as the question of costs is concerned, I am presently minded to order the Respondents to pay the Applicant's costs on the basis that even though I have directed the Chief Land Registrar to cancel its application, the Applicant is the



substantially successful party in this litigation. However, I shall invite submissions in that regard before making any final decision.

ORDER

UPON hearing counsel for the Applicant and counsel for the Respondents

IT IS ORDERED THAT:

1. The Chief Land Registrar cancel the Applicant's application dated 24th January 2014.
2. The Respondents shall file and serve any submissions which they wish to make in respect of the order which the Tribunal should make concerning the costs of this reference by 5 pm on 16 August 2016.
3. The Applicant shall file and serve such submissions as it may be advised in answer to any submissions made by the Respondents in respect of the costs of this reference by 5 pm on 6 September 2016.
4. The parties' time for applying for permission to appeal against this decision is extended to 28 days after the date of the Tribunal's decision concerning their liability to pay (as opposed to the amount of) the costs of this reference.

Dated this Tuesday 19 July 2016

Max Thorowgood

BY ORDER OF THE TRIBUNAL