



[2018] UKFTT 575 (PC)

REF/2016/0481

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

**BETWEEN**

**DAWN KARINA MAY  
RICHARD ANDREW JURGA**

**APPLICANTS**

**and**

**ANTHONY JAMES ILES  
DEBORAH LOUISE ILES**

**RESPONDENTS**

**Property Address: Land on the south side of 25 Winterbourne Bassett,  
Swindon, SN4 9QB**

**Title Numbers: WT280643, WT181395, WT280643, WT232775**

**Before: Judge Owen Rhys**

**Sitting at: Swindon Magistrates Court**

**On: 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> July 2018**

**Applicant representation:** Mr Matthew Wales of Counsel instructed by BLB Solicitors  
**Respondent representation:** Mr Ewan Paton of Counsel instructed by Royds Wither King Solicitors

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**DECISION**

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1. The Applicants are the registered proprietors of titles WT280643 and WT275943. WT275943 is known as 35 Winterbourne Bassett and WT280643 was purchased as an additional parcel of land lying to the south and west of 35 Winterbourne

Bassett. Although the titles remain separate, the land comprised in both titles has been combined, with WT280643 forming an additional garden area. I shall refer to WT275943 and, where the context admits, also to the combined area, as no.35. I shall refer to WT280643 as “the Paddock” when it is necessary to distinguish it from the combined area. The Respondents are the registered proprietors of titles WT181395 and WT232775. WT181395 is known as Lanes Cottage, Winterbourne Bassett (“Lanes Cottage”), and WT232775 is a small triangular piece of land that lies on the eastern side of Lanes Cottage and is registered with a possessory title (“the possessory land”). By an application made on 8<sup>th</sup> September 2015, the Applicants applied to the Land Registry to determine the exact line of the boundary between the parties’ respective titles. There are two areas of dispute. First, the boundary between Lanes Cottage and the Paddock. Secondly the boundary between the possessory land and no. 35. The parties have dubbed these “Area 1” and “Area 2”. The principal dispute relates to Area 1, which is a considerably longer stretch of boundary. The dispute was referred to the Tribunal on 28<sup>th</sup> June 2016.

2. The Applicants were first registered as owners of no. 35 on 31<sup>st</sup> December 2008, and of the Paddock on 21<sup>st</sup> May 2009. The possessory land was first registered on 6<sup>th</sup> September 2004 in the name of the former owner of Lanes Cottage, Dr John Yates. The Respondents became registered proprietors of Lanes Cottage and the possessory land on 23<sup>rd</sup> January 2015.
3. The physical situation of the various titles is as follows. Winterbourne Bassett is a small Wiltshire village south of Swindon, lying along a country lane that runs north-west from the main A391 road. Lanes Cottage and no.35 are at the extreme western end of the village, no.35 situated just to the east of Lanes Cottage. As it happens, both houses – Lanes Cottage and no.35 – have been constructed relatively recently, but on the site of pre-existing buildings which have been demolished. In relation to Lanes Cottage in particular, this has made the task of ascertaining the relevant boundaries slightly more complicated, since the original building has been removed.

4. The Area 1 boundary is the common boundary between WT280643 and WT181395. The title plans for each title are based on different editions of the Ordnance Survey but the position of the common boundary is more or less the same. On the ground, there is at present a physical feature on or close to the apparent registered boundary. This is a very substantial beech hedge, which has grown into a line of trees. There have also been several fences in the area, to the east of the line of trees, but these have been removed and replaced over the years as I shall explain. The Area 2 boundary is formed where the eastern end of the possessory land abuts the western end of WT275943. The area is rough and overgrown, and the only physical feature in the general area of the boundary is the existing post and mesh fence in the position shown on the experts' plans.
5. Before I outline the parties' respective contentions as to the true boundary line, I shall set out the conveyancing history of the titles.

(1) **WT275943**. No.35 was first registered on 5<sup>th</sup> November 2008 – the Applicants being the first registered proprietors. It appears that prior to the sale to the Applicants it was in the occupation of an elderly lady, Miss Hilary Wright, who was said to be something of a recluse. The title was unregistered when the possessory land was removed from it and registered in the name of Dr and Mrs Yates (see below). It had formed part of the land owned by Garnet Horton and conveyed in 1940 – see below.

(2) **WT9071**. This title includes the farm and buildings known as Rabson Manor and first registered under title number WT9071 on 2<sup>nd</sup> February 1966. The first registered proprietors were William Kenneth Horton and Marilyn Dorcas Horton, who had acquired the title by virtue of a Conveyance dated 25<sup>th</sup> March 1965 and made between Hosier Estates Company (1) and the Hortons (2). This conveyance was preceded by a Conveyance dated 8<sup>th</sup> January 1940 and made between Garnet Horton (1) and Gaunts Estates Company (2) (“the 1940 Conveyance”) whereby some 595 acres of the Winterbourne Bassett Estate were sold. It is not known whether Hosier Estates Company was a renamed Gaunts Estates Company, or a purchaser from it, but that is not of importance. The sale in

1940 included the land now known as Rabson Manor, including Ordnance Survey enclosure no.65, being Rabson West Field comprising 101.662 acres of “Arable”. The sale also included (as part of enclosure no.46) the cottage known as no.35, namely WT275943. However, there was excluded from it the land and buildings now comprised in WT181395, namely Lanes Cottage. For reasons that I shall expand on in due course, it is common ground that the physical boundary that existed in 1940 between Lanes Cottage and Rabson West Field – or at least the line of that boundary if it no longer exists – will have fixed the legal boundary between the two titles. The evidence suggests that the Horton family continued to farm the land after the sale in 1940, as tenants rather than owners.

- (3) **WT280643 – The Paddock**. This formed part of WT9071 (specifically part of the former Rabson West Field) and was sold to the Applicants by the Hortons on 14<sup>th</sup> May 2009. The conveyancing files of both vendors’ and purchasers’ solicitors have been disclosed and form part of the evidence in this case. The sale was negotiated between Mr George Horton (on behalf of his parents) and Ms May, and I have heard evidence from both of them as to the discussions that they had. It is part of the Respondents’ case that the Area 1 boundary was agreed between them to lie along the line of a post and barbed wire fence then in position. This is denied by the Applicants and is an issue of fact which I shall have to resolve. On the face of it, however, the land transferred to the Applicants was described by reference to a plan attached to the TP1 and thereon edged red. The plan is derived from the Land Registry Index Map plan which is itself derived from the Ordnance Survey. The red edging delineates an elongated isosceles triangle, forming the northernmost section of Rabson West Field where it adjoins no.35. The apex of the triangle abuts the south-eastern corner of WT275943, and the base forms the disputed Area 1 boundary with Lanes Cottage. In the TP1, the Applicants entered into elaborate overage provisions, and also covenanted to erect a stockproof fence along the line A-B shown on the plan. Point A

is the south-western corner of the land, adjacent to the south-eastern corner of WT181395 (Lanes Cottage), and Point B the western point of the land (i.e the apex of the triangle). The effect is to fence the area sold to the Applicants from Rabson West Field, creating a straight line boundary to the north of the field in place of the previous diagonal boundary.

- (4) **WT232775 – “the Possessory Land”**. This was the subject of a successful application for a possessory title by the then owner of Lanes Cottage. The statutory declaration supporting the application was made by Dr Yates on 28<sup>th</sup> August 2004. The area of land claimed was marked on a plan, being the title plan for Lanes Cottage, and was defined as “the Red Land”. It delineates a triangle at the eastern end of the title, where it adjoins no.35. The statutory declaration states that; *“In January 1982 we levelled the ground of the Red Land grassed it over, planted a rose and hawthorn hedge along the boundary marked A B on the plan, two May trees and many bulbs. Since that date we have continued to and still regularly cultivate the land.”*
- (5) **WT181395 – “Lanes Cottage”**. The title documentation is not complete. However, it is the Respondents’ case that the property was owned by Garnet Horton and retained out of the sale to Gaunts Estate Company in 1940. This was the unchallenged evidence of Mr William Horton, the son of Austin Horton, who became the tenant of Rabson Farm after the sale, and I accept it. Accordingly, both parties accept that the critical date is 1940, when Lanes Cottage and Rabson Farm ceased to be in common ownership and the titles were split. The legal boundary existing in 1940 would therefore constitute the current boundary, subject of course to any subsequent variations.
- (6) It appears from the statutory declaration of Richard Horton that his wife Joyce Evelyn Horton (confusingly known in the family as “Jim”) bought the property in 1954, presumably from Garnet Horton. William Horton gave evidence to the effect that Joyce had lived at Lanes Cottage prior to

this time, having converted the cottage into one dwelling some time after the war. Originally there were two semi-detached cottages which were used by farm workers. It is possible, therefore, that Joyce had been a tenant of Lanes Cottage prior to 1954. In 1981 Lanes Cottage was sold to Dr and Mrs Yates but the conveyance has not been produced. The title was first registered on 6<sup>th</sup> September 2004, at the same time as the possessory land was first registered. The title was acquired by the Respondents from Bernard Gulley on 23<sup>rd</sup> January 2015.

### **THE DISPUTE**

6. As previously stated, the Applicants have applied to the Land Registry in Form DB for the determination of the exact boundary between WT181395 and WT280643 (the Area 1 boundary) and between WT232775 and WT275943 (the Area 2 boundary). The application was supported by a plan identifying the proposed line of the boundary. This lies to the west of the line of beech trees which is the obvious physical feature in this area. The Applicants' Statement of Case provides some further explanation, derived from the report dated 29<sup>th</sup> July 2015 of Mr John Naish FRICS. He explained that the line A-B shown on the DB plan follows the line of a timber fence that had previously been erected just to the west of the trees, but had since been removed. This fence was, it is said, attached to a timber building which was still present. Mr Naish opined that this line was consistent with the boundaries shown on the Ordnance Survey and title plans. Accordingly, this was the boundary line originally claimed by the Applicants. In relation to the Area 2 boundary the two candidates are either an existing post and wire/mesh fence, or a notional parallel line somewhat to the west.
7. The Respondents, in their original objection to the DB application, contended that the true line of the Area 1 boundary had been marked by a post and barbed wire fence that lay to the east of the line of trees. It was stated that this fence was in existence at the date of the purchase of the Paddock by the Applicants in 2009, and was the intended western boundary at the time of the sale by the Hortons. In their Statement of Case, the principal argument appears to be that there was a binding, oral boundary agreement made (between 2001 and 2008) between Dr

Yates on the one hand, and George Horton (representing his parents) on the other, that the legal boundary between the two properties was represented by the barbed wire fence that has been referred to. This is the red line A-B shown on the survey plan drawn up by the Respondents' expert, Ms Julia Stolle annexed to the Statement of Case. In the alternative, the Respondents contended that prior to the boundary agreement there was another fence on a slightly different line, farther to the west but still to the east of the beech trees, and this was the true boundary between the two parcels. This fence is in the position A-E shown on Ms Stolle's plan 1B. In her report, Ms Stolle took issue with the approach of Mr Naish, stating that the margin of error when scaling up from small scale Ordnance Survey (and thus Land Registry) plans was so great as to render any such exercise worthless.

8. By the time that the dispute came on for hearing the parties' positions had been clarified somewhat. I shall consider the Applicants' position, as indicated by Mr Wales's Skeleton Argument. Paragraph 19 reads as follows: "*In the circumstances, the Applicants seek a determination that the boundary in section A runs along (1) line AB as per Mr Naish's drawing 3715.04. alternatively (2) the mid-line of the line of beech trees, in the further alternative (3) a line 3 feet to the east of the mid-line of the beech trees.*" Mr Paton, for the Respondents, drew attention to the fact that the Skeleton Argument departed from the initial application, and from the argument put forward in the Statement of Case, in that two additional possible boundary lines were put forward. I shall consider in due course whether this presents any jurisdictional issues. However, it should be recorded that the Mr Paton, for the Respondents, did not take serious issue with this departure from the pleaded case. It is not uncommon in determined boundary references for the case to evolve as more evidence emerges, and the Respondents' position, to their credit, was that they wanted the issue of the boundary to be settled once and for all and did not wish to raise technical objections which, in all probability, would have failed in any event. For their part, the Respondents put forward three possible boundary lines, being Options 3, 4 and 5 as explained in Mr Paton's closing submissions, in reverse order of preference. Their primary case (Option 5) remains that the true boundary is marked by the line of the barbed

wire fence erected prior to the sale of the Paddock to the Applicants. They contend that this was an agreed boundary line and although “*not a classic and explicit “boundary” agreement*” (Mr Paton’s words) nevertheless took effect as one. Their secondary case (Option 4) is that the boundary lies some 2-3 feet east of the line of trees. This is based on evidence given by Mr William Horton to the effect that the line of beech trees was planted inside a garden fence that previously existed. It is also the position of the barbed wire fence that existed before it was moved during Dr Yates’s ownership of Lanes Cottage. It may be noted that this possible boundary line is the same as the Applicants’ second alternative contention. Their third and least favoured option (Option 3) is that the line of beech trees constitutes the boundary but belongs to Lanes Cottage in its entirety.

## **THE PRINCIPLES OF CONSTRUCTION**

9. Before I do so, I shall set out the legal framework for the determination of the boundary. Fortunately, there is no dispute between Counsel as to the principles to be applied, although they use different authorities by way of illustration. Mr Wales cites the following passage from the judgment of HHJ Barker QC (sitting as a High Court Judge) in ACCO Properties Ltd v Severn [2011] EWHC 1352 (Ch):

“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."

This is as good a summary as any, although with the greatest respect to the learned Judge, I am not clear as to the meaning of the first numbered point. As a matter of unregistered conveyancing, the phrase "*more particularly described on*

*the plan*” gives greater prominence to the lines drawn on a conveyance plan than would be the case if the plan had been introduced with the words “*for the purposes of identification only*”. However, in relation to registered conveyancing, the boundaries shown on the filed plan are always general boundaries unless they are determined boundaries – see section 60 of the Land Registration Act 2002. Even if the boundaries were “more particularly delineated” on a plan annexed to the conveyance leading to first registration, the filed plan boundaries would still be general boundaries.

10. In establishing the principles to be adopted, for his part Mr Paton cites the well-known passage from the judgment of Mummery LJ in Pennock v Hodgson [2010] EWCA (Civ) 873 at paras.9-11, in which the exercise is summarised (in para.12) as follows:

*“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.”*

He also submitted (para.23 of the Skeleton) that “*while mere subjective beliefs as to boundaries in themselves are not probative of anything, the subsequent conduct of the relevant parties could be admissible and probative evidence as to the boundary:.....*” In this context, the case of Ali v Lane [2006] EWCA (Civ) 1532 provides definitive guidance as to the uses and limitations of conduct as an aid to construction.

11. I would summarise the position as follows. On a referred application for a determined boundary, the Tribunal’s task is to examine the pre-registration title documents, in the light of the admissible evidence, primarily evidence of the physical features on the ground at the relevant date or dates, and in the light of admissible evidence seek to ascertain the parties’ intentions as to the precise boundary line. Direct evidence of a party’s subjective intention is not admissible. A determined boundary is necessarily more precise than the general boundaries

shown on the filed plans created on first registration. In view of certain issues relating to this Tribunal's jurisdiction, as identified by recent cases in the Upper Tribunal, and considered by Morgan J in Lowe and Lowe v William Davis Limited [2018] UKUT 206 (TCC), I should make it clear that neither side took any point as to the accuracy of the plans prepared by the respective experts. In other words, each of the parties' proposed precise boundary lines is accurately depicted on one or other of the plans attached to the reports of the respective experts.

12. Although, as I have indicated, the initial DB application in relation to Area 1 claimed a different boundary line, the Respondents did not suggest that the Applicants were bound to maintain that line even if (as here) evidence came to light which suggested a different line. The jurisprudence relating to a determined boundary application seems to have become unnecessarily complicated. It is possible to take a more straightforward view of the jurisdiction conferred by Rules 118 to 120 of the Land Registration Rules 2003. Once the Land Registry accepts the DB application it must notify the adjoining owners under rule 119(1). If objections to the proposed boundary line are received, and those objections cannot be resolved, the dispute must be referred to the Tribunal under section 73(7) to be resolved. The dispute, it seems to me, is the identification of the exact line of the boundary. Once the Tribunal is seised of the matter, and consistent both with the overriding objective, and authorities such as Jayasinghe v Liyanage [2010] EWHC 265 (Ch) and Chief Land Registrar v Silkstone & ors [2011] EWCA Civ 801, it must hear the evidence and reach its own conclusion as to the true boundary line. It would be perverse to reject the application in its entirety on the grounds that the evidence did not support the boundary identified in the DB application, if the same evidence was sufficient to establish on the balance of probabilities a different boundary line, sufficiently identified on a plan that could satisfy the Land Registry's requirements. However, this might have an impact on the eventual order for costs.

## **THE ISSUES OF FACT**

13. These are relatively straightforward. I shall first consider Area 1.

- (1) For the reasons that have been explained, it is necessary to make findings as to the physical appearance of the boundary as it existed in 1940.
- (2) It is the Respondents' case that, regardless of the original position of the boundary, at some point prior to the Applicants' purchase of the Paddock, a boundary agreement had been reached between Dr Yates and the Hortons whereby the post and wire fence (line A-B on Ms Stolle's Plan 1B) became the new agreed boundary line. I shall have to make findings with regard to this alleged agreement.
- (3) The Applicants acquired the Paddock in 2009, and that parcel of land was hived off from the existing title, namely WT9071 (Rabson Farm). It is the Respondents' case that there was an agreement between the Applicants (in the person of Ms May) and the vendors (in the person of George Horton) that the boundary of the Paddock would be along the line of the post and wire fence (see above). I shall have to make findings with regard to the discussions at the time of the sale.
- (4) The post and wire fence is no longer in place, having been removed by the Applicants. However, its exact position is known, because the Applicants commissioned a topographical survey at the time of their purchase in 2009 which is in evidence, and has been relied upon by the experts in this case.
- (5) There has been a recent history of confrontation between the parties and at least one incident where the police were involved. However, there is no purpose in considering these matters. Neither the Applicants nor the Respondents can assist the Tribunal in its task of ascertaining the historic boundary, since they did not come onto the scene until 2008 and 2014 respectively. Both Counsel sensibly agreed that the evidence relating to these issues should not be canvassed at the hearing and I do not propose to consider them further.

14. With regard to the Area 2 boundary, the principal factual issue relates to the extent of the land in the possession of Dr Yates at the date of his application for possessory title. The Possessory Land necessarily encompasses all the land referred to in the Statutory Declaration dated 28<sup>th</sup> August 2004 which led to the

registration. This is what he said: “*In January 1982 we levelled the ground of the Red Land grassed it over, planted a rose and hawthorn hedge along the boundary marked A B on the plan, two May trees and many bulbs. Since that date we have continued to and still regularly cultivate the land.*” I must therefore make a finding of fact as to the extent of the land described and its relationship to the boundary contended for the parties.

15. Both the Applicants gave evidence, and they also called Dr Michael John Yates. Mr Iles gave evidence, as did Mr George Horton and Mr William Horton on behalf of the Respondents. They had all made one or more witness statements upon which they were cross-examined. The Applicants also relied on a statement of William John Cummins but he did not attend the hearing. The Respondents relied on a statement of Mr Bernard Gulley but again he did not attend. In addition to the lay witnesses, I heard from the parties’ expert surveyors, Mr John Naish for the Applicants and Ms Julia Stolle for the Respondents.
16. By the time that closing submissions were made, Mr Wales was promoting the centre line of the beech trees as his primary case. His argument, in a nutshell, was as follows. Prior to 1940, Lanes Cottage and Rabson Farm were in common ownership – namely that of Garnet Horton. Ordnance Surveys dating back to 1886 show Lanes Cottage as separated from Rabson West Field by a solid line. As a matter of mapping convention, this indicates some form of physical boundary feature. By virtue of the 1940 Conveyance, the ownership of Rabson Farm (and therefore Rabson West Field) and Lanes Cottage diverged. The conveyance of Rabson West Field was made by reference to its OS enclosure number – Rabson West Field being OS 65. The parcels were “*for the purposes of identification only more particularly delineated and coloured pink on the plan ...*”. Again, the plan shows a solid line around OS 65 which, consistent with the 1923 edition of the Ordnance Survey, must be the same solid line that is drawn around Lanes Cottage. If, therefore, it were possible to identify the physical feature which was reflected on the Ordnance Survey map, it would be possible to identify the exact boundary that existed in 1940. In this regard Mr Wales relied on the well-known case of Fisher v Winch [1939] K.B 666. He also drew my attention to the Land Registry Practice Guide 40 relating to title plans and the OS

mapping upon which they are based. He referred to the “hierarchy” of physical boundary features, which is reflected in the last bullet point of paragraph 4 of the Guide. In simple terms, if there are two adjacent physical “boundary” features, the OS map will “*show the feature that ..... appears more important (for example if there is a wall or hedge next to a stock fence, then it is the wall or hedge that would be the surveyed feature.*” Once that boundary could be established, it would carry through to first registration, and would form the boundary shown on the filed plan. Subject to any subsequent boundary agreement or other adjustment, therefore, that would be the boundary of the Paddock when acquired by the Applicants from the Hortons. The key element in this analysis is, therefore, is to ascertain line of the dominant physical boundary feature as it existed in 1940.

## **THE EVIDENCE**

### **Mr William Horton**

17. The only living witness who could have been in a position to recall the boundaries in 1940 was Mr William Horton, who made a witness statement on which the Respondents relied, and upon which he was cross-examined. As I have said, he was the son of Austin Horton who took a tenancy of Rabson Farm after the sale by Garnet Horton in 1940. He was born in 1930 and was therefore 9 years of age at the date of the 1940 Conveyance. In his witness statement he says this:

*“6. Just before Father, Austin Horton, became tenant, Garnet Horton sold Rabson Manor farm to Colonel Richard Glen. Garnet retained two farm cottages for loyal old farm employees. Sometime after the war Joyce Horton, his niece, converted the two cottages into one and named it Lanes Cottage. The Lanes field (OS 65) was always arable in those days. The only fence was the garden fence which marked the boundary. Joyce Horton planted beech all the way round Lanes Cottage separating it from the lane at Winterbourne Bassett and our surrounding fields.*

*7. The beeches were planted well inside The Lanes (now Lanes Cottage) boundaries. I would say Joyce planted them a good 3 feet back from the edge*

*of Lanes Cottage land. Our field boundary fence was (the boundary of the part of the field that now forms the Applicants' land and is one of the boundaries in dispute in these proceedings) about a further 3 feet away from where Joyce planted the beech. At no time were beech trees on our land.*

*8. The field boundary was at all times a post and wire fence that was in position on all sides. It was therefore absolute nonsense to say that the boundary between Lanes Cottage and the Applicants' land (formerly part of our field) is behind the beech trees lining up with the corner of the outbuilding."*

18. The statement suggests that the beech hedge was planted by Joyce Horton well within the garden fence boundary. Furthermore, it appears to contain a contradiction. In paragraph 6 Mr Horton says that the only fence that he can recall was the "garden fence which marked the boundary". In paragraph 7 he says that "*The field boundary was at all times a post and wire fence that was in position on all sides.*" By the date of the hearing, and of course long after the statement had been made, an additional piece of evidence came to light. This was an aerial photograph (versions of which are contained at 441a-h in the Bundle) taken in 1946. This clearly shows the existence of a thick hedge around Lanes Cottage in precisely the position that is shown on the Ordnance Survey of 1886, 1900 and 1923. This photograph had been produced very late in the day, even though, Mr Wales informed me, his clients had been in possession of it for some time. There was of course no suggestion that the photograph was anything but authentic, but it seems that Ms Day did not understand its significance. Mr Paton, on behalf of the Respondent, formally objected to the late admission of this evidence, but recognised I think that it would be perverse to exclude such material evidence. In the event, I allowed the Applicants to rely on the photograph. In cases where past boundary features are unknown or obscure, aerial photographs can be of value, and this is just such a case. Mr Horton was cross-examined (and re-examined) on his statement, and the photograph was put to him. Given that he was being asked to cast his mind back to a time 78 years ago, to describe the appearance of one short stretch of boundary on a 500-acre farm, it is scarcely surprising, and entirely understandable, that he should have a

somewhat vague recollection of the relevant features. However, the aerial photograph did prompt him to recall some new information. He fully accepted that there had been a hedge around the cottages now known as Lanes Cottage. He said that his aunt Joyce had spent many years converting the two workers' cottages into one dwelling. As part of that process she had removed the existing hedge, and replanted a line of beech trees in the same position, pointing out that it was much easier to plant into ground which had already been cultivated than to break new ground. He did say that he recalled a wooden fence separating the gardens of the two cottages, and also that there was a fence outside the original hedge. Although he told Mr Paton in re-examination that this was some 3 feet outside the line of the hedge, he had said in cross-examination that the hedge was broken down in places, and indeed that the hedge had grown through it in others. My strong impression was that Mr Horton had only a very sketchy recollection of the fence and its appearance. He also accepted that the field adjoining Lanes Cottage was in arable cultivation in 1940, and remained so until some years later, when it was turned over to grazing. He said that the field would be cropped to a point about three feet from the hedge around Lanes Cottage – the hedge, rather than any fence. He also accepted that the embankment which has formed at the southern end of the line of beech trees was probably the result of ploughing operations over a number of years, in that the earth is piled up where the plough or tractor turns around the boundary obstruction.

19. At some point Rabson West Field became used for livestock. Mr Horton was not clear when this occurred, but it may be noted that the field was still described as arable at the time of the 1965 Conveyance. It was at this time that the stockproof fences were erected. Mr Horton recollected that these were about 3 feet away from the line of beeches. He was not aware that all the fences had subsequently been re-positioned, a matter to which his son George refers in his evidence.
20. My assessment of Mr William Horton is that he was doing his best to recall the boundary features, but understandably had considerable difficulty in recalling the details given the length of time that has elapsed since 1940 and his young age at that time. However, once the 1946 photograph had been shown to him, he was able to recall some more details. Critically, perhaps, he recalled that Joyce



Horton had grubbed up the existing beech hedge, and replaced it with new planting but along the same line. He was not able to and did not maintain the evidence given in his witness statement, that *“The beeches were planted well inside The Lanes (now Lanes Cottage) boundaries. I would say Joyce planted them a good 3 feet back from the edge of Lanes Cottage land.”* On the contrary, he clearly regarded the hedge as the boundary since the field would be ploughed to within three feet of it, with no mention of any boundary fence. Having heard his evidence, which is consistent with the aerial photograph, I conclude that the obvious physical boundary feature at the date of the 1940 Conveyance was the line of beech hedge, which was on the same line as the existing line of trees. The planting dates referred to by Dr Moir are consistent with Mr Horton’s evidence, in that the Joyce’s re-planting may well have taken place in the late 1950s or early 1960s. Since there is no suggestion that Dr Yates carried out any further planting after he bought Lanes Cottage in 1981, it would appear that Joyce Horton must have planted further trees immediately before the sale – this would be consistent with the finding that the trees in the second phase of planting date back to the late 1970s.

**Dr Michael Yates**

21. Furthermore, Dr Yates, the purchaser of Lanes Cottage from Joyce Horton and her husband in 1981, has always treated the line of beech trees as belonging to Rabson Farm. Dr Yates made a witness statement which the Applicants relied upon, and upon which he was cross-examined and re-examined. His statement includes the following:

*“3. Dealing firstly with the beech trees, I always considered the line of trees to mark the boundary. I owned land on the Lanes Cottage side and the neighbouring farmer owned the land on the other side. In keeping with this I employed a contractor to trim the trees on my side, but did not trim the other side*

*4. I was friendly with George Horton, the son of the owners of the farm, and I remember saying to George words to the effect of “sorry, I’ve trimmed my*

*side but I've not touched your side". I distinctly recall George saying something like "that's okay. I think the trees are mine anyway."*

*5. I was aware that beyond the beech trees there was a strip of land and then a fence running more or less parallel to the trees. When I first owned Lanes Cottage cattle were kept on the field, and I always considered the fence to be a cattle fence and not a boundary fence.*

*6. Occasionally I might step between the trees to dump grass or other cuttings beyond the line of the trees, but other than that I never accessed the field side of the hedge. I never carried out maintenance of the trees on the field side, and I certainly never asked George Horton or anyone else to move the cattle fence. Nor did I discuss with George Horton or anyone else from the Horton family that I owned or ought to own any land on their side of the beech trees."*

22. In relation to Area 2, Dr Yates was the only person who could give evidence as to the area which he had adversely possessed and for which he obtained a possessory title in 2004. He had of course made a Statutory Declaration upon which his successful application was based. He identified the area in question ("the Red Land") with red edging on the attached plan. This forms a triangle, with the eastern boundary line running south from the point at which the road bends on its southern side. He says: "*In January 1982 we levelled the ground of the Red Land grassed it over, planted a rose and hawthorn hedge along the boundary marked A-B on the Plan, two May trees and many bulbs. Since that date we have continued to and still regularly cultivate the Red Land.*" In his witness statement in these proceedings he gives further details. In particular he stated that when he bought Lanes Cottage, it could be accessed from the road by a driveway at the eastern end to which he refers as "the Back Drive". During his ownership he installed a five bar gate where the Back Drive met the road. He adds (at paragraph 9): "*I am confident that the eastern boundary of the Triangle was never defined on the ground. I did not put up a fence or plant a hedge or anything to physically separate the Triangle from 35 Winterbourne Bassett. The area was overgrown and I liked it that way. However I cultivated the land up to*

*the far post supporting the five bar gate, which is approximately where the red line is drawn on the plan to my Statutory Declaration.”*

23. Unsurprisingly, Dr Yates was cross-examined extensively on his statement. He was first asked about a letter he had written to the Respondents’ solicitor on 23<sup>rd</sup> June 2016, in response to a request by her for information regarding the disputed boundaries. He replied: *“I have no recollection of the boundaries you describe and have no intention of getting involved in any dispute”*. He was disarmingly frank in his answer. He said that he had moved away from Winterbourne Bassett and was making a new life for himself in Marlborough, and had no desire to be embroiled in a boundary dispute relating to the house he had left in 2008. The statement that he had no recollection of the boundaries was designed to discourage further enquiry but was not, however, true. Indeed, he had a very good recollection of his time at Lanes Cottage. For example, he recalled the exact occasion on which the statutory declaration of Richard Horton was made, on 10<sup>th</sup> December 1981, on the same day as Dr Yates purchased Lanes Cottage from Mr Horton’s wife. He recalled that he was pulled out of a hospital clinic (he was a medical professional) in order to approve the declaration. However, he did not depart from his written evidence and was in no doubt that the line of beech trees was treated both by himself and George Horton as the legal boundary. When he moved there in 1981 there was a barbed wire fence on the Hortons’ side of the trees to keep their stock away from the trees. He referred to the conversation with George Horton when the latter said that he thought he owned the trees. He had confessed to George Horton that on occasions he would enter the field through the trees and deposit grass cuttings there. Mr Horton told him *“that I need not feel guilty”*. Indeed, he told Dr Yates that he could continue to dump his cuttings there. He recalled the occasion when Mr Horton replaced the original barbed wire fence with a new fence slightly further east – away from the trees. Mr Horton discussed it with him, and moved the fence back to give Dr Yates access to the area beyond the trees. According to him, there was no discussion about boundaries – they were both aware that the line of trees constituted the boundary and the fence served a different purpose, to retain the farm stock. He had always trimmed his side of the trees, and Mr Horton the other side.

24. He was cross-examined on the Property Information Form that he had completed when he sold Lanes Cottage in 2008, in which he said that *“The East, South & West boundaries are shared with a farmer. He has a wire fence and inside this I have a wooden fence in parts and a hedge or trees in parts.”* He said that he was primarily concerned with the south and west boundaries, the east boundary being the Area 1 boundary. He said that he never regarded the wire fence on the Hortons’ side of the trees as a boundary feature, simply a stock proof fence. He trimmed his side of the trees, and the Hortons their side.
25. His evidence with regard to the Area 2 boundary was not challenged in any meaningful way.

**Mr George Horton**

26. Mr Horton, like Dr Yates, had no knowledge of the boundary as it existed in 1940. However, he did give evidence regarding the alleged boundary agreement with Dr Yates, and also regarding the discussions that he had with the Applicants prior to their purchase of the Paddock. He made two witness statements. In the first statement, he states that *“Before the land was sold to the Applicants and over many years preceding that, we kept stock in the field [i.e Rabson West field]. The fence had been erected many years ago to keep the stock in and away from Lanes Cottage.”* He goes on to say that he agreed to move the post and wire fence back onto the Hortons’ land at the request of Dr Yates, to enable him to prune the eastern side of the beech trees. He also says that it was agreed that the new fence would constitute the new boundary. At paragraphs 3 to 7 of his second statement, Mr Horton comments on Dr Yates’s earlier witness statement, in which he denied that the fence was moved at his request, and denied that either he or the Hortons regarded either the original, or replaced, wire fence as the legal boundary. In his second statement he elaborates somewhat on his discussions with Dr Yates as follows:

*“4. As stated in my first statement dated 23 November 2016, Dr Yates moved into Lanes Cottage in around 2001/2002 and during his occupation, the beech trees remained in situ had become very large. These trees belonged to Lanes Cottage and we would only cut them back if they overhung the field boundary*

*fence. We would always discuss this with the owner of Lanes Cottage including Dr Yates. Dr Yates and my father were friends.*

*5. Dr Yates says that he never asked me or anyone else to move the fence back and never discussed the ownership of the land between the trees and the field boundary fence. I am sure (as we would not have done anything to the trees or the boundary fence without discussing it with Dr Yates first and him being in agreement) that we did discuss and agree it with him. The trees were large and overhanging the field boundary fence. At that time cattle were grazing in the field.*

*6. The post and wire fence was always the boundary. The land behind it and the trees set back were always Lanes land. This was always agreed by Dr Yates and can be seen in Dr Yates' Sellers Property Information Form when selling to Lord Cochrane. We may not have discussed it but it was known exactly where the boundaries were.*

*7. Therefore discussing and agreeing that we would move it back, in my mind, we were agreeing to move the boundary back. I may not have specifically discussed that the land between where the boundary fence was and where it was to be repositioned would now be part of Lanes Cottage, it was just how it was. This is how we dealt with things – amicably and with a view to it working for both sides. As the land behind the fence was Lanes land, we naturally considered the additional bit after moving the fence back to also form part of Lanes land also.”*

27. He also gave evidence regarding his discussions with Ms May in which he agreed to sell the Paddock to the Applicants. At paragraph 11 of his first statement, he says that *“I only sold to the Applicants up to the post and wire fence. This was very clearly agreed with the Applicants at the time of sale. I informed them that the post and wire fence was the boundary fence and, in fact, walked the boundaries with Ms May during the sale process as she had raised issue [sic] with regard to a small discrepancy of about 1 foot at the eastern end.”*

28. Mr Horton was cross-examined extensively on his statements. Dr Yates's evidence – that he had said that the trees probably belonged to the farm – was put

to him. Initially he denied that he had said this but then modified his evidence as follows: *“If it had been said it was offhand – father would have put me right. I might have said that when I was younger. We never owned the trees, but we would have trimmed them.”* He agreed that he had erected stock proof fences around Rabson West Field, and agreed that the fence along the eastern boundary of Lanes Cottage was moved back to keep the cattle away from the trees. With regard to his discussions with Ms May prior to the sale of the Paddock, he resiled entirely from his written evidence. He accepted that they had not discussed the line of the western boundary, he had not mentioned the post and wire fence, and that Ms May had not entered the land leave alone walked the boundaries with him. He accepted Ms May’s recollection of the occasion, in that their discussion took place by the northern boundary fence, with him standing in the field and she standing on her land on the other side of the fence. Having agreed the area of land in broad terms, they walked back to their cars and Ms May produced a land registry plan upon which they marked the area agreed to be sold. Mr Horton took the plan away with him, although it does not seem to have been included in the solicitor’s file, unless it is the plan at page 443 of the Bundle, which bears an unknown signature.

### **Ms Dawn May**

29. As I have said, Ms May was unable to assist in providing evidence of the boundary features that existed before 2008. Her evidence was largely directed to her dealings with Mr Horton when negotiating to buy the Paddocks, her dealings with Mr Gulley when he occupied part of the land, and finally the events that occurred after the dispute with the Respondents first arose. As regards her dealings with Mr Horton, he has largely accepted her evidence as to the meeting they had on site when the sale was agreed. She denied that there was any specific discussion of the western boundary, or the post and wire fence, and Mr Horton concurs. As to Mr Gulley, she took issue with his witness statement in which he said that he believed that he owned the area between the beech trees and the wire fence and, therefore, that his tenancy agreement did not include that land. It only related to an area inside – to the east of – that fence, according to him. He also stated that the agreement lasted for 6 months or so, not the 2 to 3 years claimed

by Ms May. For her part, she insisted that the agreement related to the section of land east of the boundary, which she took to be the line of trees.

### **Mr Jurga**

30. His evidence in relation to the Area 1 boundary was in line with that of Ms May, save that he did not have any direct knowledge of the discussions with Mr George Horton prior to the purchase of the Paddock. In relation to Area 2, it was Mr Jurga who erected the fence which the Respondents contend is the true boundary. This is the line marked C-D on Ms Stolle's Plan 1B annexed to their Statement of Case. He stated that this was a temporary fence intended to keep the their dog inside their property, and was deliberately erected within the area which he believed that the Applicants owned. This part of their land was very overgrown and he was gradually clearing it, and the fence was erected before this was completed. In cross examination he said that he had used old fencing materials to construct the fence. He also said that there might have been an existing post to the left or the right of the fence line but he could not remember the details very clearly.

## **EXPERT EVIDENCE**

### **Dr Andy Moir**

31. Expert evidence was obtained in order to establish the age of the beech trees which lie in the boundary area. To this end, Dr Moir, a dendrochronologist, was instructed as a single joint expert to advise on the age of the trees. He concluded that some trees had been planted in the early 1960s, and some trees in the 1980s. The actual age of the trees dated back to the late 1950s and the late 1970s. However his opinion was that the *"The close spacing, alignment and age grouping of the trees suggest that they were planted, as opposed to self germinated. Exactly when the trees germinated is an unknown but trees from commercial nurseries are typically supplied at an age of 2-10 years. This factor should be taken into account so as not to over-estimate the length of time that the trees have been growing at the site."*

### **Mr John Naish**

32. He prepared an initial report on 29<sup>th</sup> July 2015, and two supplemental reports. He also provided answers to a number of questions put to him on those reports. There is also a joint statement from him and the Respondent's expert, Ms Julia Stolle. His opinion, in summary, is that the true boundary in Area 1 is a line (A-B on his plan 3715-02) which follows the line of a timber fence which was positioned immediately to the east of the line of beech trees, but has subsequently been removed. He reached this conclusion on the basis that all the available OS mapping evidence pointed to that line as the closest known physical feature to the lines shown on the various OS editions. Although he accepts that there is scope for inaccuracy when scaling up from small scale OS plans, he concludes that the alignment and position of this line can be accurately established by reference to other physical features that still exist on the site, or former features whose position can be established with accuracy. He does not materially deviate from this position in his two supplemental reports, nor did he do so in his cross-examination. It should be pointed out that the 1946 aerial photograph had not been shown to him at the time that he prepared his three reports. The same also applies to Ms Stolle. With regard to Area 2, his opinion is that the true boundary line is marked D-E on his plan 3715.04, where point E is the position of the southern gatepost (since removed) at the entrance to the drive of Lanes Cottage. It will be recalled that Dr Yates had referred in his evidence to cultivating the possessory land up to the far (southern) gatepost.

### **Ms Julia Stolle**

33. Ms Stolle's report emphasises the limitations of OS and Land Registry mapping – indeed, she itemises these in Appendix B to her first report. She therefore disagrees with Mr Naish's approach, which is to start by seeking to identify on the ground the exact boundary line from the mapping data, and then matching that line to the closest physical boundary feature. In a sense, she is compelled to make this argument, give that even on her own evidence the registered boundaries do not match either of the Area 1 or Area 2 boundaries that the Respondents contend for. This appears from her plans numbered 1, 1A and 1B, on which the registered



boundaries are drawn in blue on the line A-E-F-G. A-B follows a manifestly different line, as does the Area 2 line C-D. The critical part of her evidence in relation to Area 1 is to be found at paragraphs 7.8 to 7.11 of her first report. With the greatest respect to Ms Stolle, this is a form of reverse engineering, in that she has taken the barbed wire fence along the line A-B as the “most probable” boundary and thereby rejects the conclusions of Mr Naish based on the mapping data. If, therefore, the fence is found to be a stock fence and not an intended boundary, her opinion must be rejected. With regard to Area 2, she adopts a similar approach. She concludes that the existing post and mesh/wire fence marks the true boundary, dismissing the obvious discrepancy between that line and the line F-G as explained by the limitations of OS mapping. She relies on the fact that the fence is shown on the 2009 topographical survey, notwithstanding that the boundary will have been established in 2004 and Dr Yates specifically stated that the boundary was not marked by a fence.

34. In her supplementary note dated 15<sup>th</sup> June 2017 she deals in more detail with Area 2, in the light of the contents of the Dr Yates’s witness statement. In this statement he referred to the five bar gate and the fact that he cultivated the land up to the southern gatepost. She has helpfully produced as Appendix A her estimate of the position of this gatepost, based on the available physical evidence – namely, the existing northern gatepost and Mr Iles’s estimate of the length of the fence panel which he used to replace the gate. She has marked it as point X. This point tallies almost exactly with Mr Naish’s survey. More importantly, perhaps, the line shown on the Land Registry title plan is exactly consistent with the position of point X. According to Mr Naish, it is also consistent with the line shown on Dr Yates’s statutory Declaration.

#### **OTHER WITNESS STATEMENTS**

##### **William John Cummings (Applicants)**

35. Mr Cummings and his father had worked for the Hortons at Rabson Farm, and had erected a stockproof fence around the perimeter of Lanes Cottage. He says that *“We were told to erect it at least a metre in from the old fence as Mr Horton didn’t want stock eating any of the overhanging branches.”*

##### **Bill Cummings (Applicants)**

36. His statement largely replicates that of his son.

##### **Mr Bernard Nelson Gulley (Respondents)**

37. I refer in more detail to his evidence elsewhere.

## **CONCLUSIONS – AREA 1**

38. In the light of the evidence and documents, I have concluded that the true legal boundary between the two titles is the centre of the line of beech trees, which is represented on the plan attached to the report of Mr Naish and is agreed. I therefore reject the other alternatives as canvassed by both parties. My reasons are as follows:

- (1) I find as a fact that the dominant physical boundary feature between Lanes Cottage and Rabson West Field in 1940 was the original beech hedge, clearly demonstrated by the aerial photograph taken in 1946.
- (2) In addition to the photograph, Mr William Horton's oral evidence confirms the existence of that hedge, and that it was subsequently re-laid by Joyce Horton along the same line. Accordingly, the existing beech hedge – now grown into a line of mature trees – indicates the original boundary line.
- (3) Mr Horton also recalled that there was a wooden garden fence outside (to the east of) the hedge line. He described the same fence as being broken down and in places inside the hedge. As I have explained his evidence was vague in parts and not consistent with his witness statement. The answers that he gave in cross-examination did not match his answers in re-examination. I am not suggesting for a moment that he was not trying to give truthful and honest answers. This vagueness and inconsistency simply demonstrates that he had no real recollection of the position and appearance of the fence.
- (4) Even if there were had been a "garden fence" to the east of the hedge, I accept Mr Wales's analysis of the "hierarchy" of mapped features in the Ordnance Survey. The line shown on the OS map would represent the line of the dominant physical feature on the ground. Given the very substantial appearance of the hedge in 1946, that would have been the

mapped feature, not a garden fence which was broken down in places and overgrown in others.

- (5) Accordingly, because the conveyance of Rabsons Farm in 1940 was made by reference to the OS field numbers, it follows that the depicted boundary feature must be the line of the beech hedge. This is the effect of Fisher v Winch.
- (6) I reject Mr Paton's argument that the owners of Lanes Cottage have adversely possessed the land within the line of trees, because Joyce Horton's actions in removing and re-planting the beech hedge demonstrate a taking of possession of the boundary feature. He relies on Lord St Leonards v Ashburner (1870) 21 LT 595. In my view this is an unrealistic analysis. Given the close family connection between the Hortons of Rabson Farm and Joyce Horton, I cannot infer from her actions any intention to (adversely) possess the Rabson Farm's half of the boundary feature.
- (7) Unless the original line of the boundary was subsequently altered, therefore, that is the line which would have applied on first registration of Rabson Farm (from which the Paddock was removed).
- (8) At some time after 1940, but before 1981, when the agricultural use of Rabson West Field was changed from arable to the grazing of animals, a barbed wire fence stock fence was erected approximately one metre to the east of the line of trees. This was not intended as a boundary fence, as George Horton's evidence makes clear: "*Before the land was sold to the Applicants and over many years preceding that, we kept stock in the field [i.e Rabson West field]. The fence had been erected many years ago to keep the stock in and away from Lanes Cottage*" (my emphasis).
- (9) There is no basis for the contention that the line of the boundary was altered by the Hortons' construction of the new barbed wire fence during the ownership of Lanes Cottage by Dr Yates. There was no boundary agreement, and the fence was erected not as a boundary fence but for farming purposes, to keep the animals away from the beech trees. It was a

stock fence, not a boundary fence. The discussion between George Horton and Dr Yates was not directed to the question of boundaries at all, but was an amicable conversation between neighbours, in which Mr Horton informed Dr Yates as a matter of courtesy that he was moving the fence, and placed it in such a way as to enable Dr Yates to access the strip of land within Rabson West Field but to the west of the new fence. There had never been any dispute or controversy between the adjoining owners regarding the position of the boundary and the conversation about the new fence had no legal significance. None of the features present in cases such as Joyce v Rigolli [2004] EWCA 79 (Civ) applies here.

(10) Nor was there any alteration of the boundary when the Applicants came to purchase the Paddock from the Hortons. George Horton's oral evidence did not support what he says in the witness statement, namely that it was made clear to Ms May that the post and wire fence was the intended boundary of the area to be sold to the Applicants, and that they walked the boundaries before the sale took place. He accepted that there was no discussion of the fence at all, and no walking of the boundaries. On the contrary, the sale was negotiated solely by reference to the land registry title plan, upon which the agreed area was drawn.

(11) I think that Mr George Horton has found himself in a very difficult situation, in that he has committed himself to support the Respondents by contending that the post and wire fence was the intended boundary. His witness statements contain some obviously partisan passages, and he demonstrated a degree of animus towards Ms May in particular which affected his evidence. As I have said, he resiled from some crucial parts of his witness statement. Being an essentially honest person, however, he was unable to maintain this fiction in cross-examination.

(12) Further, there is nothing in the Hortons' solicitor's conveyancing file to support the case that the post and wire fence was the agreed boundary. The only plan in the file is based on the registered title plan which shows, of course, the line of trees as the boundary feature for the

reasons explained. If Mr Horton had agreed a different line that fact would have been communicated to the solicitor and recorded in the documentation.

(13) Mr Paton, for the Respondents, argued that the conduct of the Applicants, following the sale of the Paddock, demonstrated a belief that the post and wire fence represented the legal boundary. In this regard he relied on the statement of Mr Bernard Gulley, a previous owner of Lanes Cottage. He says that he took possession of the strip of land between the beech trees and the fence because he believed that he owned it. The Applicants' evidence is that he rented this strip of land from them for several years after they had bought the Paddocks. Mr Gulley agrees that he rented some land but only from the east of the fence. It is common ground that Mr Gulley planted some laurel bushes on the disputed strip (between the fence and the line of trees), which the Respondents say is only consistent with a belief that it belonged to Lanes Cottage, and since the Applicants took no steps to prevent this and recover possession from Mr Gulley they too must have believed that the disputed strip did not belong to them. The Applicants say that they were content for Mr Gulley to deal with the strip as he wished, because they had rented it to him. If that is correct, it necessarily means that they and Mr Gulley must have believed that the strip belonged to them. In the event Mr Gulley did not attend to verify his witness statement and be cross-examined on it. Since I have taken the view that Ms May and Mr Jurga are credible and reliable witnesses, I see no reason to disbelieve their evidence as to this issue, and am not prepared to give greater weight to the untested statement of Mr Gulley. Accordingly, Mr Paton's submission based on subsequent conduct – the Ali v Lane type of submission – simply cannot be made out on the evidence.

(14) Since the registered boundary of the area carved out of the Hortons' title – i.e the land that is referred to as the Paddocks – followed the centre of the line of trees, that was the boundary of the land acquired by the Applicants.

- (15) The evidence from Mr Naish strongly supports this finding. For example, his drawing 3715-05 represents his attempt to superimpose surveyed features onto the OS map. This exercise puts the eastern boundary of Lanes Cottage close to the centre line of the trees. The plans 3715.01, 02 and 03 produce a similar result. Given the degree of inaccuracy that is inherent in the scaling up exercise, the line shown on the OS map and filed plan is actually a good match for the centre line of the trees.
- (16) Although Mr Naish promoted the wooden fence on the western side of the trees as the true boundary, that argument suffers from the same defect as the Respondents' espousal of the "garden fence" as the boundary. For the reasons canvassed by Mr Wales, the OS boundary would have been represented in 1940 by the dominant feature, namely the beech hedge. Further, there is no evidence that the western fence existed at the material date.
- (17) Both Counsel agreed that direct evidence of the parties' subjective intentions is inadmissible as an aid to construction. Having said that, however, some of the evidence in this case comes perilously close to evidence of subjective intention. Once it is accepted that the boundary between the unregistered titles of Lanes Cottage and the Paddock (originally Rabson West Field) was fixed by the 1940 Conveyance, it follows that the subsequent registration of both titles will have maintained the same boundary. Evidence from subsequent owners as to where they thought the boundary to be is inadmissible and irrelevant, save insofar as it is adduced in order to establish a genuine and legally valid boundary agreement, or alternatively to a claim for rectification of a conveyance or transfer. There may be circumstances in which evidence of subsequent conduct by successors in title to the parties to the original conveyance is admissible, but as *Ali v Lane* makes clear this would be exceptional.

## CONCLUSIONS - AREA 2

39. In my judgment, the true boundary between WT275943 and WT232775 is along the line D-E on Mr Naish's Plan 3715.04, not along the line of the existing fence to the east and marked C-D on Ms Stolle's Plan 1B. My reasons are as follows:

- (1) The original western boundary of the possessory land is a matter exclusively within the knowledge of Dr Yates, the person who was in adverse possession for many years. It was his evidence that he had cultivated the land up to the southern gatepost and that he had intended to identify this cultivated area on the plan attached to his Statutory Declaration. Both surveyors have been able to pinpoint this southern gatepost – Ms Stolle in her supplementary note and Appendix A, and Mr Naish in his Plan 3715.04.
- (2) It was his evidence that there was no physical boundary feature dividing the area which he adversely possessed and the remainder of No.35.
- (3) Dr Yates's evidence was not challenged, nor sensibly could it have been. When he submitted his application for adverse possession he attempted to delineate the Red Land on a plan – being the land whose north-western point was the southern gatepost. The line he drew did not reflect any physical boundary feature, but delineated the area he possessed. The Land Registry attempted to reproduce that line on the title plan. A comparison between the two plans demonstrates how closely they match.
- (4) If it assumed that the north-western extent of the boundary was represented by the southern gatepost – Ms Stolle's Point X – it is apparent that the plotted line taken from the title plan and shown on her Appendix A as F-G is entirely consistent with that point. In other words, a projection of her line F-G intersects almost exactly with Point X. The position of Point X provides a good cross-check on the accuracy of the line derived from the Land Registry plan.
- (5) On the ground, at the site view a mound of earth was pointed out to the west of the mesh fence. Mr Wales submitted that this might well have resulted from the levelling of the ground that Dr Yates referred to in his

evidence, pushing the earth beyond the levelled and cultivated area. This may be speculation but is a plausible explanation and indicates that the mesh fence is to the east of the land cultivated by Dr Yates.

- (6) Mr Jurga made it clear that the purpose of the mesh fence was to secure the site so that his dog could not get loose. It was not intended as a boundary fence and was deliberately placed within what he believed to be their boundary. Both he and Ms May did accept, however, that the exact line of the boundary at this point was uncertain, given the fact that the ground was completely overgrown and virtually impenetrable. Their uncertainty is perfectly understandable. There were no obvious boundary features, and it has taken considerable research by the experts in this case to enable a precise determination to be made.
- (7) As I read Ms Stolle's Supplementary Note, prepared in the light of Dr Yates's evidence, she does not repeat her suggestion that the mesh fence represents the boundary line. Her summary reads thus: "*The question therefore arises on how accurate Dr Yates drew the eastern extent of the Triangle in relation to what he believed to be the land he had always cultivated and maintained.*" Since, as I have said, it is possible to determine the farthest extent of the land possessed by Dr Yates (Point X) and this coincides with Ms Stolle's line F-G (being the line of the general boundary), she has answered her own question. Dr Yates's red line is remarkably accurate.
- (8) Mr Paton suggests that Dr Yates may have acquired title to an area larger than the area which he physically possessed. This might be the case if there was an obvious eastern boundary feature, so that his possession of the main part of the site would be treated as possession up to the boundary. However, there is no evidence that any boundary feature existed. Dr Yates specifically stated that there was no such feature, the evidence is that the area east of his cultivation was overgrown and impenetrable, and the boundary shown on the Land Registry plan is a



assessment is required, each providing an estimate of their costs incurred since the date of the Tribunal reference.

42. Finally, I should like to thank Counsel, and both surveying experts, for their very considerable assistance to the Tribunal in dealing with this matter. I think I should also record that although the parties themselves have been at loggerheads, to say the least, I am grateful to them for the way that they conducted themselves at the hearing, particularly when giving their evidence.

Dated this 31<sup>st</sup> day of August 2018

*Owen Rhys*

**BY ORDER OF THE TRIBUNAL**

