CASE NO: F00WJ323

IN THE COUNTY COURT AT WALSALL

B E T W E E N:

(1) JOSEPH JOHN DAVIS
(2) YVONNE JOAN MARSH

Claimants

- and –

AIMEE VICTORIA WINNER

Defendant

BEFORE HIS HONOUR JUDGE MITHANI QC

Mr Mathew Haynes (instructed by Enoch Evans LLP, Solicitors) for the Claimants
Mr David Nuttall (instructed by HCB Solicitors Ltd) for the Defendant

Hearing dates: 25-27 August 2021 and 15 October 2021

Judgment handed down remotely on 24 November 2021

Approved Judgment

I EXPRESSIONS AND ABBREVIATIONS USED IN THIS JUDGMENT

1 In this judgment, the following words and expressions shall have the following meanings assigned to them:

1.1 "the Claim" shall mean the claim made by the Claimants against the Defendant in this action;

1.2 "the First Claimant" shall mean Mr Joseph John Davis;

1.3 "the Second Claimant" shall mean Ms Yvonne Joan Marsh;

1.4 "the Claimants" shall mean both the First Claimant and the Second Claimant;

1.5 "the Defendant" shall mean the defendant in the claim, Ms Aimee Victoria Winner;

1.6 "the Claimants' Property" or "No.132" shall mean the property at 132 Lichfield Road, Bloxwich, Walsall, WS3 3LZ, owned and occupied by the Claimants;

1.7 "the Defendant's Property" or "No.128" shall mean the property at 128 Lichfield Road, Bloxwich, Walsall, WS3 3LZ, owned and occupied by the Defendant;

1.8 "the Claimants' Expert" shall mean Mr Graham Thompson of Wiggins Lockett Thompson Ltd, the expert instructed by the Claimants to provide an expert's report on the position of the boundary between the Claimants' Property and the Defendant's Property;

1.9 "the Defendant's Expert" shall mean Mr John Punch, the expert instructed by the Defendant to provide an expert's report on the position of the boundary between the Claimants' Property and the Defendant's Property;

1.10 the Disputed Boundary shall mean the boundary between No.128 and No.132, the location of which is the subject of the Primary Claim; and

1.11 "the Primary Claim" shall mean the main dispute in the Claim relating to the location of the Disputed Boundary.

2 In addition, in this judgment, unless otherwise stated or the context otherwise requires, any reference, where appropriate, to "the Claimants" shall include one or both Claimants.

II THE CLAIM

3 The dispute between the Claimants and the Defendant is primarily a dispute relating to where the boundary between the Claimants' Property and the Defendant's Property lies. The Claimants allege that two fences were built at separate times by the Defendant on what the Defendant claimed was the boundary between those properties but that those fences encroached on to their property.

4 The particulars specified in paragraph 9 of the Particulars of Claim sets out the extent of the encroachment which the Claimants allege has taken place into their property:

(a) an encroachment of 9 inches to the northern and front western boundaries of No.132; and

(b) an encroachment of 8 inches to the rear western boundary of No.132.

5 To the outside observer, the extent of the alleged encroachment – in terms of monetary value – is not substantial. I well appreciate that the parties may not view it as such. Nonetheless, it is quite beyond my comprehension to see how an encroachment such as this would warrant the substantial costs which I was informed by both counsel had been incurred by the parties, who, at one stage, were very good friends to litigate this dispute. The Claimants' costs alone are estimated at £90,000 plus VAT. I do not think the Defendant's costs will be substantially less.

6 The Claim was originally allocated to the fast track. However, it was re-allocated to the multi-track. Cost budgets were dispensed with, though I know not why. If the parties had thought about what little (in terms of the value of the claim) was in dispute, and had thought about furthering the overriding objective, as they should have done, they would have sought to have the Claim initially allocated,

or subsequently re-allocated, to the small claims track. It is difficult to see how the value of the Claim, in monetary terms at any rate, could conceivably exceed the small claims monetary limit, even if one took into account the additional claims by made the Claimants, specified at para. 7, below[1]. In my judgment, the Claim did not need to be allocated to the fast-track, let alone being subsequently re-allocated to the multi-track. The relief sought by the Claimants could just as easily have been obtained by them (if they were successful) if the claim had proceeded in the small claims track. I do not criticise the District Judge for re-allocating the Claim to the multi-track. Where both parties invite the District Judge to do so – and substantial or significant expense has already been incurred – it is very difficult for the District Judge to allocate, or reallocate, it to another track of his or her own initiative.

7 In addition to the dispute between the parties relating to the location of the correct boundary dividing their properties, the Claimants claim: (a) aggravated damages for the conduct of the Defendant by throwing waste on to the Claimants' Property and annoying the Claimants by placing a scarecrow on her property facing or adjusted to face the Claimants' Property in adverse weather conditions; and (b) causing or allowing an escape of water accumulated on their property on to the Claimants' Property. That latter claim is brought in nuisance and/or the rule in *Rylands v Fletcher*. I will refer to these two heads of claim as "the Claimants' Subsidiary Claim".

III THE BACKGROUND CIRCUMSTANCES

8 Although the facts, matters and evidence which give rise to the Claim are in substantial dispute between the parties, the background circumstances leading to the dispute between them, and the bringing

[1] As I state below, the suggestion that the Claimants loss would be as high as £50,000 is without substance. Even the provisional figure of £10,000 referred to in their Particulars of Claim seems to me to be excessive.

of the Claim, are largely uncontroversial. They need, therefore, only brief mention.

9 The Claimants own No.132. The Defendant owns No.128. If one stands on Lichfield Road, to the right of No.132 is No.128; to the left of No.132 is No.134; and to the right of No.128 is No.126. The titles to both No.128 and No.132 are registered at HM Land Registry with title absolute.

10 The circumstances in which each of the parties came to acquire their property are helpfully set out in a chronology prepared by Mr Haynes, counsel for the Claimants, and submitted with the trial bundles. I set out the substance of it below. Although some of the phraseology used in the chronology is based on what the Claimants say is their case, I do not believe that the substance of the chronology is disputed by the Defendant. It is appropriate for me to set it out in full, editing out those words and expressions which are liable to be controversial to the Defendant (the numbering in square brackets refer to the page numbers in the trial bundles)[2]:

Date	**Event**
22.10.23	Common ownership ceased as No.128 and No.126 purchased by Dudson: see conveyance plan at [**680**]
23.10.23	No.132 and No.134 sold to Bickley by Baker
16.3.33	No.128 is sold. House is built subsequently?
28.3.36	Bickley sells No.132 and No.134 to Elton & James
10.8.38	No.134 and No.132 become separate with sale of 134

[2] A slightly lengthier chronology is contained in the Claimants' counsel closing submissions, though there is no material difference between the two documents.

1938	No.134 house built
10.8.38	No.134 sold
24.12.51	No.132 sold by Elton/James
1952	No.132 house built
21.8.70	first registration of No.132
11.6.76	Cs registered owners of No.132
2.12.77	First registration of No.128 by Mr and Mrs Chell as purchasers
1990	Mr Turner purchases No.215
2000	Mr Turner erects fence between No.215 and No.128's rear garden boundary
2009	Photo of Fraser Woods sales particulars for No.128 [**268**]
22.12.09	D becomes registered owner of No.128
2010	Cs allege D trespasses by erection of Fence along the disputed boundary

Aug 2010	D alleges agreement with Cs that the fence along the disputed was to replaced. D says her father announced his intention to remove the privet hedge to the rear. Cs claim they had no involvement with this other than wishing to protect an electricity cable conduit
October 2010	Intruder on Cs leads them to place razor wire on shed in rear garden: see photos at **[61-63]**
2014	D alleges that a discussion over a car port was had with C and her father, the latter offering to build Cs one
13-15.8.15	Work by Cs to reduce conifers along the boundary: see photos at **[74-82]**
3/5.9.15	On return from holiday, Cs discover that D car port with framework only and roller shutter door. Plastic fence backing attached to the metal gate
15-17.11.15 13.11.15	Roller shutter and gate now installed to car port: see photos at **[68-69]** Wasall Planning conduct a site visit re. view car port
7.12.15	Marrion & Co, instructed by Cs, write to D [**91**] and enclose plan
20.2.16	D letter to QS sols stating no boundary dispute
13.4.16	Cs write letter of claim to D
7.6.16	Photo at [**72 & 436**] showing what Cs assert is the true boundary evidenced by concrete changes
3.7.16	D father allegedly tells C1 that boundary will be restored as per Marrion plan
21.3.17	D writes
17.7.17	Cs' expert's first report
6-9.10.17	Cs allege that D trespasses by erection of Second Fence along disputed boundary. 2 concrete posts were removed. See photos at **[50-59, 203,205, 207-213]**

13.11.17	D's father alleged to be seen throwing stuff over fence on to No.132, said to be fox excrement and matted tree roots from sewer: see photos at **[84-86]**
October 2018	installation of last 3 panels to the front of the Second Fence
14.3.19	Particulars of Claim
24.4.19	Order of HHJ Mithani [19]
29.4.19	D father seen moving 3 fence panels and interfering with C garden
3.5.19	Defence
20.5.19	Reply
2.9.19	D father allegedly erects red and white poles into C's garden
7.10.19	D father allegedly erects red and white poles into C's garden
23.9.20	fast track directions
24.11.20	JP report
1.4.21	joint statement of experts [**526**]
21.4.21	order for listing hearing
4.5.21	2nd joint statement of expert [**841**]
6.5.21	re-allocation to multi-track and directions [**105**]
25.8.21	Trial

11 The Claimants claim that the fence (which I will refer to as "the First Fence", as it was referred to at times during the trial) built by the Defendant in 2010 dividing their property from the Defendant's Property to replace the "existing boundary" between the two properties encroached into their property by 9 inches at the front of their property and 8 inches to the rear of their property. Previously,

the front northern and western boundaries to No.132 were demarcated by a row of conifers and other shrubbery, whilst its rear western boundary consisted of a privet hedge.

12 In September 2015, the Defendant erected a carport immediately behind the First Fence along part of the front western boundary of No.132. The Claimants claim that, on the basis that the carport was built over the front area of 9 inches over what they claim was the extent of the encroachment of the Defendant over that area, the carport constitutes a trespass on their property. In their prayer for relief in the Claim, they seek an injunction requiring the Defendant to remove the carport and the fencing which the Claimants allege encroaches upon it.

13 In or about October 2017, the Defendant erected a second fence (which I will refer to as "the Second Fence", as it was referred to at times at the trial) in place of the First Fence which had been damaged by a storm. There is a dispute between the parties about whether just the panels were replaced or also the posts. Whatever was replaced, I do not believe it to be suggested by the Claimants that the erection of the Second Fence constituted an encroachment over and above the encroachment alleged to have been caused by the First Fence. So far as it is, it is not supported by any evidence and is not sustainable.

IV THE BASIS OF, AND THE PRAYER FOR RELIEF IN, THE CLAIM

14 Stripped to its bare essentials, the basis of the Claimant's Primary Claim may briefly be stated as follows:

(a) the boundary dividing the two properties had been established many years ago – at least since 1951 – but if not, at least since 1976 when No.128 was acquired

by the Claimants or 1977 when No.128 was acquired by Mr and Mrs Chell[3].

(b) the First Fence encroached upon that boundary and amounted to a trespass of the Claimants' Property by the extent of that encroachment;

(c) that trespass was continued by the construction of the Second Fence which replaced the First Fence. As I have already said, there is no suggestion (or evidence) that the construction of the Second Fence amounted to the encroachment of any more of the Claimants' Property.

(d) the Claimants are entitled to obtain possession of the encroached land and to restrain any further encroachment of that land by the grant of an injunction.

15 In addition to seeking an injunction to remove the carport and fencing which encroaches on their land, the Claimants claim, *inter alia*: (a) a declaration that the boundary dividing their property from the Defendant's Property is as shown by the plan referred to in the Claimants' Expert's report; (b) an order requiring the Defendant to give up possession of the land comprising the encroachment ("the Disputed Land"); and (c) an order that they be entitled to be registered as proprietors of that land.

V THE BASIS OF THE DEFENDANT'S OPPOSITION TO THE CLAIM

16 The Defendant opposes the Primary Claim of the Claimants on the basis that: (a) there was no encroachment into the Claimants' Property; (b) if there was, the Claimants had agreed to it – i.e., an

[3] Mrs Chell being the Defendant's immediate predecessor in title.

oral boundary agreement was concluded or had come into existence between them; and (c) the Claimants are estopped from laying claim to any encroachment. I do not believe that the last point is relied upon by the Defendant any more. Nor would it appear that the Defendant relies (having previously sought to do so) upon adverse possession to the Disputed Land in resisting the Primary Claim.

17 As regards the Claimants' Subsidiary Claim, the position of the Defendant is that there was a scarecrow on her property, but it was not intended to annoy the Claimants and that there is no substance in the claim in nuisance or *Rylands v Fletcher*. I understand it to be now accepted by the Defendant that her father did throw waste on the Claimants' Property but she says this had nothing to do with her.

VI THE ISSUES IN THE CLAIM

18 The issues which form the basis of the Claimant's Primary Claim may briefly be stated as follows:

(a) what was the position of the boundary before the First Fence was constructed?

(b) when the First Fence was constructed, did it encroach on to the Claimants' Property?

(c) was there any additional encroachment on the Claimants' Property as a result of the installation of the Second Fence?

(d) If the First Fence and/or the Second Fence encroached upon the Claimants' Property, was there an oral boundary agreement between the parties that this would be the boundary line between the two properties?

VI BURDEN AND STANDARD OF PROOF IN THE CLAIM

19 The burden of proving the facts and matters upon which the Claimants rely in making good their claim against the Defendant rests upon them. The standard of proof is the usual civil standard of proof – the balance of probabilities.

20 In contrast, if the Claimants can prove encroachment, it then becomes necessary for the Defendant to prove that a boundary agreement came into existence between her and the Claimants. The standard of proof remains the same – the civil standard of proof.

21 Numerous factual matters have been relied upon or raised by the parties in the Claim. As far as my approach to the determination of those factual matters is concerned, it is not necessary for me to decide every point which has been advanced by the parties in order to determine the issues in the Claim. It is only necessary for me to decide whether the matters relied upon by the parties are supported by the evidence which I have heard and, if they are, whether they warrant the relief sought by them against the other party or parties being granted: see, by way of examples, *Weymont v Place* [2015] EWCA Civ 289, at [4]-[6], per Patten LJ; and *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605*,* [2002] 3 All ER 385, CA*.*

VIII OVERVIEW OF THE EVIDENCE IN THE CLAIM

22 I heard evidence from the Claimants, David Chell ("Mr Chell"), Robin Turner ("Mr Turner"), the Defendant, the Defendant's father, Robin Winner ("Mr Winner"), David Alcock ("Mr Alcock"), Kathryn Mills ("Ms Mills") and the joint experts.

23 None of the parties' evidence was reliable. They were all content to say whatever they thought would advance the position which they were putting to the court.

24 One example of what I am saying will suffice, although there were many others. The Claimants had complained about Mr Winner throwing waste and fox excrement over the boundary fence dividing the two properties on to the Claimant's Property. Mr Winner is clearly seen to be throwing something over the boundary fence on the video footage which was played in court that the Second Claimant took. That behaviour was deliberate, malicious and disgraceful, as was his dismissive replies to a number of questions which were put to him about how badly he had behaved towards the Claimants. He did not appear to me to be expressing any regret for the way in which he behaved, stating, when he was asked whether he would find that acceptable behaviour if someone threw waste material on his land, that it would not bother him in the slightest.

25 But while not nearly as bad as Mr Winner's behaviour, when the Second Claimant took that footage, she was heard to be saying that Mr Winner had thrown fox excrement on their property. She had no reason to make that statement. It was a self-serving remark made to bolster up her and the First Claimant's allegation that Mr Winner and the Defendant had throughout their dispute behaved badly towards them. The Second Claimant did not need have done that. It is clear to me from Mr Winner's demeanour in the witness box that he does not kindly to people who disagree with him. I find, as a fact, that several allegations of the Claimants about how he behaved towards them are likely to be correct.

26 I found certain aspects of the evidence of the First Claimant very difficult to understand. The evidence of the Second Claimant was substantially clearer. Much of their evidence – and the evidence of the Claimants' Expert – was concerned with the present location of the Disputed Boundary by reference to the historic conveyancing documents. While this might have been a reasonable starting point

to decide the location of the Disputed Boundary, it would have been more helpful to have known how the measurements specified in those documents compared with the position of the boundary between No.128 and No.132 before Mr Chell stopped living at No.128 in 1990, and Mrs Chell ceased occupying the property in late 2009 when she sold it to the Defendant in late 2009. Up until that point, there was a boundary of sorts between the two properties (though it was by no means ideal), which had been in situ for a substantial period of time. As the First Claimant says at para. 17 of his witness statement:

> "We had been led to believe by the previous owners that there had never been any issue regarding the boundary which caused disputes between the owners of neighbouring properties. Prior to 2009 before the Defendant owned and took up occupation at No.128, the boundary between those properties never became an issue".

27 That same point is made by the Second Claimant in the same para. of her witness statement.

28 I agree with the Claimants that the evidence of the Defendant was combative and defensive. She would not give a straight answer to many of the questions which were put to her. She largely deferred to Mr Winner on most points, stating that most of the discussions which took place about the fence were with Mr Winner and the Claimants. Even on the issue of what works were done to her property following the intimation of the Claimants' Subsidiary Claim in relation to the escape of water from her property, she claimed that she left everything to her father.

29 I will deal with the evidence of the other witnesses in the course of this judgment.

IX DETERMINATION OF THE ISSUES IN THE PRINCIPAL CLAIM

(A) Position of the boundary before the First Fence was constructed.

30 The Claimants' Expert, at para. 3.1.1 of his report, comes to the following conclusions about the location of the Disputed Boundary:

> "Based on the documents I have been provided with, my site inspection and the site dimensions taken, in my opinion I confirm:-
>
> (i) The disputed fence between 132 Lichfield Road and 128 Lichfield Road is incorrectly positioned to a significant proportion of the boundary to the detriment of the owners of 132 Lichfield Road.
>
> (ii) On this basis the car port secured to the side of 128 Lichfield Road extends beyond the boundary between the two properties and constitutes a Trespass.
>
> (iii) Due to the absence of any appropriate drainage or soak-a-ways overflowing water from the roof to the car port, which is collection in the two drums and the patio area drains under the fence causing damage and flooding to 132 Lichfield Road."

31 Those conclusions are largely premised on two (simplistically put)[4] bases as follows: a historical evaluation of what boundaries should have been at the point when No.128 and, subsequently, No.132 were sold off; and an assumption that had the land conveyed by the historic conveyances reflected the position on the ground, the boundary between the two properties would be the boundary line contended for by the Claimants.

32 Plainly, the terms of the conveyances relating to the properties are an essential starting point to determine the boundaries between two or more properties. If the conveyancing documents and transfer plan are clear and unambiguous, the approach of the court must be to give effect to them: see *Cameron v Boggiano* [2012] EWCA Civ 157. As Mummery LJ stated, at [57], in that case: "[a] mismatch between a clear plan and the actual physical features on the ground is not in itself a reason that could possibly justify ditching the title documents and determining the position of the disputed boundary by reference to the topographical features alone." However, at [63], Mummery LJ went on to say that the court was entitled to take extrinsic evidence

[4] For a detailed analysis of how the Claimants' Expert comes to his conclusions, see para 2 of his report.

into account where the document or documents in question were not sufficiently clear "to the reasonable layman with the plan in his hand to determine the position of the boundary …."

33 A helpful summary of the relevant principles governing the determination of the position of a boundary between two or more properties is provided by His Honour Judge Simon Barker QC, sitting as a Judge of the High Court, in *Acco Properties Ltd v Severn* [2011] EWHC 1632 (Ch), at [11], in the following terms:

> "1. Where, as in this case, the property in question is registered land, the file plans show only general boundaries and not the exact line of the boundaries unless the property is said to be "more particularly described in the plan."
>
> 2. Similarly, Ordnance Survey plans, if not forming part of the registered title as filed plans, are no more than a general guide to a boundary feature, and they should not be scaled up to delineate an exact boundary. This is because the lines marking the boundaries become so thick on being scaled up as to render them useless for detailed definition.
>
> 3. In order to determine the exact line of a boundary, the starting point is the language of the conveyance aided, where the verbal description does not suffice, by the representation of the boundaries on any plan, or guided by the plan if that is intended to be definitive.
>
> 4. If that does not bring clarity, or the clarity necessary to define a boundary, recourse may then be had to extrinsic evidence — such as topographical features on the land that existed, or maybe supposed to have existed, when the dividing conveyance was executed.
>
> 5. Admissible extrinsic evidence may also include evidence of subsequent conduct where of probative value in showing what the original parties intended.
>
> 6. Evidence of later features — that is, later than the earliest dividing conveyance — may or may not be of relevance. The probative significance of such evidence depends upon the extent to which, if at all, the dividing conveyance, or evidence of its terms, exists.
>
> 7. Where a boundary is in dispute, it is important to bring certainty to the determination by proclaiming the boundary and not leaving the plot "fuzzy at the edges" (*Neilson v Poole (1969) 20 P&CR 909* , Megarry J).
>
> 8. Even where a boundary line may be determined by reference to a conveyance, other evidence may be admitted and probative in establishing a different boundary obtained by adverse possession, showing enclosure of the land in denial of the title of the true owner. As the phrase implies, title is established by intentionally taking exclusive possession of land without the consent of, and adverse to the interests of, the true owner, and maintaining such possession continuously for the limitation period.

9. As to informal boundary agreements, the statutory requirement that contracts for the sale or other disposition of land be in writing does not apply. That is because the purpose of such agreements is to demarcate an unclear boundary referred to in title documents and not to transfer an interest in land.

10. Such agreements are usually oral and the result of neighbours meeting to avoid or resolve a potential or actual dispute. However, there is scope for a boundary agreement to be implied or inferred — that is, to be the logical conclusion to be drawn from primary facts.

11. When bearing these principles in mind as the platform on which to place and examine the facts, a judge should have regard to three further important yardsticks or rules of thumb. These are: (1) when considering any acquisition of property, it is vital to consider what a reasonable layman would think he was buying; (2) every case turns on its own facts; and (3) the task of the court is to assess all available and admissible material in arriving at its answer, and then to achieve the correct answer."

34 The Defendant says – and I accept – that the substance of the Claimants' Primary Claim is based on the premise that the boundary between No.128 and No.132 can be ascertained by reference to the historic conveyancing documents – at any rate by reference to the measurements which the Claimants' Expert undertook to identify where the boundary should have been, based on the conveyancing documents. At para. 2.4 of his report, the Claimants' Expert says this:

"2.4.1 I have reviewed the documentation provided and note that the plan which relates to 132 Lichfield Road and shows plan width has a number of "T" which subject to reviewing the text of the conveyance document, from which this plan was abstracted, would indicate the obligations for the repair and maintenance of the various fences. From this I note that the boundary fence between 132 and 128 Lichfield Road the disputed boundary is the responsibility of the owners of 128 Lichfield Road.

2.4.2 I am advised that, historically, there was no fence between the two properties but a hedge. I am unable to confirm this. I am further advised that at some date which is unknown to me, a fence was erected between the two properties by the owner of 128 Lichfield Road. I also understand the position of this fence was not confirmed or agreed by Mr J Davis or Ms Y J Marsh. I understand that the 2No. fence posts set into the shrubbery to the front garden adjacent to the fence that now exists was constructed by the neighbour without their agreement These posts never formed part of a fence. The boundary was historically a hedge on the line of the disputed boundary. I am also advised that there was a privet hedge to the rear garden on the line of the disputed boundary.

2.4.3 Based on my site inspection it is clear that the fence to the front of the disputed boundary appears to have been erected along a line to the west i.e. towards 128 Lichfield Road, of a straight line from the end of the brick boundary wall to the frontage of 132 Lichfield Road extending along the disputed boundary and positioned at 18,090 (59ft. 4 inches) from the side wall to 134 Lichfield Road. This section of fence is not in a straight line and the fence diverges back in a easterly direction away from 128 Lichfield Road. The fence line continues to deviate back in a easterly direction for the whole of the disputed boundary up to the rear boundary. This can be seen on the sketch plan prepared by me and included in Appendix 4. This is confirmed by the dimensions taken to check the width of the plot of land to 132 Lichfield Road from the side wall of 134 Lichfield Road. This is on the basis that as already stated, in my opinion, if the right-hand / eastern boundary between 132 and 134 Lichfield Road is accepted as the side wall of 134 Lichfield Road then this is a fixed point and will not have been moved or changed position over time. This side wall therefore allows an accurate measurement to be made to establish the position of the disputed left hand / western boundary between 132 and 128 Lichfield Road.

2.4.4 The RED line shown on my sketch drawing in Appendix 5, which is not to scale, shows the position of the disputed boundary if a plot width to 132 Lichfield Road, measured from the side wall to 134 Lichfield Road of 59 ft. 4 inches (18.090 metres) is to be achieved and shows the areas where the fence has been erected incorrectly.

2.4.5 The disputed boundary being located in this position would not reduce the plot width to 128 Lichfield Road at the frontage. The dimensions of 45 ft. 0 inches (13.176 metres) for the frontage of 128 Lichfield Road is shown on DOCUMENT 2 PLAN in Document 2 – The Conveyance dated 16 March 1933. My dimension up to the fence between 128 and 126 Lichfield Road is 14.200 metres (46 ft. 7 inches) which is significantly above the plot width shown on this document. However, the plot width to the remainder of 128 Lichfield Road would be reduced if the disputed boundary is repositioned as shown on my sketch drawing in Appendix 5.

2.4.6 I am of the opinion, but I cannot confirm this, that the reduction in the plot width to less than the dimension shown on DOCUMENT 2 PLAN – The Conveyance dated 16 March 1933 is due to the incorrectly positioned fence between 128 and 126 Lichfield Road. Without confirming that the fence to the boundary between 128 and 126 Lichfield Road is correctly positioned and based on the evidence I have seen in relation to the rear boundary I suspect that this fence is not on the legal boundary to the two properties and adversely affects the plot width to 128 Lichfield Road, I cannot confirm if the dimensions I understand have been given by the owner of 128 Lichfield Road are correct. I have not measured the plot width to 128 Lichfield Road and I cannot confirm the plot width.

2.4.7 However, I am of the opinion that the fence and Car Port to the side of 128 Lichfield Road would need to be relocated closer to that property by:

To the front of the house
18.090
Less 17.854
236 mm (9 inches)

To the rear of the house
18.090
Less 17.880

> 210 mm (8 inches)
>
> to follow based on the above opinion the correct position of the disputed boundary."

35 The plan to the conveyance dated 22 October 1923 created rear and frontages of 90 feet for No.126 and No.128. The next day – on 23 October 1923 – plots 132 and 134 were sold also with the same 90 feet measurement. No.128 came to exist as a plot on 16 March 1933 when it was sold. No.132 came to exist as a separate plot on 24 December 1951, with its frontage measured at 59 feet and 6 inches and the rear at 59 ft and 9 inches. The written description in the conveyance stated:

> "ALL THAT piece or parcel of land fronting for a distances of Fifty nine feet and six inches or thereabouts to Lichfield Road Bloxwich Walsall in the County of Stafford ALL WHICH said piece or parcel of land contains in the whole an area of One thousand four hundred and sixty five square yards or thereabouts and is with the boundaries and abuttals thereof more particularly delineated and described upon the map or plan hereto annexed."

36 The Claimants contend that the measurements appearing in the 1951 Conveyance should be applied to the ground as it is now, on the basis that these show the true position of the boundary. The position of the Defendant is that the current and historic boundary features are the best – or indeed only – indicator of the location of the Disputed Boundary.

37 The Defendant also states that, so far as the Claimants assert that these conveyances demonstrate the true position of the Disputed Boundary, that assertion is flawed. The 1923 conveyances are silent about where the distance of 90 feet was to be measured from. In addition, while the description in the 1951 conveyance identifies what was conveyed by particular reference to the plan annexed to it[5], the

[5] See *Megarry & Wade's Law of Real Property*, 9th Edition, 2019, at para. 5-043: "This is the description of the property. Description by reference to an annexed plan is a common alternative, but is not essential if an accurate verbal description can be given. Very often a conveyance both describes the property verbally and also includes a plan. In that case it is advisable to provide that one or other shall prevail in case of inconsistency. For example, if the plan is expressed to be included 'for the purposes of facilitating identification only' the verbal description will prevail. However, if the property is said to be 'more particularly described in the plan', then the plan will prevail. If the verbal description is insufficient, as by failing to indicate a boundary, the court may have recourse to the

conveyance uses the words "or thereabouts". The Claimants' Expert thought there was nothing in this point, commenting that it was lawyers' language to use such words to leave a margin for errors, particularly where the description of the property conveyed was identified by reference to a denomination as small as an inch.

38 I am not sure that the Claimants' Expert can proffer a view about what lawyers mean when they use terminology of this nature[6]. But even if he is right, it is, I agree with the Defendant, very difficult to ascertain how the boundaries to the various plots were determined at the time when the plots were sold, more so when the plots were built on. The conveyances do not contain any datum points beyond the highway. As the Defendant says, it is possible that in 1923, the boundaries to the various properties may have been demarcated in some way – such as by a string or a fence – so that the purchaser would know the property which was being conveyed to him. However, even in such a case, it is impossible for the court to know where the demarcation was on the ground, especially once the plots were built on.

39 That the requirement is for the location of a disputed boundary to be ascertained by reference to the circumstances which applied at the time when a parcel of land was conveyed is clear from the following passage in the decision of the Court of Appeal in *Pennock v Hodgson* [2010] EWCA Civ 873, at [10] and [12]:

> "The long standing general principles of how to construe a conveyance underpin those points. In Eastwood v. Ashton [1915] AC 900 at 906 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.'
>
> 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

plan, even though it is 'by way of identification only.' In such a case, the court adopts an objective test. Taking into account the surrounding circumstances, including the topography, the language of the conveyance, and the representation of the plan, what would the reasonable lay person think that they were buying?"

[6] See, for example, *Whittemore v Whittemore* (1869) L.R. 8 Eq. 603: small unintentional errors are covered by the description "or thereabouts".

> 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 …
>
> Before the judge and in this court it was agreed that the parties' subjective beliefs about the position of the disputed boundary in this case and about who owned the bed of the stream were extrinsic evidence that was inadmissible in the construction of the relevant conveyance: *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 1 WLR 896 at 913. The effect of the conveyance is not determined by evidence of what the parties to it believed it means, but what, against the relevant objective factual background, they would reasonably have understood it to mean."

(My emphasis).

40 That it is difficult to identify the position of the boundaries to the various properties is evidenced by what the experts themselves say in para. 4 of the joint statement about the location of the boundary between No.126 and No.128:

> "The two experts agree that the legal boundary between 126 and 128 may be located:
>
> (i) On the side gable wall of the house – 126 Lichfield Road
>
> OR
>
> (ii) On the external face of the brick garden wall closest looking the rear patio closet to 126 Lichfield Road
>
> OR
>
> (iii) On the external face of the brick garden wall overlooking the rear patio closet to 128 Lichfield Road
>
> OR
>
> (iv) As claimed by Mr J Punch in the centre to the brick garden wall overlooking the rear patio. Mr G Thompson considers that the boundary could be located within the overall width of this plot."

41 At no stage up to the point when the present dispute arose was any thought given to the location of any of the boundaries that divided the plots conveyed by the historic conveyances. That makes ascertaining the boundaries dividing those properties almost impossible.

42 It must, therefore, follow that reliance upon the historic conveyances alone to identify the Disputed Boundary will not be sufficient and that extrinsic evidence is important in considering the location of the boundary.

43 There is no evidence at all about how the boundaries dividing the various plots were located at the time when the 1923 and subsequent conveyances conveyed those plots. Nor was any thought given to the location of the boundaries when the first registration of these properties was applied for at HM Land Registry. The Land Registry would simply have prepared the filed plans for the properties based on ordnance survey plans, broadly reflecting the plans which were included in the conveyances. There are no photographs or detailed plans from the 1920s and despite the Claimants' Expert suggesting in the course of his evidence that some thought must have been given to it, I cannot see that there was. Nor can the court rely on any topographical features to assist in locating the Disputed Boundary as there are none, i.e., there are no natural features on the ground now which might help to identify the intended boundary position. That was exactly what the Defendant's Expert was alluding to when he said that he could not say where the true location of the Disputed Boundary was. I do not consider that the Claimants' criticism of him on that point is fair. As I understood his evidence, he said that there were far too many uncertainties for him come to the conclusion that the historic conveyances would provide any meaningful indication of where the boundaries to the various properties were located. I agree with him.

44 I also agree with the Defendant that the Claimants' Expert's evidence relies far too much on the plans and descriptions contained in the historic conveyances when there is no evidence that that was how the boundaries between the various plots were demarcated at the time, particularly given that the buildings and other structures on those properties were erected after the plots were conveyed. His opinion is based on the premise that the plans in the two 1923

conveyances provided measurements of 90 feet. His says it can safely be assumed that those measurements were undisputed on the ground and that this is evidenced by the fact that there was no issue about the location of the Disputed Boundary until the First Fence was installed. The measurements may have been undisputed (just as the Claimants did not initially dispute that the erection of the First Fence amounted to an encroachment on their property) but that does not mean that they correctly reflected the measurements in the various conveyances.

45 In short, the Claimants' expert evidence relies upon numerous assumptions, most especially that when the various plots were conveyed in 1923, the boundaries properly reflected the position on the ground. I am unable to accept, in the circumstances which apply in the present case, that those assumptions may properly be made by him.

46 It does also seem to me that the Claimants' expert evidence is not helped by his failure to base his conclusions on a measured plan. The Defendant's Expert based his conclusions on an Advance Survey plan, which was broadly consistent with his opinion that he could not see that there had been an encroachment. I did not understand the Claimants' Expert to be saying that he did not agree with the measurements on that plan. If that is correct, it is difficult to see how any encroachment can be established, particularly if one accepts the evidence of the Defendant's Expert about where it might be appropriate to take the measurements from.

47 The Claimants' Expert states that it is necessary for the court to start with the 1951 conveyance because that conveyance transferred the last plot – No.132 – to the Claimants' predecessors in title. At that stage, the adjoining plots had already been developed. The measurements on the ground must have reflected the terms of that conveyance and, therefore, set out what the plot owners believed the boundaries to their plots were.

48 The approach of the Claimants' Expert to the location of the Disputed Boundary (based on what was described as the "Thompson Plan") was to measure the frontage of No.132 (18.090 metres or 59 feet 4 inches) by reference to the dimensions set out in the 1951 conveyance and to proceed on the basis that, from front to back, No. 132 should have the same width as that frontage measurement. Having then transferred those measurements on to his plan and drawn a straight red line which also ran the same distance (18.090 metres) away from the boundary dividing No.132 from No.134, he then took the width between No.134 and the fence currently erected on the Disputed Boundary and concluded that the position of the current fence is a few centimetres over the position of the red line – by some 236 mm or 9 inches to the front of the house and 210 mm (or 8 inches) to the rear of the house.

49 This methodology can only be correct if, at the time of the erection of the First Fence, the 1951 conveyance correctly reflected the position on the ground. I am not satisfied it did for the reasons already indicated. As I have also said, that was precisely what the Defendant's Expert was alluding to when he said that there was no way of telling whether the boundaries to any of the plots ever reflected the position in the historic conveyances.

50 The Defendant maintains that there are at least seven reasons why the Claimants' expert's evidence cannot be relied upon in support of the Claimants' contention that there was an encroachment. They are set out at para 19 onwards of Mr Nuttall's closing submissions.

51 It is not necessary for me to deal with those submissions at any length – some being of significantly less weight than others. I do, however, agree with the substance of what he says on her behalf.

52 I wholly agree with the Defendant that the Claimants simply cannot establish that the red line in the Thompson plan correctly identifies the intended boundary position between No.128 and No.132.

53 First, the 1951 conveyance, though plainly an appropriate starting point, simply cannot be relied upon as containing measurements which were accurate. I have already alluded to that. That is because it is impossible to know what position obtained on the ground at the time.

54 Second, there are no datum points on the 1951 Conveyance plan. It is impossible to know where the measurements were taken from. The fact that a number of possibilities are postulated in the second agreed joint statement about where the measurements should be taken from is evidence of this fact.

55 Third, it is wrong in principle to calculate the extent of an encroachment by reference to the width of a property and, essentially, to work backwards. As Mr Nuttall pointedly observes in his closing submissions, it is wrong to treat the frontage as the width. The frontage of the plot and the width of the plot may well be different, if for example the side fences are not quite at right angles, are not perfectly straight, or are not quite parallel with one another.

56 One important point which the Claimants' Expert does not refer to – but is important – are the historic concrete posts. Looking at the images of those posts at pages 27, 438, 932 and 933 of the bundle, it is very difficult to understand how there could be an encroachment. If, as appears to be accepted by the Claimant, those posts represented the earliest boundary feature on the ground[7], I cannot see how the First Fence can be said to be encroaching on the Claimants' Property as the First Fence appears to be placed on No.128's behind those posts.

[7] See para.18 of the First Claimant's witness statement in which he says that "Previously the front northern and western boundaries of our property was demarcated by a row of concrete posts." That exact same statement is made by the Second Claimant, also in para.18 of her witness statement.

57 A good starting point about where the Disputed Boundary lay before the present dispute between the parties arose is to consider the evidence of Mr Chell.

58 Mr and Mrs Chell had lived at No.128 from 1978 to 1990 and Mrs Chell had then occupied the property until it was sold to the Defendant, so that would have meant that regardless of the correct location of the boundary between the two properties by reference to the historic conveyances, at least since 1978, the Claimants and Mr and Mrs Chell and then Mrs Chell regarded the then location of the boundary as representing the correct boundary between their properties. If, as the Defendant, maintains, the First Fence did not encroach on that boundary, then the Claimants have no claim in respect of their Primary Claim.

59 Both Claimants state that up until the carport was erected, they had not given any thought to the location of the boundaries dividing the two properties. At para. 17 of his witness statements, the First Claimant (repeated by the Second Claimant in the same paragraph of her witness statement) says this in terms:

> "At the time that we purchased the property in 1976, we did not scrutinise the size elements of the boundaries, although we have since been enforced to consider this ..."

60 Mr Chell gave evidence. Other than his memory – and the memory of the other witnesses' – having faded after such a lengthy period of time, I found his evidence to be both honest and reliable.

61 The substance of what he had to say is summarised in the following two passages of his witness statement:

> Para. 6
>
> "I clearly recall to begin with the driveway was regularly used to access the garage to the rear of the house. However, during my occupation, the aforesaid garage was demolished to make way for an extension to the house. As part of that renovation process the driveway was improved with the limited intention of parking family vehicles to the rear of the property … I cannot comment upon the position of the boundary as it now stands."

Para. 8

"In trying to describe the paved accessway which ran from the front to the rear of the house at No.128 … that ran parallel with the neighbouring property at No.132 … I would reiterate that the accessway was narrow. I would describe the width of the accessway as sufficient for car or trailer as stated. I would describe the width of the accessway was restricted by a chimney serving the dining room on the house side, which protruded from the side of the house by some 10 inches. Furthermore the boundary fence structure between the properties at No.128 and No.132 … consisted to the best of my recollection, of a concrete support post to which was attached to a timber fence post carrying horizontal beams to which was attached feather edge board which would have ingressed over the accessway by a further approximate 9 inches. My best estimate of the overall width from the house wall to the boundary (within No.132) would be the approximate width of my car [6ft] together with a narrow distance on either side.

During my occupancy I can confirm that this boundary fence was never altered."

62 In his oral evidence, Mr Chell confirmed that when he was living at the property, the fence began at or about level with the front of the No.128 house, then went along the rear until it reached the privet hedge.

63 Mr Chell's evidence helps very little in identifying the boundary at the point when he ceased to live at No.128. However, I agree that the Chell boundary structure (which was referred to in the course of the trial as the "Chell fence") has to be the location of the boundary, given, as Mr Chell himself says, at para. 8 of his witness statement, during his occupancy of No.128 the boundary fence in situ was never changed or modified in every way.

64 The question then becomes whether the First Fence was constructed along the area of the Chell fence or whether it somehow encroached into the Claimants' Property. Neither Claimant makes express reference to this in their witness statements.

65 When the First Claimant was asked how he could tell where the Chell fence was, and whether it was closer to their house than No.128, his answer was that he knew because they had been living at No.132 since at least 1976.

66 Mr Chell was unable to remember whether the "pallet" fence identified by the First Claimant was in position at the time he was living at No.128. The most he could say was within the conifers which he identified on page 883 of the bundle were a couple of concrete posts and shrubs and that the concrete posts were some 3 feet high and to those were attached some wooden posts and some feather board fence panels.

67 Much evidence was given about where the position of the Chell fence is likely to have been by reference to matters such as where the chimney breast of No.128 was, where the gates to the properties were installed and how they would close, where and how cars could be parked at the properties and the plans which the Defendant had exhibited to her witness statement which she refers to at paras. 4 and 5 of her witness statement. There is little mention made of this in the written evidence and it is telling that little mention is made of this in the experts' reports or the two joint statements. To the extent that any reference is included in the experts' reports, the experts are at complete variance about what conclusions might be drawn from them.

68 I am unable to be satisfied that any of these matters demonstrate that the Defendant installed the First Fence beyond the extent of the Chell fence. There is no evidence of where the Chell fence was, other than the generic reference to it in Mr Chell's written and oral evidence. The contention on the part of the Claimants that the photographs at pages 889 and 72 show a repositioning of what was alleged to be the Chell fence (and the alleged encroachment) is difficult to see and is based on speculation.

69 There was little assistance I could derive from the evidence of Mr Turner. Plainly, he does not get on with Mr Winner and comments about his and the Defendant's conduct. Those comments are not relevant to the issue I need to determine.

70 The Second Claimant said that that the First Fence was "cockeyed", but the Second Fence straightened this when it was erected. She referred to this being in the region of the historic concrete posts, which she claims Mr Winner removed. The next day, those posts had gone, and she took images of them, which are included in the bundle. I can well understand – having seen him Mr Winner throw dirt into No.132 – why he might do that, but am unable to accept that these posts showed where the Disputed Boundary was. The Claimants' case is also based on how long they have been living at No.132. However, if, as the Claimants allege, the First Fence was not in a straight line, and should have been, one has to question why when they did not complain about it until the dispute between the parties arose. Surely, they must have known that the First Fence was not in the position or path of the Chell boundary.

71 In any event, I consider the Defendant Expert's analysis (by reference to the Advance Survey plan and the images included in the bundle) to be more compelling. He says at para. C of his report that:

> "1. The deed plan dated 16th March 1933 for 128 Lichfield Road clearly shows a measurement of 45 feet (13.716 metres). The Advanced Surveys Limited survey by laser confirms the 45 feet measurement. Given the angle on the road frontage, there may be a slight discrepancy but this will be a few millimetres. The accuracy of laser surveys is stated by manufacturers as being + or – 2mm at 50 metres.
>
> 2. The deed plan Appendix 2 dated 24th December 1951 for 132 Lichfield Road shows a measurement of 59 feet 6 inches or 18.136 metres at the local authority footpath. The Advance Surveys Limited survey shows 60 feet 2 inches. The plan Appendix 5 shows a measurement of 59 feet 6 inches (18.136 metres). The plan Appendix 6 shows 18.090 metres (59 feet 4 inches). I presume the Appendix 5-6 plans were measured using a tape measure. Neither plan gives details of the calibration of the tape measure.
>
> 3 The next point relates to the measurements of 58 feet 8 inches on Appendix 5 and 17.880 metres on Appendix 6 taken between the car port of 128 Lichfield Road and 134 Lichfield Road which I presume is the basis of the claim by the owners of 132. The width in this location is dictated by the gable to 134 and the edge of the car port. If the car port encroaches, it would show as two changes of direction in the fence line at the front and rear of the car port. The Advanced Surveys Limited plan shows the fence line running along the carport to 128 in line with the fence front and rear of the car port and in line with the garden wall.

> 4 In addition to the last paragraph, I measured the rear elevation of the property and confirm the measurement across the plot at the rear of the car port is 45 feet. I also used an uncalibrated tape measure but the Advanced Survey plan gives the same measurement if it is scaled.
>
> 5 Confirmation that the fence is in the correct position can be seen in three photographs of the gates at the front of the car port. The first photograph shows the gates in 2009 when Miss Winner purchased the property. The next two photographs show the gates fitting in the original space following erection of the new fence. As the gates do fit without additional work, the new fence must be in the same position as the old fence.
>
> 6 I understand that 132 Lichfield Road was built in 1952 following 128 in 1933 and 134 in 1938. Unless the car port can be proven to encroach, the boundary has been fixed since 1938. I have seen no evidence to show the car port does encroach. As most gardens, fences move slightly over the years. The fence to 128 varies in position by being too far to the west by between 10 inches and 1 inch but then moves eastwards by 6 inches towards the bottom end of the gardens. I have been informed that the replacement fence was erected in 2010 with the help of the owners of 132."

72 The Defendant's Expert concludes at para. D of his report that:

> "There is no encroachment from 128 Lichfield Road on to 132 Lichfield Road as 128 matches the deed plan measurements. In addition, the fence between the two properties as surveyed by Advanced Surveys shows the fence to be in the correct position. Thirdly, 132 Lichfield Road was constructed some 19 years after 128 Lichfield Road when the boundary had been set. The property on the other side of 132 was constructed in 1938 so again the boundary had been set for 14 years."

I accept the substance of that conclusion.

(B) <u>Second Fence</u>

73 So far as I can see, there is no suggestion on the part of the Claimants, that the Second Fence was constructed by or on behalf of the Defendant beyond the boundary of the Fence First into the Claimants' Property. So far as the Claimants suggest otherwise, there is no evidence to support what they say.

(C) <u>Has there been an encroachment?</u>

74 On the basis of what I have said above, I cannot be satisfied, it being the Claimants' burden to prove encroachment, that there has been an encroachment.

75 On that basis, the Claim must be dismissed, and it is not necessary for me to deal with any of the other issues which arise in relation to the Primary Claim. However, I do so in the event that the Claimants decide to take the matter further.

(D) Boundary Agreement

76 The case most often cited to establish the law relating to boundary agreements is the decision of Megarry J in *Neilson v Poole* (1969) 20 P&CR 909, though the law on that subject has been settled going back several years.

77 Paragraph 303 of Volume 5 of the Fifth Edition of *Halsbury's Laws of England*, summarises the law applicable to boundary agreements in the following terms:

> "Boundaries may be fixed by an agreement made between two or more adjacent owners where their boundaries are not clearly defined or have become lost or confused. In general, such an agreement need not be in writing and, a fortiori, need not be by deed; for, if it was fairly made, it will be presumed that it did not involve any alienation of land but that the boundaries settled were the true and ancient limits. Even where a conveyance apparently conveys a disputed strip of land to one adjoining owner, the erection of a fence or wall by that owner leaving the disputed strip accessible only to the other adjoining owner may be evidence of an express or implied agreement that the boundary is to be represented by that fence or wall. Moreover, the settlement of boundaries is a mutual consideration sufficient to support a contract not made by deed, even where the land is situated out of the jurisdiction."

78 In *Stephenson v Johnson* [2000] E.G, 92, Bennett J said, at [52]:

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

79 The factual finding on the basis of which the first-instance judge ruled that there was a boundary agreement in that case was summarised by Bennett J, at [36]:

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

80 Likewise, in *Acco Properties Ltd v Severn* [2011] EWHC 1632 (Ch), a boundary agreement was found by the court to have existed where there was a sufficient discussion of the boundary for the defendant to understand that the claimants would be cutting down trees on their own land and therefore within their boundary. This was sufficient to plot an entire boundary line, by way of an informal boundary agreement, some distance away from the legal boundary as interpreted from the documents. So far as the boundary agreement in that case had involved the claimants being deprived of any part of their land, the judge ordered that they be compensated for it by the payment to them of the sum of £1000.00 by the Defendant. The amount by which I would have compensated the Claimants in this case if the Claimants had succeeded in establishing that there had been an encroachment is unlikely to have exceeded that figure.

81 It is, of course, for the Defendant to establish that the parties had entered into a boundary agreement. The standard of proof is the usual civil standard of proof – the balance of probabilities.

82 The Defendant is unable to say much about the discussions which took place relating to the construction of the First Fence. She said it was her father who undertook all the discussions, and he did so with the First Claimant.

83 In his witness statement, Mr Winner says this:

> "7 I came round once Aimee had moved in. I met John Davis straight away. I told him and Von [Yvonne Marsh] about our plans to remove all of the remaining old fence and large shrubs. Yvonne and John told me it would be fantastic to have a new fence. John told me that he had to look after the boundary fence for the previous owner Mrs Chell and that it had taken him much time and effort to maintain the shrubs. He said he would be glad not to have to do that anymore, as he told me that he was not responsible for any of the boundaries.
>
> 8 Aimee and I met with the fencing contractor at 128 to discuss what we required. He gave us a quote and told us he would let us know when he would be doing the job.
>
> 9 I kept John updated about matters. I was a little concerned as I live in Spain for part of the year and would be in Spain when the contractors were likely to be doing the job. However, John said he would be there to oversee things. He wanted to ensure that the fence did not damage his CCTV cables which were directly next to the existing fence. I thanked him. He said Yvonne would also be there to move the valuable shrubs near to fence on their side, which she wanted to keep and replant.
>
> 10 The contractors let Aimee know when they would be coming. I told them that John would be there to oversee things, as I would be in Spain. I told John about the date the work would commence. Again he told me he would oversee the work and that Aimee should not worry. Aimee later telephoned me in Spain to reassure me that john and Yvonne were there waiting for the contractors to arrive on the morning and that they had assisted throughout. She also told me that they were happy with the new fence.
>
> 11 I came back to 128 in early 2011. I inspected the fence, as I wanted to make sure it had been done properly. It had been and the contractors had done a very good job. Both sets of gates at 128 and 132 had been rehung in exactly the same position as they had been before the new fence was installed. As far as 128's property was concerned, the gates had been rehung using the existing holes in 128's gable wall.
>
> 12 I remember speaking with John and Von when I returned. They both told me how pleased they were with the new fence and we became good friends. There was no mention of any boundary dispute nor the fence being put in an incorrect position. This was not surprising as the fence was in exactly the same position as the previous fence, as illustrated by the gates being rehung in the existing holes.

84 I do not believe that the Claimants dispute para. 12 of Mr Winner's statement. They appeared to be pleased with the fence and, at no stage, until the carport was constructed, did they appear to object to it, whether in relation to its location, how it looked, the manner in which it was constructed and the material used to do so, or whether, as the First Claimant alleges, it was "cockeyed".

85 There was some dispute about whether (and the extent to which) the First Claimant monitored or supervised the work. The Defendant worked in a nearby school at the time and saw little of what was happening and appeared to pay little interest to what was being done by Mr Alcock. So far as she purported to suggest otherwise, I reject what she says. Mr Winner was on holiday and returned only after the fence had been erected. Neither could, therefore, state whether and, if so, how the works were supervised.

86 The evidence of Mr Alcock was to the effect that the First Claimant did not just supervise the erection of the First Fence but was instrumental in ensuring that it was placed in a manner which both the Claimants and the Defendant understood to be the boundary line dividing the two properties.

87 At para. 4 onwards of his witness statement, Mr Alcock says this what the work he undertook involved and how closely it was monitored by the First Claimant:

> "4 I met with him and Aimee and they explained what they wanted - a fence between Aimee`s property and her neighbours. We agreed a price and I informed Aimee when I would be starting.
>
> 5 There was a fence already in place between the two houses and some original fence posts at the front. There was a hedge from the fence to the bottom of the back garden. The next-door neighbour helped me remove the hedge and the existing fence although we left in one existing fence post to mark the boundary.
>
> 6 I then ran a piece of string from the fence post at the front through the fence post between the houses which we had left in and along the old boundary line to the bottom of the garden. This ensured that the new fence would be in exactly the same place as the existing boundary.
>
> 7 The next-door neighbour was very involved in the work. He assisted by removing unwanted shrubs and the fence panels. He took the old fence panels to the bottom of Aimee's garden where we burnt them. His partner was also there.
>
> 8 The neighbour closely supervised where I was laying the fence as he was anxious to ensure it was in the correct position and the wires on his side of the fence were not damaged.

88 In the course of his oral evidence, Mr Alcock mentioned the following:

(a) that Mr Winner had explained to him precisely what needed to be done in terms of what type of fencing need to be used and its specification;

(b) he had also done some fencing work between the properties at No.128 and No.126.

(c) that it took him some three weeks to complete the fencing to No.128 and No.132

(d) He explained precisely how he carried out the fencing work. Paragraph 6 of his witness statement summarises this.

89 The most crucial part of his evidence was what how closely he said the First Claimant was supervising him. He stated that the "he [that is the First Claimant] was standing over me day in day out for some 6 to 8 hours every day." If that statement is correct, then it is difficult to see how the First Claimant can conceivably assert that the Claimants had not realised that the First Fence encroached on to their property.

90 Mr Alcock said that during the time of the First Claimant's supervision of the fencing, his main concern was to safeguard their electric conduit. Nonetheless, he supervised the entirety of the fencing work, including the positioning of the First Fence.

91 The Defendant's case on this issue was purportedly supported by the written and oral evidence of Kathryn Mills. In her written statement, she said:

> "I can recall many years ago (I cannot recall precisely when because of the passage of time but it has been suggested to me it was about ten years ago which seems correct) looking outside my back bedroom window and seeing two fencing contractors putting up a fence along the whole of the boundary between 132 and 128.
>
> At the time, I was not sure who owned the fence or was responsible for it. Mr Davis was supervising the fencing contractors, telling them where to put the fence and he was helping them remove the privet hedge and a few old fence panels and putting them on a fire at the bottom of Aimee's garden. I thought it strange at the time that he seemed to be directing operations and was in charge of a project but the panels were being dumped on Aimee's land so it appeared to be her fence."

92 However, when she gave oral evidence, she indicated that she could only recall one occasion when she saw the First Claimant observing "down the fence line" and "telling the contractors what to do". She did not hear any conversation between them. There was little of any significance in her evidence that assisted with this issue.

93 But the Claimants dispute what Mr Alcock says. They dispute that there was any supervision of the fencing work by him in the manner he suggests. True it was, they say, the fence looked good and glad they were that a proper fence replaced what had been at there before but they never knew that that the fence had encroached on their property.

94 Whether or not the First Claimant spent 6 to 8 hours a day supervising the work, what is clear to me is that he monitored the fencing work sufficiently to know exactly where it was being erected.

95 There is very little information in the Claimants' witness statements about what conversations took place between the First Clamant and Mr Alcock. First, I would find it remarkable if the First Claimant did not have some knowledge of how the fencing work was being undertaken and where the fence was being erected by Mr Alcock. So far as he suggests that he left matters to Mr Alcock believing that the First Fence would be erected without encroaching into the Claimants' Property, or that he did not know where the fence was being installed, I reject his suggestion.

96 Plainly, the Claimants were happy with the erection of the First Fence, even if they did not, at the time, realise that it might have encroached on to their property. Although they do not say this in their written evidence, the Second Claimant accepted that apart from what she referred to as the "cockeyed bit" of the fence. But, as I have said, she never complained about that part of the fence, which is rather surprising. One would have thought that having lived there as long as she and the First Claimant had, if the First Fence had even slightly

veered towards their property, they would have said something about it. They failed to do so.

97 If the substance of the Mr Alcock's evidence is correct, then it is difficult to see how a boundary agreement could not have come into existence between the parties.

98 But even on the Claimants' own evidence, it is difficult to see how there had not come into force an informal boundary agreement between the parties.

99 In the circumstances, even if I had decided that the Claimants had proved the encroachment, I would have come to the unhesitating conclusion that the Defendant had established that there was an informal boundary agreement between them.

100 In the circumstances, as I have said, the Primary Claim must be dismissed. However, even if I had concluded that the Claimants had established the Claim, I would not have been willing to grant an injunction to the Claimants in the terms sought by them. I do not see how it would be appropriate for me to exercise my discretion in favour of granting an injunction in circumstances where the carport was built in 2015, some five years after the First Fence was installed and has been in situ for some 7 years. Nor can I understand how, based on the extent of the alleged encroachment, could it conceivably be suggested that the Claimants are unable to develop No.132 because of the encroachment. The suggestion made by the Claimants that they might – but for the encroachment – have built an extension on No.132 is unsupported by any evidence. Nor is their allegation that they have lost the ability to enhance the value of their property by £50,000 by building a two-storey extension to it. It is noticeable that in the Particulars of Claim, the claim was provisionally valued at £10,000.

101 On the basis that there can be no claim against the Defendant in trespass, there cannot be a claim against her for aggravated

damages for allegedly annoying the Claimants by placing a scarecrow on her property, which, though reprehensible, and plainly intended to annoy the Claimants, could not be said, by its own, to amount to any actionable wrong against the Defendant. It is difficult to see on what other basis such a claim could succeed.

X THE CLAIMANTS' SUBSIDIARY CLAIM

(A) The claim in nuisance and/or *Rylands v Fletcher*

102 The burden of proving the ingredients necessary to establish a claim in nuisance and/or *Rylands v Fletcher* rests upon the Claimants. The claim has to be established to the usual civil standard of proof – the balance of probabilities.

103 The claim is pleaded in the Claimants' Particulars of Claim in the following terms:

> "12. In 2015 or thereabouts, the Defendant installed guttering on her car port which feeds through a downline into water butts which, when they overflow, discharges water via an overflow pipe positioned in the direction of the Claimants' land. The overflow pipe discharges water directly under the boundary fence which then runs on to No.132.
>
> 13. The storage of water in the water butts amounts to a non-natural user of land.
>
> 14. When the water butts overflow (there being no other means for the water to escape), the water drains away on to No.132.
>
> 15. Further, the matters complained of herein constitute a nuisance caused or permitted by the Defendant.
>
> 16. Further or alternatively, the Defendant owes a duty to the Claimants to ensure that the water stored by her does not run on to the Claimants' land and thereby cause damage to it. The matters of which the complaint is made herein constitute a breach of that duty.
>
> 17. By reason of matters aforesaid, the Claimants' land is damaged and the Claimants have thereby suffered loss and damage:-
>
> (a) pooling of water onto No.132 which has left staining to the surface;
>
> (b) malodorous smells arising from the stale water;

(c) a wisteria plant died due to the extent of the water being discharged onto No.132.

18. Despite correspondence, including a letter of claim dated 13th April, 2016, the Defendant continues to trespass as aforesaid and to permit the discharge of water on to the Claimants' land. The Defendant threatens to continue to act as aforesaid and intends to do so unless restrained by in-junction from doing so."

104 The evidence upon which this head of claim is based is weak and tenuous. Leaving aside the pleading point taken by the Defendant, it appears to be the Claimants' case that an unpleasant smell emanates from No.128, along with water ingress from No.128 onto No.132, including on to the Claimants' garden.

105 It is not clear how many times the ingress of water took place, but it is alleged, on one occasion, to have caused a wisteria plant on No.132 to have died.

106 The Claimants' Expert provides the following opinion about this at para. 2.6 of his report:

"2.6.1 The roof to the car port slopes from the side wall of 128 Lichfield Road towards the disputed boundary. At the bottom of the roof there is a pvc gutter extending from front to back of the car port and this discharges into a downpipe to the rear corner. This downpipe is connected to two plastic drums which collect the rainwater. The two drums are interconnected with a small pipe so that both drums collect rainwater off the roof. Based on the limited inspection that could be undertaken, there is an overflow pipe from the second of these plastic drums which extends along the fence and discharges water directly at the bottom of the fence to the disputed boundary.

2.6.2 Based on this limited inspection it is clear that if the two drums that collect the water are not regularly maintained and emptied and the water removed then a significant amount of rainwater, following heavy rain or similar, would fill both drums and discharge into the overflow pipe and this would then cause water to leak under the fence on to 132 Lichfield Road.

2.6.3 Again, based on a very limited inspection there appears to be little or no provision for drainage from the patio area between the disputed boundary fence and the side wall to 128 Lichfield Road and it is thought likely, although it could not be confirmed without an inspection aft.er heavy rain, that water drained from the slabbed area under the fence adding to the water draining on to 132 Lichfield Road. The slabbed areas to the rear appear to be laid to a slightly higher level than the slabs to the side of 128 Lichfield Road, again restricting drainage.

2.6.4 During my inspection there was some evidence the water draining under the fence on to 132 Lichfield Road was causing some damage to the path. I was advised that Mr J Davis and Ms Y Marsh consider

> the large amounts of water have killed a large shrub adjacent to the affected area, however, I cannot confirm this.

107 I do not consider this evidence to be sufficient to demonstrate that the water escapes from No. 128 on to No.132. Nor can I accept that it causes noxious smell to emanate from the property. The Claimants' Expert makes no reference to the latter point in his report.

108 At paras. 8 and 9 of his report, the Defendant's Expert concludes:

> "8 I was requested to check for any problems with drains, water storage butts and the like which might create a drain smell. I found nothing from a visual inspection nor did I experience a smell.
>
> 9 I was requested to check if the construction of any gutters and downpipes, water storage butts and the paving around the car port could cause water to flow on to the paving of 132. The only issue I could find was that the overflow outlet of the water butt was a small diameter and may cause water to come over the top of the water butt. However, it would be such a small quantity that I do not believe it would cause a problem. I advised that Miss Winner take a video recording during a period of heavy rain to see if there was any other problem. In most cases of storm water problems, they only occur when there is exceptional rainfall and the location of a problem can only be seen at that time."

109 I am bound to say that I agree with the Defendant that, in the absence of evidence showing how the water flows from the Defendant's patio, the rate at which it does so in rainy conditions and that it flows into No.132, it is difficult to see how the Claimants can make good this head of claim. I accordingly dismiss it.

110 So far as the conduct of Mr Winner of throwing waste on to the Claimants' Property is concerned, I consider that is plainly made out. The Defendant sought to distance herself from it, saying, in evidence, that she had not told Mr Winner to behave in that way and, in fact, had specifically warned not to do so in case he was filmed. She expressly denied the allegation in the Defence when, frankly, it must have been obvious to her what he was proposing to do (having apparently warned him not to do it). It is inconceivable that Mr Winner would not have told her what he had done (given his close involvement in this dispute) and the fact that she expressed no remorse when she found out is telling. So far as it is suggested by

the Defendant that she cannot be liable for Mr Winner's actions, I am unable to accept what she says. The Defendant well knew what Mr Winner was doing and, if she did not encourage him, most certainly did not discourage him, from doing so. In the overall scheme of things, this will be of small comfort to the Claimants, but it is right that what may seem trivial to Mr Winner and the Defendant, would not be viewed in the same way by right-minded people. It was disgraceful behaviour of their part and while it appears only to have happened once – and would not warrant the making of an injunction for that reason – it is important that the court makes to clear that if the behaviour continues, the grant of an injunction could be appropriate.

XI CONCLUSION

111 In the circumstances, subject to the claim for throwing waste on to No.132, which must succeed, all the other claims of the Claimants must be dismissed.