

[2018] UKFTT 0611 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2017/479

BETWEEN

MARION ELIZABETH BOND

Applicant

and

1. ALAN ALFRED CAMPBELL
2. PAULINE BARBARA CAMPBELL

Respondents

Property address: Sunny Corner, 63 Sandy Point Road, Hayling Island PO11 9RR
Title number: SH22571

ORDER

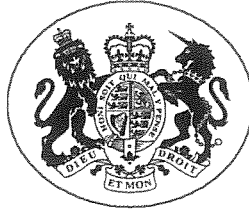
The Chief Land Registrar is directed to cancel the application in Form DB dated 20th March 2016.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

11TH SEPTEMBER 2018





[2018] UKFTT 0611 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2017/479

BETWEEN

MARION ELIZABETH BOND

Applicant

and

1. ALAN ALFRED CAMPBELL
2. PAULINE BARBARA CAMPBELL

Respondents

Property address: Sunny Corner, 63 Sandy Point Road, Hayling Island, P011 9RR
Title number: SH22571

Before: Judge Hargreaves
Havant Justice Centre 23rd August 2018

DECISION

Key words – determined boundary application

Cases cited

Alan Wibberley Building v Insley [1999] 1 WLR p894 (HL)

Lowe v William Davis Limited [2018] UKUT 0206 (TCC)

1. For the following reasons I direct the Chief Land Registrar to cancel the Applicant's application for determination of the boundary between her property at 63 Sandy Point Road, Hayling Island (SH22571), "Sunny Corner", and the Respondents' property at no. 61 (HP338684). The application was made in Form DB dated 20th March 2016. The application has been vigorously opposed throughout by the Respondents and not always in a manner which enabled the Tribunal to understand the real nature of their objection. I should stress therefore that this decision deals only with the boundary between these two properties: the question of whether the rear (western) boundary of John Curran's property at 27 Bosmere Road is in the "correct" position or not is not a matter I determine (or have any jurisdiction to determine) in this application. References to the rear boundary of 27 Bosmere Road are made to provide relevant factual background to this decision.
2. References are to pages in the trial bundle, except where otherwise made clear.
3. A site visit was held on 22nd August, with a hearing the following day which finished late. The parties were given permission to provide closing written submissions by 31st August, and both have done so. In particular, the Respondents wished to clarify that the two photographs which were handed to me at the hearing and which I marked R1 and R2 were, contrary to what the Respondents said in evidence they thought was the case (and had written on the back of the photographs), pictures of the "new" fence, not the "old" fence. Mr Campbell explained that he had been feeling unwell in the afternoon (he thought the hearing would be over by lunchtime) and wanted to correct his evidence. The correction means that the Applicant's contention that these photographs depict the "new" fence is correct and I therefore proceed on what now seems to be an agreement about these particular photographs.
4. The DB plan is at p12, but I had the use of a spare A3 version (copied) for convenience. It is best understood re-orientated to view the properties from Sandy Point Road, ie looking north (with your back to the road looking at the properties). Sandy Point Road runs east-west (roughly). The DB application concerns the Applicant's western boundary and the Respondents' eastern boundary. From the road to the rear point (where both properties roughly meet the south-west corner of 27 Bosmere Road's garden) the obvious physical boundary runs south to north in three segments which are easy to describe in the sequence "hedge – garage – fence." The history of all three features plays a part in the dispute. As HMLR wrote to the Applicant on 18th November 2016 (p155) "*the inspection confirms that the physical boundary dividing the properties is a virtually straight line consisting of, at the northern end, a panel fence at least 15 years old, the eastern wall of the [Respondents'] garage, erected over 50 years ago, and a well established hedge from the garage to the front boundary.*" Whilst the confident assertion as to the age of the fence is undoubtedly misplaced on the evidence I heard, and the garage description wholly rejected by the Applicant (but on a basis which is questionable, as will be explained), the description is generally apt. The Applicant's detailed response to this

letter is at p159. I should record my surprise that the Applicant states that despite request she was unable to obtain a full copy of the HMLR survey report. Not only was this refusal unhelpful to the parties and the Tribunal, it is out of step with the practice of producing copies which I have observed in many cases, and given that it is a public document, of dubious justification. The explanation might be that the Applicant did not ask for the right document: see p157. What was made available was the survey plan, which is helpful and is at p158, but without the commentary and the photographs.

5. As Mr Bond submits, there is no dispute as to the accuracy of the plan as drawn, except as to the proposed DB line, drawn by Mr Reed north-south from points B-C in a straight line which cuts through the Respondents' garage (his report is at tab 1 p6). Its relationship with the hedge or the roots is unclear because the hedge is not outlined. There is a dispute about how long the garage has been in its current position, and another factual dispute as to whether, when the Respondents replaced the fence panels running north of the garage in 2011, they moved the panels eastwards into the Applicant's garden. (See the Applicant's comparative plan at p268 for example.) There are also issues about the choice of point B and point C as start and end points for the DB line which are critical. In order to clarify where the Respondents contended that the boundary should be, they were ordered to draw a green line on a version of the DB plan in March 2018, and at tab 3 of the bundle is a copy of their version of the plan. Whereas the Applicant's B-C line goes through their garage, the Respondents' line goes straight south from point A, which is the south west corner of Mr Curran's garage at 27 Bosmere Road. Suffice it to say that I find nothing to support the Respondents' suggested green line, which bears no resemblance to any historical or existing feature on the ground and is not supported by any expert evidence based on any relevant conveyancing plan. As an argument in support of their defence to the application, it does not provide an alternative. In their objection to the DB application the Respondents suggested that the true boundary was (at least) 5 feet to the east of the garage wall, in a straight line (see eg p24, 82-85), which has the same problems.
6. As far as photographs are concerned, there is a lack of historical photographs or direct recollection to support the Applicant's main contentions as to the boundary in physical terms, given that the house has been in her family for many years. Putting aside the contentious issues as to who was standing where when certain photographs were taken, there are photographs which assist interpreting the boundary as it is now at p70 -75, p192-196A, p199, p239, p251-253, p283-6, and for 1988, at p27 the Ravens Estate agent particulars for no. 61.
7. It is worthwhile considering the file plans if only for completeness. The file plan for Sunny Corner is at p111. It is undated but from a 2009 edition. It shows the garage at 27 Bosmere Road adjacent to the north boundary. The western (general) boundary runs to the road in a straight line from the north west corner. Notably, there is no

garage at no. 61. The file plan for no. 61 is at p115. The plan is the 1976 edition. It shows no. 61 before the eastern extension was built, and something which could be a shed or a garage to the north of the existing garage. The Applicant contends that this garage was in the position drawn by hand on the plan at p263 but that is no more than guesswork and I am unable to give any weight to it or even decide whether it is an outline of the current garage in a different position. Finally, the file plan for 27 Bosmere Road is at p118 and reflects the plan for no. 61. To recap, the current layout is outlined on p158. What these plans show is various mapping exercises by OS. Without investigating the detail (which the parties have not done), it is not possible to be precise about when the OS plans on which the file plans are based, were prepared. But the absence of the Respondents' garage in the current location on any of the file plans does not mean that the garage was not there when the Respondents bought no. 61 in 2002 or even before that, as the Raven Estates particulars show, which relate to 1988. I should add that I saw a better version of those particulars handed up at the hearing and I disagree with the Applicant's submission that the photograph does not show the garage, also referred to in the verbal description of the property. The file plans form only one part of the evidence and as to those, as they are based on OS maps, it is worth recalling that they are subject to limitations which on occasions justify giving more weight to other evidence: see for example Lord Hope in *Alan Wibberley Building Limited v Insley* [1999] (HL) 1 WLR p894 at p901 D-H.

8. On any view, it is necessary to look at the conveyancing documents to see whether they assist in locating the legal boundary. By 1934 the properties formed part of the Eastoke estate, section M. Sunny Corner was part of Lot 15: see tab 9. It was conveyed by Grace Bull to Annie Hinder on 8th January 1934, being described as "*ALL THAT piece or parcel of land ... having a frontage of fifty feet or thereabouts (The curved corner of the said land being struck with a radius of thirty feet) which said piece or parcel of land is for the purpose of identification only delineated and described in the plan annexed hereto and thereon coloured "Pink" and forms the Southernmost moiety of Plot 15 of Section M*". See tab 10. Grace Bull and consequently Hinder were obliged by the terms of a conveyance to Bull on 6th January to erect and maintain a fence or wall by 6th February 1934 strong enough to exclude cattle, sheep and horses on the western boundary. Whether this was the hedge alone is not clear. The Respondents are subject to a similar covenant and it is a pity that they appear to have been confused about the maintenance of a fence which was the Applicant's responsibility (thereby leading in part to a dispute about renewed fencing prompting a row which forms part of the background to this application). The plan at p133 is a scaled down photocopy and therefore not useful, and the scale is too great and therefore of questionable use in any event. The plot was sub-divided by the Applicant's predecessors on 17th April 1963 to create 27 Bosmere Road to the north: see tab 11, which recites the description of the land conveyed as "*ALL THAT piece or parcel ... situate on the west side of a road there called Bosmere Road having a frontage thereto of sixty feet or thereabouts and a*

mesne depth therefrom of fifty feet or thereabouts which piece or parcel of land is delineated and coloured pink on the plan attached hereto ...” The plan is at p137 and will not assist, again due to scale, though it suggests that the western boundary of 27 Bosmere Road and Sunny Corner was a straight line as the Applicant contends. By 1963 the physical boundary which is the subject of this application was about 30 years old as would be its continuation northwards to what became the boundary between 27 Bosmere Road and no. 61.

9. To possibly complicate the point chosen by Mr Reed as point C, that was probably physically affected by the compulsory purchase of a strip of the frontage of Sunny Corner by the highways authority to create a visibility splay in 1967: see tab 12. The highways plan at p142 (see also p145) does not show any part of the western boundary or provide any width measurements which might have assisted. However, the 1967 highways plan became the basis of the plan attached to the next conveyance of Sunny Corner: see tab 14 and the conveyance of 6th March 1970. Although the description of Sunny Corner gives a plot description by way of frontage to Bosmere Road of 60 feet 6 inches “*or thereabouts*” and fifty feet “*or thereabouts*” by way of depth from Bosmere Road the reference used to the attached plan describes the plot as “*for the purpose of identification only delineated on the plan attached hereto*”. That gives a 50 foot measurement across the northern boundary of Sunny Corner, specifically noted on the plan (p153) but whether it reflected an actual measurement or the historical 50 feet measurement is unclear. The Applicant’s submission in her statement of case that an enlarged version of the 1934 plan shows the Sunny Corner plot to be wider than the other plots by 17% (p41) is neither precise nor relevant to the 1970 plan, which is the last of the pre-registration conveyancing documents relied upon.
10. In terms of chronology, the following, apart from the conveyancing history set out above, is relevant, stripping out much of what the parties have added to accounts of their respective behaviour. The Respondents bought no. 61 in 2002. They say the garage was already there, and along the boundary north to south was a line of hawthorn trees, some of which were cut down in 2006 at Sunny Corner to reduce leaf fall. After 2006 the line was (visually) hedge – garage – fence panels, which also predated 2002. They are adamant that the garage is long standing and that they did not move the fence panels as alleged by the Applicant. A neighbour dispute started when in the summer of 2010 they pruned or cut the hedge too vigorously for the Applicant, and then in March 2011 replaced the fence panels. Since then the parties have argued about the location of the boundary.
11. The Applicant’s chronology and statement of case includes the following. Sunny Corner was purchased by her father in 1970 (as above) but had always been in the family. She says that in December 1969 “*The boundary fence between no. 63 and 27 [Bosmere Road] found to be incorrectly sited: fence moved to correct location.*” Whether this relates to the assertion in her statement of case that the parties’

properties and 27 Bosmere Road “shared a common boundary post” (ie point A) is not entirely clear. This point is not developed in her pleading yet raises obvious questions (see below). It conflicts by a couple of years with what she wrote to the Respondents in September 2014 (p202): “In 1971 the owners of 27 Bosmere Road, 61 and 63 decided to put a fence down the borderline. They got together to mutually agree a position and the owner of [Sunny Corner], my father and 27 Bosmere Road (Mr Wallace) paid for the fence to be erected The border was mutually agreed by all concerned and there has never been a problem with the boundary until this time.” But she agrees that the hedge has been in location from the 30s and the fence in place for “many years” before March 2011 (p43). In opening Mr Bond sought to answer my query about this agreement by saying on instructions that this allegedly “agreed” point is point B. The concept of a boundary agreement was not expressly raised or explored and so far as 1969-1971 is concerned, the facts are scanty and remain unclear. I can see no basis for concluding that point B was agreed in 1969-1971 (see further below).

12. The Applicant’s case is pleaded at paragraph 38 of her statement of case as follows: “we submit that the boundary line runs directly on the Western side of the Applicant’s boundary hedge and through to the line of the fence as it originally stood prior to 2011.” The Applicant’s case is firmly based on the legitimacy of the fence post at B as the correct starting point despite the fact that it then slices through the garage. The trouble with the Applicant’s case is that there is no reliable or cogent means of demonstrating that this reliance on B is correct. It turns out that on the balance of probabilities she is wrong about how long it has been there.
13. With that observation in mind I turn to consider Mr Reed’s evidence at p6 dated November 2017. His report does not contain the usual CPR Rule 35 statement though he understood and confirmed its application to me in giving evidence. He is not RICS qualified but has conducted boundary disputes and DB applications previously, he thought about six of the latter. The Respondents did not obtain their own expert report. There are troubling features in Mr Reed’s report which on analysis stem from the Applicant’s confidence that point B is the correct point from which to draw a straight line south to the pavement at C, being the eastern edge of a brick pier which was installed by the Respondents after they bought no. 61 in 2002 when they rehung their driveway gates in the course of building a new front wall along their southern boundary. It is clear to me from their oral evidence, which I accept, that the brick pier was built on the west side of the hedge but with no particular regard to any precise boundary, just being an obvious place to erect a brick pillar, leaving it to their builder. See the photographs at p253 for example. Although Mr Reed is right in saying the brick pillar is a “strong” boundary feature, he fails to explain precisely why it provides an end point for Sunny Corner, and his explanation for relying on the fence post at B depends primarily on the Applicant’s assertions. (The Applicant herself was far from ready to accept the Respondents’ evidence about when they built the front wall at no. 61.) I conclude this because although Mr Reed says point B is “the one currently

shared by no. 61 and 27 Bosmere Road, as in the title plans", he does not explain how a general boundary with its scope for "movement" provides for point B with any certainty, and he did not seek to plot the general boundaries at all. To clarify, the distance between point B and the fence post to which the fence is actually tied is well under a metre and well within the margins of a general boundary.¹ His further assertion that the garage as *"a prefabricated structure ... cannot be used to define an assumed boundary"* is also meaningless. To start with, he accepts that he does not know why the garage does not appear on any OS/file plans, and to evade the obvious impact of an adverse possession point arising, undermines his conclusion.

14. Whilst the plan is correct so far as it goes in terms of what is plotted (there being no effective challenge to the contrary), Mr Reed did not purport to plot the file plan boundaries, nor did he plot the 1970 plan despite its obvious significance.² In particular, the northern boundary of Sunny Corner was measured at my suggestion at the site visit, to see how close to *"fifty feet or thereabouts"* that measurement might be. It transpires that from the north east boundary of Sunny Corner to the new fence is 52 feet, and to point B is 53 feet 6 inches. The 1970 plan gives a northern measurement of 50 feet on the face of it. Mr Reed did not refer to this in his report, though it is an obvious point to cross-refer to given the conveyances. Neither of these measurements match the *"50 feet"* written on the 1970 conveyance plan. Furthermore, the DB plan does not depict the hedge which is an obvious feature for the first section: though Mr Bond in opening disavowed reliance on the hedge, I have no idea where it is in relation to the DB line.
15. In evidence Mr Bond said he plotted the boundary *"as he perceived it to be"*, and that he had been unaware of the alleged 1969/1971 boundary arrangement. He thought the rear width measurements (over 50 feet) to be within an acceptable tolerance to point B, and was not aware that his point C was based on a post 2002 feature, though said it would make no difference. He agreed that the *"dog-leg"* evident at the critical junction round point B would not show up on OS mapping techniques such as those evident on the *"Buy A Plan"* map he attached to his report in support of his DB line (p16). He gave some additional evidence about the garage which I found helpful, including his observation that it was typical of a type fabricated in the 60s-70s. Of the Applicant's allegation (in support of her contention that the Respondents moved the fence eastwards in 2011) that the Respondents laid new concrete in the gap where the old fence used to be before being moved eastwards, Mr Reed said that the crack in the concrete suggested there was some movement between different materials, but that he could not date the cracking. The Respondents deny creating any new channel of concrete. He thought it was possible that the garage depicted on the 1988 Ravens Estates photograph could be in the location shown on the file plan for no. 61 (eg at p115, ie the *"old"* location). I do have to bear in mind that the reason why the

¹ The current end fence post seems to have shifted westwards from 2011 in any event.

² He explained the lack of physical features plotted by saying he had not been instructed to plot them.

Respondents replaced the fence posts was because they were deteriorating, and that corner was overgrown. That makes me question how aware the Applicant was about the detail of the physical condition at that end of her garden in 2011.

16. Mr Reed arguably had little to work on, but he did not plot any boundary from the 1970 conveyance despite the fact that it was a more recent plan and was an obvious starting point. This is a significant omission because I do not know what the impact would be, ie would the western boundary reflect his DB line or not, and if not, why not? He was not aware when he drew his DB plan of the possible dates of point B or point C as alleged by the parties (and see below as to Mr Curran's evidence). In drawing a line from point B through a garage (the alleged encroachment being nearly half a metre) it could be said that he was reflecting the Applicant's instructions rather than exercising a truly independent analysis. For these reasons, Mr Reed's approach is only sustainable if there is other clear and cogent evidence to support his points B and C given the fact that he did not plot the 1970 plan.
17. Mrs Bond gave evidence. Her other witnesses did not and their statements are too short and vague and beg too many questions to be helpful. She does not live full time at the property which had belonged to her father from 1970-2001 when she inherited it with her brother. He became the sole owner in 2006 before she inherited it in 2009. She had gone to Sunny Corner in March 2011 when the Respondents were taking the fence apart, and left before the job was completed, having said they could carry on (there was a brief conversation). When she returned her evidence was that it was "*blatant*" that it had been moved (eastwards), and this is clear from the tenor of the exhibited correspondence. She relied amongst other things on the fact that the washing line had been attached to a post which had been moved. However I am by no means satisfied on the balance of probabilities that the Applicant's recollection even then is as confident or precise as it needs to be on this point. She was born in 1949 and went to the property annually as a child but only for about a week. She recalled a hedge along the western boundary but had no recollection before about 2001 as to when the hedge became hedge-garage-fence explaining that between 1969-2001 she was "*hardly there*", particularly since after her mother's death in 1988 a family friend was in occupation much of the time. She also said she had "*no idea*" when the garage at no. 61 and along the northern boundary appeared, and told me that her contention that the Respondents' garage has moved is based on an analysis of the Respondents' title plan.
18. This, for reasons already given, is a flawed approach. It means that I can give due weight to the Respondents' contrary position on this, and in doing so, and taking all the available evidence into account, I find that the garage at no. 61 was placed in its current location at the latest in 1988 after the eastern extension was built if not before (see the Raven Estate particulars). The Applicant admitted that she did not know when the eastern extension was built either and while I have some sympathy with her contention that this was something that the Respondents might have been

able to clarify, they have been in person and clearly struggling on occasions with the demands of this litigation, and she too could have checked planning records or aerial photographs (etc) before pinning her case on something which she could not actually prove on the balance of probabilities.³ It is also notable that hawthorn trees were removed at Sunny Corner after 2002 (by her brother) and that would have revealed the garage wall had it not been obvious before.

19. The Applicant's evidential difficulties continued with her admission that she did not know when the fence panels were first installed either. As to the alleged 1971 agreement, she explained that Mr Wallace, Mr Curran's predecessor at 27 Bosmere Road, was her godfather and her father's cousin. He built no. 27. He wanted a fence between Sunny Corner and 27 Bosmere Road, the first fence was built in the wrong place (this was not detailed), but her evidence was that point B dates from 1971. This is not sustainable if I accept Mr Curran's evidence as to point B, see below, which I do. At the same time she had no recollection of the garage at no. 27 and the two pieces of evidence are hard to reconcile. The garage is a large and visible object in contrast with point B. I am far from convinced on the basis of the Applicant's evidence alone that the fence panels were originally tied in to point B from 1971. Mr Horton, whose statement is at p174, also gave evidence supporting the Applicant's case about the movement of the fence panels, with particular reference to the washing line post, and maintained that the location of the new posts were different, but cannot say that point B originated in 1971.
20. But there is photographic evidence from both parties on the movement of the fence panels which I have to take into account. The Applicant relies in particular on the photograph at p192 (taken end of March 2011), which shows the new fence part erected, and alleges that it shows the old northernmost panel, yet to be replaced, tied in to the northwest post (B). That is not entirely clear from the photograph because I cannot see "over" the fence, and there is something leaning against the top panel. But looking very carefully at the fence panel joining across the north (the southern boundary of 27 Bosmere Road) it is possible to discern a line of what might be nail marks running top to bottom, and this has been clarified by a better version attached to the Applicant's closing submissions, but raising a point not specifically put to the Respondents in cross examination. At p193 of the bundle is another photograph showing the northern panels after the completion of the new fence. Mr Bond argues (again supplying a better version attached to his closing submissions) that the proximity of the northernmost panel on the western boundary to the nail holes proves the fence was moved to the east and the dog leg visible at p193 in the Respondents' garden was thereby created for the first time. New end posts were fitted which adds some support to the case that the fence was moved to the east (otherwise why need a new post?). This also appears to be the case looking carefully

³ For example, Mr Reed had been involved in the planning and building of a bathroom extension at Sunny Corner, and a site plan might have been available to assist on some of these issues, but was not produced by the Applicant

at R1 and R2. To add to the evidential picture, the northernmost fence panel has since been replaced as 2017 pictures eg p285 show, the fence panel comprising vertical not horizontal slats and possibly tied in to yet another point on the southern boundary of 27 Bosmere Road (which has been reduced in height). What no-one addressed in evidence is whether the location of the northernmost fence panel as shown on p192 was the location of the panel prior to the building works when the evidence of the Respondents was that it was falling down (which was unchallenged).⁴ That is a question which could and should have been put to the Respondents, as should the questions based on the argument about the nail holes. This omission is unsatisfactory (eg, could the nail holes indicate the location of a previous fence post? Why are there nail holes?) and raises issues about whether it is fair for me to make findings on an interpretation of photographs which the Respondents have not been asked about. To put it the other way, I am in difficulties acceding to Mr Bond's submissions on the nail lines in the light of these evidential issues and because there is no clear photograph of the fence in the crucial north west corner prior to the contested works in March 2011. It would be unfair to reach conclusions based on an argument not put specifically to the Respondents. There is a solution to this problem in the evidence of Mr Curran, however.

21. On the limited photographic evidence, the Applicant might be able to suggest on the that the new fence has been moved eastwards since the photograph at p192 was taken. But the facts, as I have indicated, are further complicated by Mr Curran's evidence, to which I now turn. The Applicant's submissions are also complicated by the obvious question: if you have a fence along the line from point B to the edge of the garage, it would be on a slant (as drawn by the Applicant). The presence of the dog leg makes it straight and parallel with the side of the bungalow at no. 61. Again, this was not explored with the Respondents specifically.
22. Mr Curran bought 27 Bosmere Road from Mr Wallace in 1985. There is an aerial photograph of no. 27 at p68 which Mr Curran dated from about 1995. It shows his western boundary running along the eastern boundary of no. 61's back garden. In the point B corner, the view is obscured by foliage. But it is helpful for general orientation. But the point is that he says (at tab 22) that he installed his back garden fence not long after he bought no. 27 on the boundary with no. 61. He explains that he thinks this was in the wrong place because it gives him a plot depth of more than 50 feet: I am not commenting on that, particularly since that rear fence has now been in place for over 30 years and its location was agreed with the owner of no. 61.⁵ In oral evidence he expanded what happened. He removed the rear hedge which was overgrown in about 1987 together with the builder at no. 61. They put point B in place when he replaced the hedge with a fence on what they thought was a line of old fence posts, with a "return" to meet the fence panel across the northern

⁴ See paragraph 13, Respondents' statement of case, p58

⁵ But this has fed into the Respondents' submission that they are entitled to move their boundary eastwards into Mr Curran's garden as well as the Applicant's

boundary of Sunny Corner. He fenced no. 27 but had no clear recollection of what was to the south of point B in terms of the boundary features in dispute though he thought the garage at no. 61 was then in the current location.⁶ He built the garage at no. 27 between 1989/80. Before he built the garage he recalled the fence along the northern boundary of Sunny Corner which “butted up” against the hedge then running north-south between no. 61 and Sunny Corner.

23. I accept Mr Curran’s evidence about installing point B in about 1987. It might conflict with the Applicant’s contention that point B was erected in 1971 but that appears to be based on a recollection of other family members including possibly Fiona Lawley (tab 18) but she did not give oral evidence and her brief statement begs further exploration to make real sense of it, so it is of little weight by comparison.⁷ He has no interest in the outcome of this litigation and had become involved because the Campbells had approached him for assistance. He was straightforward, and what is more, his account makes sense. It also undermines point B as the starting point for the legal boundary of Sunny Corner unless it is otherwise demonstrated to be the starting point. The evidence is that it has nothing to do with Sunny Corner. That alone renders the DB application unsustainable.

24. The upshot is that whilst the photographic evidence suggests that the fence might have been moved eastwards in 2011, that is of little relevance on the question whether point B is the correct starting point for the DB line. However, it does require me to consider the Respondents’ evidence. In doing so I am putting to one side what the Respondents say about the legal boundary starting from point A on Mr Reed’s plan (the corner of Mr Curran’s garage). There is not a shred of evidence to suggest that any boundary feature has run south from it ever. But they maintain strongly that there was at all times a dog leg round point B on their side of the fence (from 2002), and that their instructions to the builder in 2011 were to replace the fence panels on the existing line. The washing line post was replaced in the same position. This is corroborated by a statement from Peter Everard at p190 but he did not give oral evidence either, so is of little use. Comparing the photograph taken in 2017 at p285 the location of the northernmost fence panel seems something of a moveable feast depending on how well maintained it is in any event: that photograph suggests the northernmost fence panel has shifted westwards more recently as a result of it having to be propped up again.

25. The Respondents’ approach to the dispute has been complicated by their insistence on another boundary line without concentrating on the case put by the Applicant.

⁶ This is understandable. There is a small gap to the rear of Mr Curran’s garage which contains a dilapidated shed which leans against the northern boundary fence panel abutting Sunny Corner. It is the sort of area right at the back of a garden which contains junk and is not used regularly. Mr Curran said he knew very little of what went on it the north west corner of Sunny Corner because it was a “rubbish area”. None of the fence movements in issue directly affected him. See the photograph at p285 for example.

⁷ The critical issue is whether her recollection of point B and the actual point B are in fact the same fence posts, which is doubtful on the face of her evidence and Mr Curran’s.

But stripping that out and before considering their evidence about the alleged movement of the fence, I have no hesitation in accepting their evidence about the garage. They did not move it. Their best evidence is that it was in that location from 1988 at the latest and I accept that. The Applicant's suggestion to the contrary has no evidential weight. That provides a cast iron adverse possession answer to the eastern flank of the garage wall if required (12 years would expire under the transitional provisions before October 2003).

26. As to the dog leg, I find on the balance of probabilities that there was a dog leg from the time that Mr Curran installed point B. The precise measurements might have varied over the years but if point B was installed by Mr Curran, unless the fence panels were on a slant (and the evidence suggests that they were on a straight line), the fence panels did not tie in to point B. A straight line south from point B slices through the garage as the DB plan shows. I am by no means satisfied that the Applicant's contention that the fence posts were moved in the vicinity of the garage is correct either: her recall was just not firm enough to persuade me on the balance of probabilities that the fence as a whole was moved eastwards by around a foot. I conclude that the best analysis of the conflicting evidence is that the fence probably was not erected on precisely the same line, but it was not tied into the post at B when the Respondents bought no. 61.
27. In conclusion the DB application must be rejected. In short, even if the Applicant has correctly interpreted the photographic evidence (as to which I make no findings because the point was not put to the Respondents), there is nothing to show that point B is the northwest corner of Sunny Corner for the reasons given. There is in reality nothing to locate the true legal boundary as a line running straight south from point B. The Applicant's case on this is uncertain both on the facts and any analysis of the 1970 plan, including the fact that it gives a substantial plot width of more than three feet over fifty feet. It would also include an area of land which (given that I accept the Respondents' evidence as to the dog leg) would have been inside no. 61 before 2002 and even 1987. It would also be impossible to give effect to a DB line in this case which then slices through a garage which has probably been in position since 1988. If that was not built to the boundary line but over it on the Applicant's case, her title to that area occupied by the garage has long expired. Adverse possession alters the legal boundary. Moving on to the hedge, her case that the line to the west of the hedge is the true boundary is based on an extremely vague assertion that there was a fence at some point. But she cannot say who erected it, or where it was. Point C suffers from the same problem as point B: its position as a legal boundary feature is unproven.
28. As was highlighted by Morgan J. in the recent case of *Lowe v William Davis Limited* at paragraph 6, *s60 LRA 2002* provides that a determined boundary is the "exact line of the boundary." This is not a case in which, having rejected the DB line, I can find on

the evidence before me, where the “exact line” is. The parties will therefore be left with a general boundary.

29. The general rule is that the successful party is awarded costs. If the Respondents wish to apply for their costs as litigants in person from 17th May 2017, they should do so by 5pm 26th September, attaching a list of their reasonable disbursements and calculating the number of hours they have spent on the reference. The Applicant should comment by 5pm 4th October and I will deal with costs after that.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

DATED 11TH SEPTEMBER 2018

