



[2017] UKFTT 0181 (PC)

REF/2016/0036

**PROPERTY CHAMBER LAND REGISTRATION  
FIRST-TIER TRIBUNAL  
IN THE MATTER OF A REFERENCE  
UNDER THE LAND REGISTRATION ACT 2002**

**BETWEEN**

**MRS FAYE DAVIES  
MS KAY DAVIES**

**APPLICANTS**

**and**

**MR DENZIL LEWIS**

**RESPONDENT**

**Property Address: Land at Brynderwen, Tallylyn, Brecon**

**Title Numbers: CYM649143 and CYM305359**

**Before: Judge Owen Rhys**

**Sitting at: Cardiff Civil Justice Centre**

**On: 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> November 2016**

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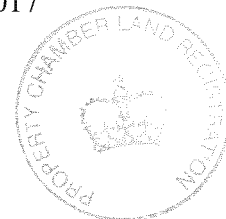
**ORDER**

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**IT IS ORDERED** that the Chief Land Registrar shall give effect to the Applicant's application in Form ADV1 dated 13<sup>th</sup> January 2015 as if no objection had been received.

Dated this 13<sup>th</sup> day of January 2017

*Owen Rhys*



**BY ORDER OF THE TRIBUNAL**





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**Applicant representation:** Mr Selway of Counsel instructed by JCP Solicitors Ltd

**Respondent representation:** Ms Brown of Counsel instructed by William Beales & Co Solicitors

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**DECISION**

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1. This dispute relates to a small area of land – said to be some 20 feet square, possibly slightly more – that lies at the south-western corner of the Respondent’s land and forming part of a larger parcel known as Brynderwen, which is registered under title number 305539 (the Disputed Land”). To the south and west lies land belonging to the Applicants, mother and daughter, who farm it together in partnership. The farm is known as Ty-Gwyn and is registered under

title number CYM649143. A disused railway runs through the middle of Ty-Gwyn north to south. Part of it has been incorporated into the access road to the farm buildings. However, the bed of the railway continues northwards towards Brynderwen. Shortly before it reaches the boundary it bifurcates, so one arm of the railway curves north and east and the other north and west. The Respondent's land forms a triangle lying between the two disused railway lines. Indeed, there are the remains of an old engine shed on the land, to the north of the parcel.

2. The Disputed Land is bounded on the western side by a field forming part of Ty-Gwyn, but subject to rights of common in favour of the Respondent ("the Common Land"). The boundary consists of a somewhat broken down fence, formed of wire and concrete posts, with a decrepit wooden gate set within it. There is a ditch on its western side. This is the only boundary feature that has remained intact since this dispute began in 2011. There is no visible boundary feature to the north or east. To the south – along the legal boundary between Ty-Gwyn and Brynderwen - there is a post and wire fence with a stile set into it. The ground is rough but has been cleared and the whole area is wooded.
3. Prior to April 2015, the physical boundaries of the Disputed Land were somewhat different. To the north there was a wire stockproof fence with an old metal gate set within it. It was tied to the western fence just to the north of the gatepost and ran eastwards to join another stockproof fence which marked the eastern side of the disputed land. There was no physical boundary to the south to mark the legal boundary between Ty-Gwyn and Brynderwen. However, there is a dispute between the parties as to whether or not there has ever been a southern boundary fence prior to 2011, and I shall consider this issue in some detail when dealing with the evidence. However, a Land Registry surveyor visited the disputed land in January 2015 and his report (together with photographs) is in evidence. It is clear from this report, and the photographs, that as at January 2015 at least, the physical boundaries were as stated in this paragraph – i.e that the land was fenced on the western, northern and eastern sides, but not to the south.
4. By an application in form ADV1 dated 13<sup>th</sup> January 2015, the Applicants applied for a title to the Disputed Land based on adverse possession. In the ST1 in support both Applicants claimed that the Disputed Land had always formed part

of Ty-Gwyn for as long as they had known it. Kaye Davies was born in 1983, but her mother had been familiar with the land since her late husband had bought it in 1975 – and therefore the period of adverse possession relied on was said to date back to 1975. This would have entitled the Applicants to have made a claim to alter the register under Sch. 12 para 18 of the Land Registration Act 2002 (“the Act”) – the transitional provisions. However, no such application was made and this dispute is therefore being decided within the scope of Schedule 6. For his part, Mr Lewis served a NAP counter-notice, but did not require the registrar to deal with the application under paragraph 5 of Sch. 6. As a result, I am only considering whether the Applicants have proved 10 years’ adverse possession prior to the date of the application. I do not need to consider other matter, such as “reasonable belief” within the meaning of para.5. There is no controversy as to the underlying principles to be applied. The Applicants must prove exclusive factual possession, with an intention to possess, for a period commencing no later than January 2005. The expressions “exclusive factual possession” and “intention to possess” have been definitively explained in the seminal decisions of Powell v McFarlane (1979) 38 P & CR 452 and J.A Pye (Oxford) Ltd v Graham and anor [2002] UKHL 30, and I do not need to explain them any further.

5. The Applicants both gave evidence, as did Mr Ben Williams, Mr David Parry and Mr Robin Rennison. Mr Williams had been a former tenant of Brynderwen, having given up the tenancy in around 2005 or 2006 when the land was sold to Mr Lewis. Mr Rennison was the husband and son-in-law of members of the Harris family who had owned Brynderwen (they were Mr Williams’s landlord) and then sold it to Mr Lewis. Mr Lewis gave evidence, as did his son Justin. Mr Selway of Counsel appeared for the Applicants, and Ms Brown, also of Counsel, appeared for the Respondent. I had a very useful site visit on the afternoon of the second day, accompanied by the parties and their representatives.
6. The Applicant’s case is that the Disputed Land has been fenced within the boundaries of Ty Gwyn at least since they bought the neighbouring land on Ty-Gwyn farm in 1975. They say that the land was physically separated from Brynderwen by means of the northern and eastern fence, and it was unfenced along the southern boundary and therefore open to them. They say that the gate in the northern boundary was wired shut. It therefore formed a small salient of Ty Gwyn

land projecting north of the line of the common boundary. They say that the Respondent erected a fence along the southern boundary in 2011, which they removed. The boundary remained unfenced until April 2015, after the date of the application, when the Respondent removed the northern and eastern boundary fences and erected a new southern boundary fence which remains in position today. They say that they have always treated the Disputed Land as part of Ty Gwyn, maintaining the fences, clearing nettles and grazing sheep in the winter. The Respondent says that the Disputed Land has always been used by him as a “holding pen”, it being fenced on all four sides. His case is that there had always been a southern boundary fence until the Applicants removed it in 2011. He says that the land has been used to collect sheep when necessary to treat them with medicine or for other animal husbandry purposes. He says that there was never any interference with his access to the Disputed Land through the northern gate. Furthermore, he says that he regularly used the gate in the western fence to obtain access from Brynderwen to the Common Land and although the gate was old and poorly maintained it was nevertheless usable. He has always treated the Disputed Land as his own, and has cleared nettles from it on a regular basis.

7. As will be apparent from this summary of the parties’ respective cases, there is a fundamental factual disagreement between the parties which is central to the dispute. I refer to the fence between Ty-Gwyn and the Disputed Land, and whether or not a boundary feature had always been in place prior to 2011. The Applicants’ claim that the Disputed Land has always been fenced within the boundaries of Ty Gwyn is a very important element in establishing exclusive factual possession. The acts of user are relatively minor, but taken in conjunction with enclosure would be sufficient to establish exclusive factual possession. Enclosure is not conclusive, of course, but having regard to the size and nature of the Disputed Land it would be highly significant. By the same token, it is central to the Respondent’s case that the Disputed Land was sealed along its southern boundary, thus creating what he described as a holding pen. If the Disputed Land had at all material times been open to the Ty-Gwyn land to the south, it simply could not have been used for the purposes claimed by Mr Lewis. Furthermore, a finding one way or the other must have an impact on my assessment of the parties’ credibility as witnesses. Accordingly, a finding as to the southern fence

may not be determinative of the application by itself, but it will clearly be of critical importance.

8. In summary, the Applicants relied on the following evidence:

- a. Mrs Davies's evidence as to the appearance of the land in 1975 and onwards. She had lived at Ty-Gwyn since 1981. Her husband farmed the land from 1975 until his death in 2010. It was her evidence that the Disputed Land has always been fenced within the boundaries of Ty-Gwyn, and that it has always been treated as part of that holding. During that time she says that sheep were grazed on the land particularly in the winter. She explains that the Disputed Land forms part of the former railway land and is therefore dry and firm ground. Indeed, this is accepted on all sides. It was therefore suitable for winter grazing. It was kept clear from overgrowth. From the records of the farm, she was able to confirm that the Disputed Land was included within the application for farm subsidies, both under the superseded IACS system and also under the current Single Payment Scheme. She produced a copy of the plan which accompanied her application for Single Farm Payment, from which it is clear the Disputed Land (showing as a northern salient projecting into Brynderwen) was included. She also confirmed that Mr Lewis or his contractors carried out works on the Disputed Land in July 2015, removing the historic northern and eastern fences and constructing a new fence and stile along the southern boundary.
- b. Miss Kay Davies was born in 1983, and save for studying at Harper Adams Agricultural College between 2001 and 2005, and a period of some 5 months in New Zealand in 2006, she has always lived at Ty Gwyn. She says that as a child and teenager she helped her parents out on the farm, and since her father's death she has entered a farming partnership with her mother. It seems to be accepted by the Applicants that it is Kay Davies who does much of the hands-on farming activity. She confirms her mother's evidence to the effect that the Disputed Land was fenced within the farm boundaries until the events of 2011. She says that their sheep were grazed on the Disputed Land, and "*this area is*

*particularly dry (as a former railway) to enable us to place feeders for the sheep and provides adequate shelter both during winter and summer months for the sheep.*” She recalled an occasion in 2011 when she found that Mr Lewis had erected a fence along the southern boundary – which had previously always been open to Ty-Gwyn. She says that she herself removed this fence, and *“replaced the fence in its original position”*.

- c. Mr Ben Williams is a cousin – a distant cousin – of the Applicants. He and his brother were tenant farmers of Brynderwen between 1992 and 2005. For some of this time Mr Denzil Lewis worked for him as a farm hand. He made two witness statements, upon which he was cross-examined. His evidence was that the Disputed Land was never used by him as a holding pen during the time that he was the tenant farmer of Brynderwen, that he had never instructed Mr Lewis to take sheep there (as Mr Lewis contended) and that he had always regarded the land as part of Ty Gwyn farm. He said that on occasions stock would escape from Brynderwen onto Ty Gwyn, and vice versa, and that the northern gate would then be opened and the animals exchanged. In cross-examination he added to this testimony. He recalled actually walking the boundaries of Brynderwen with his landlord, Mr Harris, at the commencement of the tenancy, and it was apparent that the Disputed Land did not form part of the tenancy. He also recalled meeting Gwyn Davis, the late husband of Mrs Davis and father of Miss Davis, and discussed the boundary between the two farms with a view to ensuring that he did not claim farm subsidy on land that did not belong to him. He also recalled that the northern gate was difficult to open, so much so that he once managed to “repatriate” cattle which had strayed into Ty Gwyn by getting them to jump over the fence in preference to undoing the gate. He said that the Disputed Land was wholly unsuitable for use as a holding pen, since the fences, although stockproof, were not reinforced sufficiently to contain a collection of many sheep, as opposed to a few grazing animals. Furthermore, there was no fence on the southern side. .
- d. Mr Robin Rennison’s evidence, in the form of a written statement dated 29<sup>th</sup> October 2014, upon which he was cross-examined. This stated that



he was familiar with Brynderwen and Ty-Gwyn, being the son-in-law of the Thomas Gwynne Harris who had owned Brynderwen prior to his death in 1982, The land had the passed to Mr Rennison's wife June and two other siblings. They had sold the land to Mr Lewis in 2005. He states that the Disputed Land was always fenced within the boundaries of Ty-Gwyn, that it was known to belong to Ty-Gwyn and was practically inaccessible from Brynderwen.

- e. Mr David Parry is Chairman of the Caerphilly Wildfowlers Gun Club. His evidence was that, for over 30 years, his club shot over the Disputed Land with the permission of Mrs Davies, and that he believed the land to form part of Ty-Gwyn. He accepted in cross-examination that the Club had rights over the entirety of Ty-Gwyn, and that Mr Lewis also gave it permission to shoot over Brynderwen. He accepted that he did not take a map with him when shooting.
  - f. Following the Applicants' application, the Land Registry sent a surveyor to inspect the Disputed Land. He did not make a witness statement, and was not called to give evidence, so the report amounts at best to a hearsay statement. Nor is it expert evidence. The report must therefore be treated with some caution. However, the photographs are clearly unchallengeable, and although the surveyor's view as to the age of various boundary features is merely an opinion, it is hard to see why his observation of the features that existed at the time of the inspection in February 2015 should be rejected out of hand. The report confirms the existence of the western northern and eastern fences at that time. It confirms that the gates in the western and northern boundaries were tied (not wired) shut. Most importantly, perhaps, it confirms that there was no existing fence along the southern boundary at that time, and, according to the surveyor, no evidence of any previous fence.
9. Mr Lewis gave evidence. The central points of Mr Lewis's witness statement were as follows: *"I can state with certainty that the [Disputed] Land was fenced off and used as a holding pen with the Brynderwen land at all times when I worked for the Williams brothers. It was part of my work to keep the boundary*

fences maintained and to so the hedge trimming. The Land in the holding pen was therefore well known to me..... I have never seen any member of the Davies family on the land and I am often there. I was aware, in 2011, that the Applicants (I assume) had taken down the fence between Brynderwen and the Applicants' land but I re-instated it along the same line." However, much of the witness statement deals with other, more peripheral, issues. There is a section headed "Access to the Common Land". As previously stated, in 2007 Mr Lewis registered rights of common over a field within Ty-Gwyn – adjoining the Disputed Land to the west. According to paragraph 11 of his statement "..... the only access to it from my land is through the gate to the west of the holding pen ... It just would not make sense for me to have abandoned using that area of land as suggested by the Applicants." He goes on to say that used to be a vehicular right of way to the Common Land from the west (past Rose Cottage), but "*The Applicants applied to have that right of way closed. I objected but they were successful in closing the access with vehicles.*" There is now only a right of way on foot past Rose Cottage. He also states that he "believes" that there is a public right of way over the disused railway leading from Station Road to the north, and that this public right of way continues south through the Disputed Land and over Ty-Gwyn. In paragraph 13 he expresses the view that "*the Davies family wish to prevent other people from using the commons land so that it can be incorporated with their own land.*" He repeats this statement at paragraph 17. He also says that the Davies family wanted to buy Brynderwen but he had outbid them.

10. In other passages in his witness statement in which he refers to his dispute with residents of Station Road to the north with regard to his use of the road as an access to Brynderwen. It seems that there was a trespass action brought against him, in which it was established that he had an agricultural right of way, but not the right to drive stock along Station Road. He says that "*resentment towards me started around this time.*" He also states that Mr Ben Williams and his brother were "annoyed" that he had been able to purchase the Brynderwen land, because they then had to rent other land. This explains, he says, why Ben Williams was giving evidence "*against me*". He adds (in paragraph 16) that he was ordered to pay the costs of the appeal in the Station Road litigation, and this was secured by a charging order over Brynderwen. "*I then heard from Robert Rennison that the*

*Davies family, Ben Williams and the residents of Station Road were all hoping that I would not be able to pay the costs and this would enable them to purchase the land.”*

11. Mr Lewis’s son Justin gave evidence in support of his father. It seems that he and his father “replaced” the southern boundary fence in 2011, but it was taken down “for apparently no reason”. He and his father then replaced the fence in April 2015 “and removed the livestock pen” (a reference to the removal of the northern and eastern fences).

## **FINDINGS OF FACT**

12. I am satisfied that the Disputed Land was fenced within the boundaries of Ty-Gwyn until the new fence was erected by or on behalf of Mr Lewis in 2015. Prior to that time – leaving aside the brief interruption in 2011 when Mr Lewis attempted to construct the new southern fence – the owners and occupiers of Ty-Gwyn had exclusive factual possession of the Disputed Land. It was not a holding pen accessible to and in use by persons farming Brynderwen, being enclosed on three sides only and quite clearly outside its boundaries. Although the northern gate could be opened, and therefore it was physically possible to enter the Disputed Land from Brynderwen, this was only done in order to “repatriate” stock from one side of the boundary to the other. Beyond that, the gate and fence were treated as the legal boundary between the two properties. The western gate (into the Common Land) has for some years been dilapidated and practically unusable. In reaching these findings, I have of course had regard to all the evidence that I heard, but the following factors are worthy of mention:

- a. Overall, I found the Applicants to be truthful and reliable witnesses. There were some inaccuracies in Ms Davies’s witness statement – the suggestion that sheep feeders had been placed on the Disputed Land, for example, when this was clearly not the case, and the curious statement that she had re-erected the fence in 2011 along the original boundary line. However, both she and her mother gave clear and straightforward responses under cross-examination and were not in any way shaken in the key areas of their evidence.

- b. Mrs Davies accepted that she did not regularly carry out the day-to-day farming activities whilst her husband was alive, although of course she did help from time to time. It was suggested to her in cross-examination that she could not know whether or not the Disputed Land was fenced within Ty-Gwyn, or whether the Ty-Gwyn sheep were actually on the Disputed Land. Her response was that from time to time she had walked over the area with her late husband. It seems to me wholly improbable that Mrs Davies, over a period of some 40 years, and actively involved in her husband's farm, would not have entered the Disputed Land, or been close enough to observe the boundary features, at any point during that time. Furthermore, the Ty-Gwyn sheep, grazing on the land around the sheep feeders (kept to the south of the Disputed Land) must inevitably have entered the Disputed Land to the north which formed one part of the unified grazing area. The notion that somehow they turned back at the legal boundary is of course untenable.
- c. Ms Davies was more hands-on than her mother. She is a farmer's daughter, has studied agriculture at college, and, in her words, was an "outdoor girl" who liked to help her father around even as a child, and regularly came back from college at weekends to do the same. It is inconceivable that she would not have been well aware of the physical boundaries of the farm, even in one obscure corner of it, and the use made of it as part of the farming operations.
- d. Mr Ben Williams was an impressive (and essentially an independent) witness, despite a slight familial connection with the Applicants. In cross-examination he was asked to comment on the letter from Gareth Harris (dated 22<sup>nd</sup> June 2015), a member of the Harris family who were landlords of Brynderwen. The letter is very short, and simply states that "*the parcel of land as detailed on the Land Registry map CYM217372, is completely correct, and has not been altered in any way.*" He said that Gareth Harris was not concerned with his family's farming operations, having left the land when he became an adult, and he would know nothing about the precise boundaries of the land. He accepted that he had contacted him to discuss the letter, which he felt gave a wrong impression which needed to

be corrected. He denied that he held any animus towards Denzil Lewis. He denied that he had wanted to buy Brynderwen and was resentful of Mr Lewis who had secured it. He said that he and his brother owned other holdings in the area and had no need of this land which was of very poor quality and, due to an expansion of their poultry business, unsuitable for their needs. He said that he liked Mr Lewis and felt awkward at having to give evidence in this case, preferring to keep on good relations with his neighbours. However, his evidence as to the use and appearance of the disputed land was true. He was adamant that the Disputed Land was never farmed together with Brynderwen and was always treated as part of Ty Gwyn and physically joined within it. He displayed no animus towards Mr Lewis – quite the opposite, in fact. He was clearly troubled by the position in which he found himself, giving evidence against his former employee for whom he retained considerable respect. However, his evidence was convincing and unequivocal, and entirely credible.

- e. Mr Rennison's evidence was somewhat compromised by the degree of confusion which he demonstrated in cross-examination, when attempting to depict the physical boundary between Ty-Gwyn and Brynderwen, as far as he recalled. Although he was clear that Ty-Gwyn did project into Brynderwen towards the north-western corner, by the old railway land, the line of the boundary he identified was not the same as the actual fencing.
- f. I regret to say that I found Mr Denzil Lewis to be an unimpressive witness, evasive and vague under cross-examination and unwilling to engage with the questions. He clearly feels a very considerable amount of resentment towards the Applicants, and Mr Williams and indeed others in the locality, and I think that this has unfortunately affected the accuracy of his evidence.
- g. I think that Justin Lewis was doing his best to support his father, but again I did not find his recollection of the relevant boundary features, and his father's use of the Disputed Land, to be at all convincing.
- h. Actions – or inactions – often speak louder than words. On Mr Lewis's case, there had been a long-established boundary feature, separating

Brynderwen from Ty-Gwyn, which the Applicants arbitrarily removed in 2011, without notice to him, thereby trespassing on his land and annexing a portion of it. According to him, and apart from an attempt to re-erect the fence once in 2011 - which is disputed – nothing was done for a period of four years until after the Applicants had made this application. Although there was an attempt by Justin Lewis to say that “hurdles” were erected from time to time as fencing, this was never previously referred to and there were no signs of this when the Land Registry survey was carried out. Similarly, if indeed the holding pen was an integral part of the Brynderwen farming operations, it seems extraordinary that the pen would have been removed at precisely the time that Mr Lewis erected the southern fence in 2015. This suggest to me that the purpose of erecting the southern fence, and removing the northern and eastern fences, was to destroy long-established features, and create a new reality on the ground by way of rebutting the Applicant’s claim.

- i. There is no evidence of any public rights of way over the disused railway track as it runs through Brynderwen and Ty-Gwyn. Nothing is shown on any public record.
- j. There is no evidence of any private right of way over the Disputed Land and into the Common Land. The historic access appears to have been from the west.
- k. Quite how, when and why the Disputed Land became separated from the remainder of Brynderwen, to form a northern salient of Ty-Gwyn, is unknown. Undoubtedly the historic title plans show the boundary as a straight line at this point. However, this is a very small area, largely obscured by trees, and no doubt when the Ordnance Survey revisions were carried out no physical inspection was made. The salient would not show up on an aerial survey. However, the live evidence, from those familiar with the land for many years, is in my view more compelling than lines drawn on Ordnance Survey maps. I also include in this assessment the contents of the Land Registry survey, which is unequivocal.

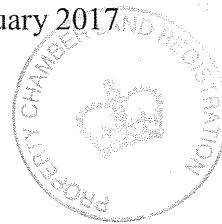


13. All this evidence and associated factors leads me to the conclusion that the Disputed Land has, certainly for the period since 1975, been physically enclosed within the boundaries of Ty-Gwyn and indistinguishable from the adjoining land to the south. It has been used as part and parcel of the farm since that time. At certain seasons the use was no doubt minimal, but at other times, such as when the sheep feeders were in use just to the south, the use would be more intensive. I accept Ms Davies's evidence that routing maintenance was carried out to the land and to the surrounding fences.
14. The Applicants must prove both exclusive factual possession, and an intention to possess. It is clear that they have always believed the Disputed Land to form part of Ty-Gwyn – an entirely reasonable and understandable belief given the absence of the southern fence. For what it is worth, had this case been fought on a different basis – if paragraph 5 had been invoked in the NAP – I would have had no hesitation in holding that the third condition had been satisfied. Either way, the Applicants would have succeeded.
15. This is an unfortunate case. Ms Brown suggested at the outset that the Applicants were being unfair to Mr Lewis. They had a farm of several hundred acres of good quality land. He has a much smaller holding, of land which is of lesser quality. The implication was that the Applicants were being unreasonable in pursuing their claim to this tiny piece of land which, it is said, they do not actually need. It is clear that, rightly or wrongly, Mr Lewis believes that he has been ill-treated by his neighbours. It is very regrettable that he has found himself in this position, with the likelihood of a further costs order against him, which no doubt he can ill-afford. However, the function of this Tribunal is to come to a conclusion on the basis of the evidence, and the applicable law, which it has done. Mr Lewis was not obliged to object to the application, and to persist with that objection to the bitter end..
16. I will therefore direct the Chief Land Registrar to give effect to the Applicant's application in Form ADV1 dated 13<sup>th</sup> January 2015 as if no objection had been received. This Tribunal has an unlimited jurisdiction in relation to costs. Generally speaking, and in the absence of special factors, the usual order is that costs follow the event – namely, that the loser pays the winner's costs. I therefore

propose to make an order to that effect, but before doing so will give Mr Lewis the opportunity of providing any arguments that he may have as to why a different order should be made. I direct that written submissions should be filed (and served on the Applicants) no later than 4pm on Wednesday 18<sup>th</sup> January 2017. The Applicants may respond within 7 days. I would also like the parties to state whether they consider this case to be suitable for a detailed or summary assessment. As a rough rule of thumb, a costs bill in excess of £20,000 will normally go to a detailed assessment by a costs judge in this Tribunal.

Dated this 13<sup>th</sup> day of January 2017

*Owen Rhys*



BY ORDER OF THE TRIBUNAL