

[2019] UKFTT 0049 (PC)

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

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY  
LAND REGISTRATION ACT 2002**

**REF/2017/0662**

**BETWEEN**

**(1) Dr KALYANA RAO BHAJANTRI  
(2) Mrs VYDURYA BAI BHAJANTRI**

**APPLICANTS**

**and**

**(1) Mr STEPHEN CRISPIAN TOMPKIN  
(2) Mrs PATRICIA ANN TOMPKIN**

**RESPONDENTS**

**Property Address: 16 Heathervale, Compton Acres,  
West Bridgford, Nottingham NG2 7ST**

**Title Number: NT225109**

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**ORDER**

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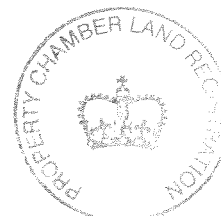
Upon the trial of this Reference

And upon hearing Counsel for the Applicants and the Respondents

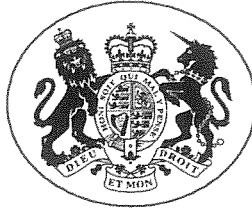
- (1) The Chief Land Registrar is directed to dismiss the Application made by the Applicants dated 17<sup>th</sup> August 2016 in Form DB to determine the exact line of a boundary in respect of title number NT225109, 16 Heathervale, Compton Acres, West Bridgford, Nottingham NG2 7ST, and affecting adjoining property NT225619, 15 Heathervale, Compton Acres, West Bridgford, Nottingham NG2 7ST.
- (2) Pursuant to rule 40(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 I direct that the registrar is to note on the register that the boundary between title number NT225109, 16 Heathervale, Compton Acres, West Bridgford, Nottingham NG2 7ST, and affecting adjoining property NT225619, 15 Heathervale, Compton Acres, West Bridgford, Nottingham NG2 7ST is marked by the eastern face of Post D and the eastern face of Post H as appears on the plan drawn by Mr Andrew Lynch MRICS as Appendix 9 to “Boundary Between 15 and 16 Heathervale Nottingham” dated July 2016, scale 1:100, and is a straight line between these two points and projecting to the point that line meets the northern boundary fence for these properties.

**Dated this 21<sup>st</sup> December 2018**

*Anthony Verduyn*



**BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL**



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**RESPONDENTS**

**Property Address: 16 Heathervale, Compton Acres,  
West Bridgford, Nottingham NG2 7ST**

**Title Number: NT225109**

**Before: Dr Anthony Verduyn sitting as Judge of the Property Chamber of the  
First-tier Tribunal**

**Sitting at: Nottingham Justice Centre, Carrington Street, Nottingham NG2 1EE**

**On: 3<sup>rd</sup> October 2018**

**Applicants represented by Mr Paul Letman of Counsel instructed by Actons Solicitors**

**Respondents represented by Mr Andrew Beaumont of Counsel instructed under the  
Direct Access scheme**

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## DECISION

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### INTRODUCTION

1. On 17<sup>th</sup> August 2016 the Applicants made application to determine the exact line of a boundary between their home, 16 Heathervale, Compton Acres, West Bridgford, Nottingham NG2 7ST (registered title number NT225109 - “No.16” below) and the Respondents’ property to its immediate east, 15 Heathervale (registered title number NT225619 - “No.15” below). In support of the application, the Applicants filed an expert witness report from Mr Andrew Lynch MRICS dated 24<sup>th</sup> May 2016 and a supplementary report from him dated 25<sup>th</sup> July 2016. Notwithstanding a direction permitting the Respondents to obtain their own expert evidence, they have not done so. There is no real dispute that the plans prepared by Mr Lynch are accurate, save that the location of the original fence posts is imprecise, and no contrary evidence has been presented by the Respondents. Mr Lynch is eminently well qualified to produce the plan he did, and I accept its content, but it is Mr Lynch’s opinion as to the location of the boundary that is the central issue. That is a matter of assessment of the evidence, and the Respondents have urged upon me that, absent sufficient evidence for the location of the boundary, a determined boundary cannot be registered. If there is sufficient evidence, however, then the primary role of the Tribunal is to decide whether the Applicants’ asserted case is correct. If so, the application must be allowed. If not, the Tribunal may, but need not, go on to determine where the boundary is located (following Lowe v William Davis [2018] UKUT 208).
2. The two properties were developed as part of a large estate by Bovis Homes Limited in the late 1980s. I had the benefit of a site view. No.16 and No.15 are large detached houses with gardens, served by a single driveway. No.16 enjoys a right of way over the portion of the driveway located within the title of No.15 (and No.15 a right of way over a small portion of No.16 for manoeuvring). The properties are currently divided by a fence erected in May 2016. To the rear gardens and between the houses, this is located over the line of the original fence (itself much repaired and in some parts replaced since first

installed at about the time the houses were built). How precise the new line followed the old is in issue. Between the front gardens, there use to be shrubs in a bullet shaped bed between the building line and up to the drive surface, and then beyond that driveway a broad a grass verge with some trees and shrubs. In May 2016, though, the fence was erected as a boundary feature across this area.

## BACKGROUND

3. Both properties were built at or about the same time. The first to be sold was No.16 on 12<sup>th</sup> May 1988, and the transferees were Christopher Robin Nowicki and Colette Nowicki. This transfer of part of the estate is accordingly the “Operative Conveyance” for the creation of the boundary in issue between the Applicants’ property as sold and what was then land retained by Bovis Homes Limited. No.15 was sold on 10<sup>th</sup> June 1988, and the transferees were Richard Shaun Leighton and Patricia Ann Leighton.
4. No.15 was sold on 15<sup>th</sup> August 1990 to the Second Respondent, then known as Patricia Adams (and subsequently transferred into joint names of the Respondents in 1996).
5. No.16 was sold to the Applicants on 25<sup>th</sup> August 1992.
6. From about 2005 the Respondents replaced some decaying posts to the fence between the rear gardens using “Metposts”. These are metal sleeves inserted around the rotten buried part of the fence post and then attached, typically above ground, to the replacement post; hence, it appears, capable of replicating the location of the former fence post. Panels were also replaced as necessary. For convenience I shall still refer to this fencing as the “original fence”, as opposed to the “current fence”, and notwithstanding some replacement of its parts.
7. In or about 2014 the Respondents informed the Applicants of their intention to replace the original fence and extend the fencing between the front gardens of the two properties to either side of the driveway. The next year landscaping and plant removal became controversial and proposals for the fence were postponed as the boundary became contentious. It is unnecessary to explore the history of this dispute.

8. In any event, on 24<sup>th</sup> May 2016 Mr Lynch provided a report for the Applicants. On 20<sup>th</sup> and 21<sup>st</sup> June 2016 the Respondents' contractors removed the original fence and erected the current fence, then on 25<sup>th</sup> July 2016 Mr Lynch provided a supplemental report address the location of the current fence. The application to HM Land Registry for a determined boundary followed on 17<sup>th</sup> August 2016.
9. The Operative Conveyance transferred the land described in the First Schedule and termed "the Property". The First Schedule refers to:

"ALL THAT the land shown edged red and numbered 10/10 on the plan annexed hereto TOGETHER WITH the dwelling and garage erected there on or on part thereof and known or intended to be known as number 16 Heathervale".

The plan is titled "Deed Plan" dated July 1987 and has a stated scale of 1:500. It identifies 17 houses outlined in bold, with fine lines and pecked lines indicating substantial features and insubstantial or perhaps notional features, respectively. T marks are used, and I note the terms of Clause 3(a) of the Operative Conveyance:

"3. THE TRANSFEREE hereby further covenants with the Company [i.e. Bovis Homes Limited] that the Transferee will:- (a) maintain and keep in good repair the boundary markers walls and fences on the side or sides of the property as are shown marked "T" within the boundary on the plan annexed hereto".

I also note a declaration:

"(c) that any boundary markers walls and fences save those marked with a "T" on the said plan and save any flank walls of buildings which do not abut upon any adjoining buildings dividing the Property from any adjoining land included in the Estate are party boundary markers walls and fences and maintainable and repairable accordingly"

On the plan, No.16 did not have a T mark against the relevant boundary, but No.15 did.

10. The conveyance for No.15 is in identical terms to the Operative Conveyance in all relevant parts (save in respect of plot identification and house number) and used the same plan, save with different boundaries marked out in red. The T mark burdened No.15 in respect of the relevant boundary.

#### THE LEGAL FRAMEWORK

11. I was directed to several authorities by Counsel to the parties, many of which also refer to other important statements of the law relating to boundaries. The Applicants' Counsel particularly referred me to an extensive summary of the relevant law by Mr Nicholas Strauss QC, sitting as a Deputy High Court Judge, in Network Rail Infrastructure Ltd v Freemont Ltd and another (unreported) 20<sup>th</sup> June 2013 at [26] and following. This was a case on the construction of the demise in a lease, but to which freehold construction principles equally apply.

12. It is well-recognised that the principles of construction of contracts apply to parcels clauses, subject to the qualification that:

“documents granting or transferring interest in land will often have been drafted on the basis of principles, or approaches, laid down by courts and referred to and relied on in textbooks, over the years.” (Adam v. Shrewsbury [2006] 1 P.&C. R. 474; also see Drake v. Fripp [2011] EWCA Civ. 1279 at [4])

13. In general, it follows that regard may be had to any relevant background material known or reasonably available to both contracting parties (Network Rail at [28] citing Lord Hoffmann in B.C.C.I v. Ali [2002] 1 A.C. 251 at [39]), but subject, as explained in Lewison on The Interpretation of Contracts (6th ed. at §11.04 n.38), to the proposition that:

“in the case of a document like a conveyance which will pass from hand to hand the reasonable reader would only place weight on background facts that are unlikely to change; such as the physical features of the land conveyed.”

14. The case law considered in detail in Network Rail at [32]-[34] dealt with cases where the plan was “for identification purposes only”, including the well-known and much cited case of Pennock v Hodgson [2010] EWCA Civ 873, where Mummery L.J. stated:

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

15. Nicholas Strauss QC in Network Rail at [33], [35] and [36] also considered cases that dealt with plans stated to be definitive, and cases where the status of the plan is less clear like Devon Cameron v. Angel Boggiano, Craig Robertson [2012] EWCA Civ 157. He summarised the latter case as follows at [37]-[39]:

“The difficulty in that case arose because the plan showed a boundary on one side of the strip of gravel, whereas on the ground it appeared to be on the other. The contract and the transfer referred to the property as a building at a stated address coloured pink on Plan A and the adjoining court yard area in front of it coloured blue. The plans were not stated as being “for identification only”, but nor were there any words indicating expressly that the plans defined the property.

In practice, the plan was not sufficiently clear:

“63. Where the lack of sufficient clarity is in a plan marked “for identification only” it is, in my view, easier to justify regard to the topography to assist in construing the contract/transfer plan than in a case like this where the plan was not so designated and has been prepared as a defining document. Even so, if that document is insufficiently clear to the reasonable layman with the plan in his hand to determine the position of the boundary [...], the court is entitled to seek assistance on the construction of the plan and title documents by taking account of the topographical features at the relevant date.”



The Court of Appeal reversed the decision of the trial judge, who had held that the boundary was defined by the plan, on the basis that the plan, even if intended to define the boundaries, was insufficiently clear. Mummery L. J. referred to previous authority [...] and explained his decision as follows:- [...]

“65. I agree that Plan A was part of the transaction agreed between Blueperch and the claimant and that, as such, it cannot be altered by the court. The issue for the court on construction is to identify what was agreed by the parties about the boundaries of the transaction land. In that exercise the transaction plan must, as experts sometimes say, be contextualised. It was not entered into and is not to be construed in a vacuum. In more mundane terms this means that the reasonable layman would go to the property with the plan in his hand to see what he is buying. The reasonable layman is not a qualified surveyor or a lawyer. If the plan is not, on its own, sufficiently clear to the reasonable layman to fix the boundaries of the property in question, topographical features may be used to clarify and construe it.”

16. With this analysis, Rimer LJ agreed (as cited in Network Rail at [40]):

“The transfer transferred the land ‘on the attached plan ... coloured pink and blue’. It did not say that the plan was ‘for the purposes of identification only’, a formula that, for the purpose of identifying on the ground the limits of the land transferred, ordinarily gives predominance to the verbal description of the land. It instead identified the land only by reference to the colouring on Plan A and so gave the plan predominance for the purpose of identifying on the ground the limits of what was being transferred. As a conveyancing technique, that is fine if the plan is a carefully drawn one that readily enables the relevant boundaries to be identified. If Plan A were such a plan and showed beyond reasonable question that the line of the northern boundary was along the line of the southern flank wall of No 60, that would probably be the end of the construction inquiry.”

17. Nicholas Strauss QC in Network rail at [41] drew the strands of all the cases together as follows:

“The result of these authorities appears to me to be that, where the wording of the contract or transfer indicates that the plan is not merely for the purposes of identification, but is intended to define the property, it will normally take precedence

over a verbal description, and over any physical features of the property, unless it is not clear enough to show where the boundary lies. If it is not, the court must decide where the boundary lines by reference to all the available material including not only the plan, but also any relevant verbal description and physical features of the property.”

18. The latter was emphasised in Drake v Fripp at [11], where regard was had to stockproof fencing obligations as indicative of the boundary at [12]. A similar point arose in the case of Seeckts v Derwent [2004] EWCA Civ 393, where T marks were decisively taken into account by Carnwath LJ at [28]-[29]. I do note, however, the warning of Patten LJ in the case of Lanfear v Chandler [2013] EWCA Civ 1497 at [16]:

“[Carnwath LJ] recognised that there is a common and well-established practice of using “T” marks to identify the ownership of the wall or fence marking the boundary. That is undoubtedly a relevant factor to keep in mind when construing a conveyance by reference to a plan which incorporates “T” marks. But whether it is determinative of the boundary depends upon balancing it against the other relevant terms of the conveyance and the features of the plan coupled, when appropriate, with evidence of the position on the ground. The task of the court is to decide by reference to all these elements how the conveyance or transfer should be construed. All are relevant but none is necessarily conclusive. To say that the use of “T” marks raises a presumption of law (even a rebuttable one) that the boundary feature belongs to the adjoining landowner indicated by the use of the marks seems to me to be wrong in principle and in effect to pre-empt the process of construction on which the court is engaged.”

19. Finally, I note the words of Butler-Sloss L.J. Toplis v Green [1992] EGCS 20, (endorsed by the Court of Appeal in Seeckts v Derwent):

“In taking the objective approach, one looks at the language used in the contract, the content of the plan and in the context the facts relating to the *locus in quo* [...]. The question, therefore, is: what would the reasonable layman think he was in fact buying?”

## THE EXPERT EVIDENCE OF MR LYNCH

20. Mr Lynch's first report is dated 24<sup>th</sup> May 2016 and related to a site inspection before the original fence was removed. He had access to both gardens, but because of the dilapidated state of the original fence did not attempt precise measurements of the location of its posts. In other respects, the plan he prepared of the features is exemplary as to detail and unchallenged as to its accuracy. I accept the accuracy of those parts of his plan accordingly.
21. Mr Lynch considered the other evidence available from documents relating to the boundary. In respect of the Deed plans for the two properties, he noted they were identical and dated July 1987, almost a year before the Operative Conveyance. He considered the statement that the plans were to a scale of 1:500 to be incorrect, although he does not offer an alternative scale. The Deed plans he considered to have been a developer's design layout later utilised in the sales. This gave rise to a "regular problem in housing developments; the design plan is used as an as-built drawing when it should not be." He then set out the inaccuracies: the distance between No.15 and No.16 is shown larger than in reality; access roads are not in the same position relative to houses; and, the garage to No.16 is drawn closer to the house than in reality. Other features are not as drawn at all: a line links the north-east corner of No.16 to the western wall of No.15, when no such fence or wall exists, only a small fence and gate between the chimney breast of No.16 and the wall of No.15; and, an "L-shaped" feature on No.16 terminates some 2.5 metres from the drawn location. The houses at the properties are not quite parallel. In cross-examination at the hearing he could not state precise distances between the respective walls, but assert accuracy of the measurements taken to 2 mm.
22. Mr Lynch having taken account of the issues he identifies with the Deed plans provides an opinion whereby he assumes that the intention was to have a boundary which divides the space between the houses equally (and, necessarily therefore, not quite parallel with either house). He also adopts a straight-line. Such a line is close a kink in the fence line to the southern boundary of both properties (Point Y) where two posts are side by side (Post C and Post D).

23. Mr Lynch considered evidence from photographs and physical features. As to the original fence, he was told this had been replaced over the years, but generally along the same line. He considered this represented the solid line on the Deed plans and No.16's occupiers had unrestricted access up to it from their rear garden. The kink at the southern boundary (Point Y) comprises two concrete fence posts (Post C and Post D), the respective responsibilities of No.16 and No.15 based on the T Marks. His red line for the boundary is 16mm from the divide between these posts (and to the No.16 side). Only a 2mm adjustment of the line passing between the houses would cause his red line to meet Point Y exactly. Post C at Point Y is to No.16's side of Point Y, and in his opinion was not intended to accommodate the boundary because it was orientated to serve the rear garden fence. The original fence slotted in to the adjacent Post D to No.15's side and ran to Post H between the houses (Post H also supports the small fence closing the gap to the house at No.16 – Fence E – and supports the rear garden gate to No.15). The gate closing to Post H was the standard rear garden gate for the development as a whole, and the posts between the houses were also standard ones. Post H cannot be equidistant between the houses and accommodate the gate, so it is 91cm from the post against the wall of the house at No.15 (Post I), but 67 cm from the similar post against the house at No.16. Post H has Fence E across the drive side of it and returning slightly to enclose it in part.
24. Although Mr Lynch's line puts Post H on No.16's land, he justifies this as a practical way of accommodating the rear garden gate to No.15. He notes the rear gardens being separated by the boundary feature of the dilapidated fence, which is not quite on his line. Long-standing possession to each side of this would resolving any title issues in his opinion. He rejected projecting the line of the dilapidated fence to give the boundary to the frontages because the Deed plans were not accurate and the fence was not constructed on the line that bisects the houses precisely.
25. A gas pipe runs behind the Post I, which attached No.15's gate to the side of the house, and Mr Lynch is uncertain whether the post was moved to accommodate this pipe. The Respondents' evidence is that the original brackets allowed this to be fitted without relocating the post, and they exhibit a letter from the heating engineer who installed it to that effect. I accept this evidence relating to the pipe following inspection.

26. Another feature of note in the report of Mr Lynch is the “bullet shaped” flower bed projecting into the driveway and dividing the driveways serving the garage to No.15 and a parking space to No.16. This was laid to shrubs, but not by way of boundary features in his opinion. The Apex, “R”, was not bisected by Mr Lynch’s boundary line, which he draws slightly further to No.16’s side as a continuation of his equidistant line between the houses. This line then continues across the driveway and verge.
27. Mr Lynch provided a supplemental report dated 25<sup>th</sup> July 2016, the dilapidated original fence having now been replaced with the current fencing. He could not comment whether the current fence precisely followed the line of the original fence, but this was generally the case. He records that his report had not been disclosed at the time that the new fence was erected and in the frontage areas it diverged further towards No.16’s side than his line. Mr Lynch was unimpressed at the loss of the open plan frontages and Apex R was lost as a feature.
28. Mr Lynch helpfully attended the site inspection the day before the hearing. Some of the post holes of the original fence had been exposed, and were well defined as concrete had been inserted when the original wooden posts were installed. These were not plotted, but near Point Y the post holes appeared central to the current fence, albeit the holes mid-garden appeared central over slightly off centre to No.15’s side. In evidence at the hearing, Mr Lynch stated that the posts of the original fence were not exactly in a straight line, and he preferred to take a line bisecting the houses, than adopting Point Y as a boundary feature. In most respects, Mr Lynch’s oral evidence did not add or detract from his reports.

#### THE LAY WITNESS EVIDENCE

29. A good deal of the Statements of Case, appended documents and witness statements from lay witnesses dwell on the course of the dispute between the parties and rival contentions being advanced, rather than evidence for the boundary itself. I will not recount this material. It was not material and rightly not tested in cross examination. Neither do I give any weight to letters and plans from surveyors who have not been relied upon pursuant to

directions or called to give evidence. I have not read (and not been invited to read) the portion of the trial bundle comprising without prejudice correspondence.

30. Dr Bhajantri, the First Applicant, gave evidence at the hearing. He commented in his witness statement that the original fence was somewhat irregular in its line, but was not a focus for his attention. He knew works were done to it by the Respondents, but could not comment whether replacement parts followed the former line. There was a good deal of material about the history of the dispute, but he was rightly not cross-examined on this as it could not assist me. In cross-examination he confirmed that he did not know whether the former post holes to original fence were in line.
31. Ms Achsah Mrudula Bai Bhajantri, the daughter of the Applicants, also gave evidence. She stated that the original fence was not in a straight line. She suggested that visual appearance indicated that Post D was a replacement post, matching rear garden posts to No.15. Posts between Post D and Post H, along the original fence, were smaller than the terminal posts. Replacement parts had given the original fence a variety of colours of panels and was much dilapidated in the 4 or 5 years before it was replaced. In cross-examination she explained that she had not examined the lowest portion of the posts or their concrete footings, which were concealed in the ground, but the posts had always appeared a little irregular in angle at least.
32. I accept the witness evidence for the Applicants, such as it was. Dr Bhajantri and his daughter gave straight-forward evidence in a sensible manner. That evidence went to the original fence not appearing to them to be straight, but it does not really assist in identifying to what extent the original fence did not follow a precisely straight line at its footings.
33. Mrs Patricia Tompkin, the Second Respondent, gave evidence. The main purpose of her individual statement was to recount a discussion she had with Mr Nowicki, the original purchaser of No.16. He was adamant that the fence was in situ at purchase. He refused to provide a statement, apparently not being keen to be involved (although, somewhat surprisingly, stated he would be willing to give oral evidence).

34. Mrs Tompkin also signed a joint statement with her husband, and this detailed their exclusive maintenance of the original fence and its replacement.
35. In cross-examination, Mrs Tompkin referred to her purchase of No.15 from Mr Leighton in 1990, and explained that she had not inquired of him about the boundary. The property was still new. When the fence had become dilapidated and posts were replaced, two contractors were used; one of whom had since died and Mr Barr was to be called to give evidence. Repairs stopped when the need for replacement became obvious. Her husband, who was said to be too unwell to attend the hearing, and the contractors were left to do the work. She agreed that Fence E and Post H were original. A surveyor had been retained for the marking out of the location of the replacement fence, which had been pegged out, but erection was done by contractors who were unsupervised.
36. As with the Applicants' witnesses, I have no difficulty in accepting that Mrs Tompkin was giving me an honest account of the events as she witnessed them. She, too, presented as a sensible and careful witness of fact.
37. I was invited to read statements of two other purchasers from Bovis Homes Limited, Mrs Meakins of 5 Heathervale, and Ms Johnson, of 2 Heathervale. Neither offered any assistance in determining the boundary in question, nor can their experiences at purchase (which were not recounted in any sufficient detail) shed any light on matters.
38. Mr Stuart Barr gave evidence. He installed Metposts when replacing fence posts in the original fence. In cross-examination he explained he did this in respect of 3 or 4 posts, and others may have been replaced by competitor traders, but he did not know. The concrete footing was always undisturbed and would have been very hard to move at all. Metposts can be adjusted as they are installed, since they may misalign when being inserted, depending on the skill of the installer.
39. I accept the evidence of Mr Barr. He had no special interest in the case and gave an instructive and balanced account of the work that he did.

## THE PARTIES' SUBMISSIONS

40. I have had the benefit of cogent skeleton arguments and submissions from both Counsel. Each addressed matters of law set out above.
41. On behalf of the Applicants, I was invited to find a straight-line boundary as identified by Mr Lynch. The straight-line can be adduced from the Deed plans, and it runs from Point Y, where the rear boundary lines kink, midway between the houses and marginally west of Apex R. The Deed plans are to be treated as definitive, given the description and the provisions as to boundary maintenance. The Deed plans are said to be supported by extrinsic evidence: including the line being very close on the ground to Point Y when projected from the bisected space between the houses; the dilapidated fence not appearing to be fixed centrally to Post H in Mr Lynch's photograph 9; and, Fence E wrapping around Post H. The only reason for Post H being off centre was to accommodate No.15's gate. The houses may not be quite parallel, but bisecting the space avoids preferring one to the other.
42. In respect of the Respondents' case, the Applicants observe that the original fence does not appear to have been straight and its line is not sufficiently in evidence. Indeed, the purchaser of No.16 may reasonably have assumed that Post H belonged with it. One should not look to it to define the boundary accordingly. The common intention must have been to abide by the Deeds plan and the laying out of the development. The T marks cannot be used to gift one owner a fence, if it were placed in the wrong location, and give rise to no more than an inference as to the boundary; by contrast, the Deeds and especially their plans are definitive.
43. On behalf of the Respondents, the Tribunal was reminded of the requirements for a measured plan under the Regulations made pursuant to the Land Registration Act 2002. Mr Lynch's opinion is specifically asserted to be inadequate as the requisite evidence for the boundary. He is challenged on the basis that the Deed plans are of too small a scale for the analysis he makes of them; in particular, to support a conclusion that the houses were even drawn as parallel. That could just be a function of reduction in sizing. Further he is criticised for preferring an assumption as to fairness (or reasonableness) to other



evidence. It is fairness that is used to justify a line equidistant between the houses, and preferred to the features on the ground, in particular the original fence. If fairness was in the mind of Bovis Homes Limited at all, then it may have taken account of the plot for No.16 being the larger, and the division between the houses therefore being in No.15's favour. Insofar as fairness moves from an assumption to a presumption, it is disputed, as is Mr Lynch's expertise to comment upon it. Absent evidence to support the application, the application ought to be dismissed under the regulations.

44. The Respondents' positive case is that the fence predated the Operative Conveyance. It was required by planning permission (details being required in advance of development under a permission dated 9<sup>th</sup> October 1986) and its pre-existence is supported by the hearsay evidence from Mr Nowicki. It is also a likely circumstance and there is no evidence to the contrary. This is also consistent with the parcels clause giving a general description without stating that the plan is more particular or definitive; an approach supported by Network Rail. The "reasonable laymen" approach under Topliss v Green is to be adopted: the Tribunal is invited to consider the current fence to be on the location of the old, especially at Post D and Post H, and by virtue of the T marks to be part of No.15. This approach to the fence is also the most likely inference of the intentions of Bovis Homes Limited; especially given the location and incorporation of the gate. The original fence was close to straight and terminated at Post D; unlike Mr Lynch's line 16mm from Point Y (albeit thereby favouring the Respondents very slightly in the rear garden, and Applicants to the front garden). Adverse possession can also be pressed into service to support the established line of the fence in the rear garden.

45. In closing it was also observed on behalf of the Respondents that in correspondence the solicitors to the Applicants had looked at fences for guidance (as early as 10<sup>th</sup> September 2015). Now to prefer a theoretical line to the features is "to put the cart before the horse". That theoretical line, if adjusted very slightly between the houses has a significant impact at its ends. The original fence should be taken as the boundary line, as this best reflects the intention of the parties at the time of the Operative Conveyance. This may be contrasted with the intention of the draftsman when he drew the layout plan, later harnessed as a conveyance plan, which was directed at laying out and not legal interests.

## ANALYSIS

46. This Tribunal must determine the objective intention of the parties to the Operative Conveyance in order to locate the boundary in issue. The starting point is the Operative Conveyance itself, and the plan contained as part of it. The fact that the plan was not created for this purpose, but as a layout plan prior to building out the development does not, of itself, reduce the significance of the details shown thereon. It is, however, a relevant factor in explaining why some details on the plan are not matched on the ground.
47. In the case of the Operative Conveyance, the plan is not subordinated to the text. Neither, for that matter, is the plan expressly elevated to definitive status. The reality, though, is that the description in the parcels clause would lack any detail at all were it not for the reference to the plan. In this context, therefore, due weight must be given to that plan.
48. The Operative Conveyance must also be considered as a whole, and in its factual context, that means that the T marks and their express purpose relating to boundary fencing and related features must also be given consideration.
49. I find that the Deed plan does offer some important guidance in respect of the boundary in issue. It is indicative that the boundary line is intended to be straight. It also indicates that the line at its southern tip is located at Point Y, bisects the houses and passes just west of Apex R. I do not, however, find that it is sufficiently precise to identify where the southern tip reached Point Y, whether the houses are bisected equally, or how far from Apex R the line passes to its west. The plan is too far reduced for such precision and the copies available to the Tribunal and Mr Lynch are themselves HM Land Registry copies of documents that may have been either originals or copies of the conveyance, with plans reduced from the earlier layout plan, hence at least a few or more generations from that original. No original of the Deed plan or its parent layout plan is available. When there is added to this history the departures identified by Mr Lynch between layout plan and build out of the development, it becomes even more apparent that the Deed plan cannot be taken in itself as definitive of the legal boundary. It is unlikely that the parties intended such a plan to be definitive, also. Mr Lynch accepts the plan was not so precise as to be definitive, and I find rightly so.

50. It is necessary therefore to turn to extrinsic evidence. Notwithstanding the criticism of Mr Lynch made by the Respondents, it is clear that he too looked at extrinsic evidence which is appropriately referred to in his report. Mr Lynch, however, did not form his opinion on the basis of extrinsic evidence, but preferred to make an assessment of what he considered to be fair or reasonable. Here I depart from his approach. Attractive though it is to make an equal division between the houses to arrive at a line, the problems this gives rise to are apparent from an examination of his resulting plan (Appendix 9 to his first report) and its mismatch to features on the ground: the line is fractionally west of Point Y but, more importantly, a little to the east of Post H and even the part of Fence E wrapped around Post H. This result may be subjectively fair in Mr Lynch's opinion, but it suggests a boundary fence to be maintained by the owners of No.15 should overlap part of the Post C that appears to be the responsibility of No.16. It also means the rear garden gate to No.15 closes over, and is secured to a post wholly on, No.16. The result is curious, especially when one considers that the space between the houses was plainly intended to facilitate access to the rear of No.15, when No.16 had a similar gate but to the far side of its house. No 16 was afforded access to the western wall of its house, but fair or otherwise, more space in that location was required by No.15 and the physical features were arranged to accommodate this need.

51. In respect of the fence along the boundary, I also take account of the terms of the Operative Conveyance which placed no burden upon No.16 in this regard, and anticipated correctly that the obligation to maintain what would be a boundary fence in this location was to be thrust upon the purchaser of No.15. I accept that Clause 3(a) of each conveyance only required the maintenance and keeping in good repair boundary fences marked with a "T" when they were "within the boundary on the plan annexed", so a wrongly located fence on a neighbour's land could in theory be disavowed by the party bearing the nominal burden, but the implication of the wording is clear: the burden of maintaining boundary features was to be allocated in a practical and clear fashion by reference to the plan. The features thus identified with a "T" were likely to be on the land of the burdened party.

52. Put another way, I find that the Deed plan is inadequate in itself (it lacks, for example, measurements or a workable scale), and I ask myself what a reasonable layman would

think he was buying at the purchase of No.16? The answer, I find, is the rear garden up to the line of the original fence. Whilst the evidence for the existence of the fence at the date of the Operative Conveyance is not over-whelming, I find that the fence was more probably than not erected prior to the sale of No.16. That was the hearsay evidence of Mr Nowicki, and I accept the evidence of Mrs Tompkin to that effect. She gave her evidence clearly and competently, and I do not doubt, having seen her at the hearing, that she was telling me the truth. It is also likely in any event: the planning permission required fences to be erected and the sale of an unenclosed plot on a development site (and adjacent to the unsold No.15), is inherently improbable.

53. Further the line of the original fence is supported by important features on the ground: There is photographic evidence that the original fence slotted in to a groove in post D. This is the post marking the south-west corner of the rear garden of No.15 and touching Post C at Point Y. It is entirely logical that this post should represent the corner, since it is where fence with T marks burdening No.15 meet. Ms Achsah Mrudula Bai Bhajantri suggests the post in this location may not be the original, but if not, I find it was located in the same place as there was no space for deviation relevant to the boundary in issue (Post C prevented any relocation towards No.16). The effect is that point Y is the boundary as the outer side of the fence that was the responsibility of No.15 under the Operative Conveyance, and consequently Post C which serves the rear garden fence to No.16, and is No.16's responsibility, is wholly on its title (which is a minor departure from the line adopted by Mr Lynch at this location).

54. The original fence then proceeded north to Post H and I consider that this post is properly a part of the boundary fence to be maintained by No.15. I find that this is consistent with the available evidence regarding that post: the photograph from above shows the original fence attached to the post and although it is not clear that the fence is centred on it, when the photograph was taken the fence was very dilapidated so I do not consider that decisive. The gate to the rear garden of No.15 has always closed to Post H. Although Fence E of No.16 runs across the northern face of Post H and wraps around it, I do not consider that this displaces the other features sufficient to share the post between the properties, let alone treat the post as belonging to No.16. Fence E no doubt is entitled to be supported from Post H after the passage of time, but I do not consider the superficial

wrapping around of Fence E to Post H is sufficient to displace its obvious functions to mark the division between the access to the rear garden of No.15 from the strip of ground belonging to No.16 and to support the original fence. No.15 overwhelmingly benefits from the use of Post H and it is right that it's owners should maintain the same as part of that property.

55. The original fence was not plotted at its footings on the plans of Mr Lynch, and at full height I accept the evidence of the Dr Bhajantri and his daughter that it appeared not to be straight. I find that any departure from the straight line between Post D (effectively at its midpoint, but the boundary being to its eastern face) and Post H (also with the boundary at its eastern face) was minimal and such as to be disregarded by the Tribunal. Further, I do not doubt that if the fence had been removed before tensions mounted between the parties, there would have been no argument but that a replacement would have been erected on a straight line as I have described with panels running from Post D to Post H.

56. This line would then be projected, undeviating, across the "bullet shaped" flowerbed somewhat to the east of the red line drawn by Mr Lynch. Assuming, as would seem to be the case, that just such a line was taken by the current fence, then its outer face correctly marks the boundary.

#### CONCLUSION

57. Having considered the totality of the evidence and given due weight to the Deed plan, such as it was, the Applicants' application for the boundary to be determined in accordance with Mr Lynch's red line accordingly fails. I find the boundary line as set out above. The boundary is marked by the eastern face of the current fence posts as drawn by Mr Lynch as Posts D and H on Appendix 9 and is a straight-line projection between and to the north of them. The measurements Mr Lynch has provided do not relate to the boundary as I find it and it seems to me that the proper course in this case is to note my findings upon the registered titles but then leave matters in the hands of the Respondents: they can decide whether to invite Mr Lynch to provide revised dimensions for the boundary and make their own application for a determined boundary accordingly.

58. In respect of costs from the date of the reference to the Tribunal on 10<sup>th</sup> July 2017, these should usually follow the event, meaning that the costs of the successful Respondents should be paid by the Applicants, unless some good reason can be given for doing otherwise. The Tribunal does not make orders in respect of costs incurred before the date of the reference. It follows that the costs of expert evidence not relied upon by the Respondents will be irrecoverable, as well as the correspondence with HM Land Registry concerning the case summary used when the application was referred to the Tribunal. Attendance of Counsel at the site view and hearing was appropriate, but it is not apparent from the bundle that the Respondents other costs will be substantial, since they relate to witnesses of fact. The Respondents should provide a schedule of the relevant costs to the Tribunal and the Applicants within 28 days of the date of the Order in this case. If the parties can agree the Respondents' costs they should do so. If not, the Applicants should provide any objection in principle to the award of costs, or any objection to any items comprising costs, or the scale of costs in general or individually by item, to the Tribunal and the Respondents within 21 days thereafter. Any reply by the Respondents to the Applicant's submissions should be made to the Tribunal and copied to the Applicant within 7 days thereafter. The decision on costs will then be made on the papers.

**Dated this 21<sup>st</sup> December 2018**

*Anthony Verduyn*



**BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST-TIER TRIBUNAL**