

[2019] UKFTT 0508 (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. 2018/0601

BETWEEN

**(1) MICHAEL THOMAS WILLIAMS
(2) CHERIE LYNN GLADSTONE**

Applicants

and

JUDITH MEGAN THOMAS

Respondent

**Property addresses: Land at Frith Common, Eardiston, Tenbury Wells
Title number: WR165814
Marble Cottage, Lower Frith Common, Tenbury Wells
Title number: HW124809**

Before: Judge Daniel Gatty

**Sitting at: Birmingham Employment Tribunals, Hill Street, Birmingham
On: 4-5 June 2019**

ORDER

UPON hearing the Applicants and the Respondent, all in person, at a hearing on the above dates and for the reasons stated in the Decision accompanying this order

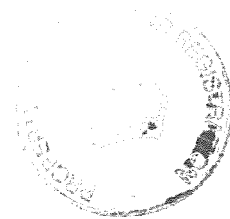
IT IS ORDERED that:

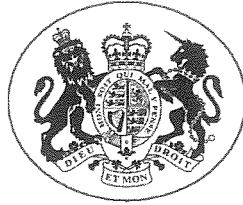
1. The Chief Land Registrar is to (i) give effect to the Applicants' application dated 5 January 2018 for a determined boundary in relation to the line shown between grid references 368963.98mE, 269555.59mN and 368965.57mE, 269525.68mM on the application plan as if the Respondent's objection thereto had not been made and (ii) cancel the balance of the application.
2. Any application for costs should be made in writing accompanied by a schedule of costs and served on the Tribunal and the other party by 4.30 pm on 21 August 2019.
3. Any response to an application for costs should be served on the Tribunal and the other party by 4.30 pm on 11 September 2019.
4. Any reply to a response to an application for costs should be served on the Tribunal and the other party by 4.30 pm on 25 September 2019.

Dated this Wednesday 24 July 2019

Daniel Gatty

BY ORDER OF THE TRIBUNAL





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Applicant Representation: In person
Respondent Representation: In person

DECISION

Cases referred to:

Lowe v William Davis Ltd [2018] 4 WLR 113

Pennock v Hodgson [2010] EWCA Civ 873
Ali v Lane [2006] EWCA Civ 1532
Alan Wibberley Building Ltd v Insley [1999]1 WLR 894

1. This case concerns an application dated 5 January 2018 to HM Land Registry made by the Applicants, Mr Michael Thomas Williams and Ms Cherie Lynn Gladstone, for a determined boundary between their property, Marble Cottage, Lower Frith Common, Tenbury Wells (“Marble Cottage”) and a neighbouring field (“the Field”) owned by the Respondent, Judith Megan Thomas.
2. The hearing took place on 4 and 5 June 2019 and was preceded by my site visit on 3 June 2019. The parties represented themselves at the hearing.

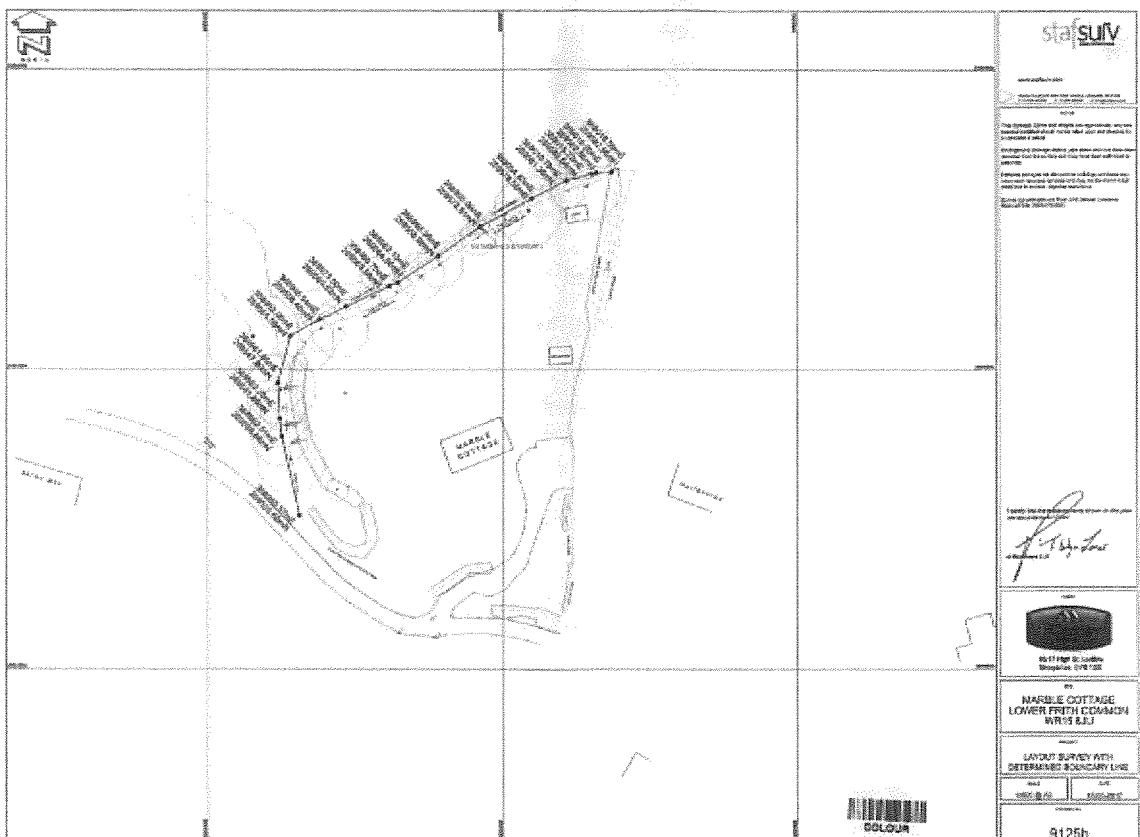
The factual background

3. Marble Cottage and the Field are situated in a picturesque part of rural Worcestershire. Marble Cottage comprises a dwelling house in grounds which rise up to the north to meet the Field. The Applicants purchased Marble Cottage in January 1993. At that time, the Field was owned by Mrs Minnie Jenkins, the Respondent’s mother along with other lands. It passed to the Respondent under her mother’s will (without the other lands) and she was registered as its proprietor in May 2016. She has lived in the vicinity for much longer than that, however.
4. The Field was rented from Mrs Jenkins by the Applicants’ predecessor-in-title and when they purchased Marble Cottage they rented the Field too. Their tenancy of the Field came to an end in January 2011.
5. There is a footpath that runs through the Field along the boundary with Marble Cottage - just how close to the boundary I shall discuss below. On its western boundary the Field meets the highway and on its eastern boundary lies another field reached via a stile.
6. The dispute between the parties over the boundary between Marble Cottage and the Field (“the Boundary”) began in autumn 2016, not long after the Respondent had become the Field’s Owner. It was precipitated by the Respondent and her husband cutting back a hedge made up of trees and bushes growing along the Boundary tight to their trunks. This led the Applicants to do some research and conclude that they owned

a strip of land apparently within the Field on the basis of the hedge and ditch presumption. The Respondent has erected a post and wire fence close to the trunks of the hedge.

7. The Applicants obtained a report dated 1 June 2017 from Mr Thomas Wyn Jones FRICS of McCartneys LLP about the location of the Boundary. He concluded that the ditch and hedge presumption did apply to the Boundary. By the date of his report there were two areas of dispute: the line of the northern boundary of Marble Cottage and the line of the western boundary between Marble Cottage and the Field from the point where it doglegs towards the south (the dogleg is shown beginning at grid reference 368963.98mE, 269555.59mN on the application plan). Mr Wyn Jones prepared a plan depicting the line of the Boundary as he considered it to be and subsequently adapted his survey plan into one suitable for an application for a determined boundary. The Applicants based their application on that plan (“the DB Plan”). A shrunken copy of Mr Wyn Jones’s plan appears below:

8.



The Issues

9. The questions that arise out of the Applicants' application are:
- (1) Does the northern line of the boundary ("the Northern Boundary Line") run along the roots of the hedge separating Marble Cottage from the Field or along the northern edge of what the Applicants say is a ditch to the north of the Hedge.
 - (2) If the latter, does the DB Plan show the exact line of the edge of the ditch.
 - (3) Where is the location of the boundary line to the south of the dogleg ("the Western Boundary Line"), i.e. the boundary line to the west and south of grid reference 368963.98mE, 269555.59mN.

The law

10. By default registered title plans show general boundaries, i.e. the approximate, not the exact, location of legal boundaries (s. 60(1),(2) of the Land Registration Act 2002).
11. It is possible to apply for the determination of the exact line of a boundary pursuant to s. 60(3) of the 2002 Act and Part 10 of the Land Registration Rules 2003. That, of course, is the application made by the Applicants.
12. If such an application is to succeed, the applicant must show that the application plan depicts the exact line of the boundary on a plan that complies with the requirements in the relevant Land Registry practice guide.
13. In the light of Morgan J's decision in *Lowe v William Davis Ltd* [2018] 4 WLR 113, it is appropriate for a First-tier Tribunal Judge hearing an application for a determined boundary to make findings as to where the legal boundary is located as part of the exercise of deciding whether it is exactly represented on the application plan. The Tribunal has power to (1) direct the registrar to complete the application in whole or in part (2) direct the registrar to complete the application but with a variation to reflect the Tribunal's findings as to the location of the boundary line, (3) direct the cancellation of the application, (4) direct the cancellation of the application but make findings as to where the boundary is, to whatever degree of accuracy is possible on the evidence (such

findings will give rise to an issue estoppel if they are necessary to the Tribunal's decision to direct cancellation).

14. In identifying the legal boundary, the Tribunal must first determine, if possible, where the original conveyance separating out the parcels of land located it, as a matter of construction of that conveyance. It may then be appropriate on the particular facts to consider whether the boundary has been relocated since the date of the original conveyance as a result of adverse possession or a boundary agreement, or otherwise.
15. In construing the original conveyance, the court or Tribunal must consider the operative clause, the plan to the conveyance and any other clauses in the conveyance that shed light on the intentions of the parties. One is seeking to ascertain, not the subjective intentions of the parties, but the meaning which the conveyance would be understood to bear by a reasonable observer with knowledge of the factual background information available to the parties at the date of the conveyance. In the now well-known words of Mummery LJ in *Pennock v Hodgson* [2010] EWCA Civ 873, at paragraph 12:

“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 that date.”
16. It is permissible to have regard to conduct subsequent to the date of the original conveyance but only if it is probative of the intentions of the parties to the original conveyance; see *Ali v Lane* [2006] EWCA Civ 1532.
17. Over the years, the courts have developed some presumptions to help with the frequently difficult task of identifying a precise boundary in rural areas. One of those is the hedge and ditch presumption which Lord Hoffman described as follows in *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894, HL at p. 896.

“There are certain presumptions which assist the inferences which may be drawn from the topographical features. Perhaps the best known is the one which is drawn from the existence along the boundary of a hedge and a ditch. In such a case, it is presumed that the boundary lies along the edge of the ditch on the far side from the hedge. The basis of this presumption was explained by Lawrence J. in *Vowles v. Miller* (1810) 3 Taunt. 137, 138:

“The rule about ditching is this. No man, making a ditch, can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on top of it ...”

It should be noticed that this rule involves two successive presumptions. First, it is presumed that the ditch was dug after the boundary was drawn. Secondly, it is then presumed that the ditch was dug and the hedge grown in the manner described by Lawrence J. If the first presumption is displaced by evidence which shows that the ditch was in existence before the boundary was drawn, for example, as an internal drainage ditch which was later used as a boundary when part of the land was sold, then there is obviously no room for the reasoning of Lawrence J. to operate.”

18. Of course, the presumption can only operate where the evidence shows on the balance of probabilities that there is, or was, a ditch and a hedge along the boundary. Where there is/was a ditch and a hedge it is presumed that the edge of the outer bank of the ditch represents the boundary unless the evidence shows that either (a) the ditch was dug before the legal boundary came into being (as a result of the separation of the land on either side of the boundary into different legal ownership) or (b) the ditch and hedge were not respectively dug and grown in the manner that the presumption assumes.
19. That is not to say that the original location of a boundary created at (more strictly, shortly before) the time when the ditch was dug cannot change over time. It can do so if one owner obtains land across the boundary by adverse possession, or by a subsequent conveyance or by a subsequent boundary agreement. However, if none of those means of changing the boundary line are proved to have occurred and the presumption arising from the existence of a hedge and ditch is not rebutted, the presumption will operate to determine the line of the boundary.

The Northern Boundary Line - the Evidence

20. The Applicants' case with respect to the Northern Boundary Line is that there is a ditch running alongside the hedge on the Field side which must have been dug to protect Marble Cottage from water running off the Field. The hedge along the Boundary is growing on a raised mound (as I could observe at my site visit). The Applicants contend that the mound must have been created using earth dug from what they say was a ditch. They say that the footpath which can be seen on Ordnance Survey plans going back to 1884 runs roughly parallel to what they say is the ditch, on its northern side. They contend that the existence of the ditch (or what they say is a ditch) and the hedge planted

on a mound next to it has the effect that I should apply the hedge and ditch presumption and find that the boundary is the northern extent of the ditch. The DB Plan purports to represent the northern extent of the (alleged) ditch as the Northern Boundary Line.

21. The Respondent's case is that there is no ditch and so the hedge and ditch presumption has no application. There is a depression in the ground alongside the hedge for some of its length but that is not now and never has been a ditch. The footpath runs through the depression which was probably made by footfall. Therefore the boundary is the root line of the hedge.
22. As indicated above, the starting point when seeking to identify a boundary is usually the originating conveyance that separated the parcels of land on either side of the boundary into separate ownership, if that is available. Here the boundary is an old one. It appears to date back to no later than 1769. I was provided with a copy of an agreement dated 20 March 1769 made between Edward Allin and John Mound by which Mr Allin purchased the land which seems to be the land now known as Marble Cottage (then known as Little Cottage). I was also provided with an indenture dated 26 March 1789 recording the sale of what appears to have been Little College to a William Smith. Finally, I was provided with an extract from an enclosure award dated 22 January 1803 which seems to relate to the Field and which describes the land being awarded, to one James Adams, as bounded to the south in part by "land allotted to William Smith". None of those documents were accompanied by plans identifying the extent of the parcels of land to which they relate but on the material available I find on the balance of probabilities that they establish that the boundary with which I am concerned was established either by the agreement dated 20 March 1769 or some earlier conveyance of Little (now Marble) Cottage.
23. I should mention that the 1803 enclosure award required James Adams and the owners and occupiers for the time being of the land awarded to make, support and maintain fences on the south side of that land, i.e. along the Boundary with which I am concerned. Inevitably, however, there is no evidence available today of what fence was erected at the beginning of the nineteenth century and where exactly it was erected. There is photographic evidence that there was a single fence post in the hedge when this dispute arose but there is no reason to think that it dated from 1803. It is most unlikely that it did.

24. This survey of old conveyancing documentation establishes that the Boundary was established at least 250 years ago but does not identify its exact line. I turn, therefore, to the question whether there is/was a ditch alongside the hedge and, if so, the location of its northern border. If there is (or used to be until recently) a ditch running along the foot of the hedge, no evidence was called capable of rebutting the hedge and ditch presumption and so it would follow that the Northern Boundary Line runs along the northern border of the ditch as it was originally dug.
25. The evidence of the Applicants (both of whom gave oral evidence before me) was to the effect that there was a ditch along the Boundary when they purchased Marble Cottage and started renting the Field in 1993 and they were informed by their vendor that the ditch was the northern boundary of the grounds of Marble Cottage. They rely on a two photographs taken in, they say, November or December 1993 showing a marked fall off in the ground in front of the hedge. For the time being I shall refer to that falling off by the neutral term “the depression”. One of those photographs, marked 6A in the hearing bundle shows a lady which I think was Ms Gladstone walking towards the camera on the northern side of the depression. The depression is clear to see in that photograph. I accept Ms Gladstone’s evidence that the photograph marked 6A and the one marked 6B were taken in winter 1993.
26. The Applicants called Mr Stephen Sheldon of Holly Cottage, Lower Frit, Eardiston as a witness. He stated that he had lived at that address since November 2013 and started walking the footpaths in the neighbourhood in January 2014. In his statement he recalled the first occasion on which he walked through the Field because, he states, he was unsure where the footpath ran, and whether it ran through the depression. He says that as he progressed through the field he concluded that the depression was a ditch and could see the path of the footpath next to it. In in oral evidence he described the depression as being 1 foot wide and getting deeper and deeper as he and his wife progressed to the east. He said that you could see where people walked, next to it. He also said that there were branches from the hedge overhanging the depression.
27. Mr Sheldon’s wife, Catherine Sheldon, also gave a statement to the effect that “there has always been a ditch at the rear of Marble Cottage” since she had lived in the area. She was not challenged in cross-examination.

28. While it was the Applicants' evidence that there has been a ditch alongside the hedge throughout their ownership of Marble Cottage, they accepted that since this dispute arose in autumn 2016 Mr Williams has from time to time dug-out the ditch. Mr Williams said that he did so when Mrs Thomas's husband damages it while carrying out works within the field. He said that he has dug the ditch and thrown earth onto the bank if needs be. He also accepted that he had used a spade to flatten out what the Applicants maintain is the route of the footpath.
29. The Applicants called Mr Wyn-Jones who gave oral evidence to the same effect as his written report. In summary, his evidence relating to the Northern Boundary Line was to the following effect:
- (1) When considering whether there is a ditch triggering the hedge and ditch presumption he looks for three things: evidence of the ditch on site, historical evidence of a ditch and a reason for there to be a ditch.
 - (2) There is a reason for there to be a ditch in this location, namely to collect water from the field and divert it away from Marble Cottage. If he had been the purchaser of Marble Cottage 200 years ago he would have dug a ditch along the northern boundary.
 - (3) The hedge line is raised as if planted on a mound and the earth making up that mound must have come from somewhere.
 - (4) The 1993 photographs mentioned above show what to him looks like a ditch next to the hedge for some of its length.
 - (5) The 1884 and 1901/03 OS map shows the footpath more than 2 m away from the hedge which would be consistent with a ditch having been there, albeit later OS mapping shows less of a gap.
 - (6) He considers the depression more likely to arise from the digging of a ditch than from footfall - footfall would not create a depression like that.
 - (7) The Northern Boundary Line as depicted by Mr Wyn Jones records the outer edge of the ditch that was apparent in March 2017 when he surveyed the land.
30. Mrs Thomas's evidence was that she has known the Field well all her life and the hedge line has always been its southern boundary. The footpath has always run close to the

hedge, through the depression, not alongside of it. There has never been a ditch there. Anyhow the depression is only apparent for some of the length of the hedge and was probably caused by footfall. Mr Wyn Thomas was misled by the Applicants' actions in digging a trench along the surface of the footpath and creating manufactured evidence of a footpath alongside it. She relied on the existence of a fence post in the hedge, which was still visible at my site inspection, which she believed to be a remnant of a barbed wire fence probably installed by her grandfather and removed in the 1980s.

31. The Respondent called Mrs Celia Sutton as a witness. Mrs Sutton lived in the locale from 1973/4 until 1986/7 and used to walk the footpath through the Field during that period two or three times a week. Her husband's ashes were scattered in the Field so she continues to visit it. She said that there had never been a ditch between the footpath and the hedge. The footpath was made of clay and stones and was right by the hedge. There were tree branches growing over it so at times you had to duck.
32. The Respondent also relied on a short written statement by Marshal Lambert to the effect that in his younger days he used the footpath through the Field and there has never been a ditch along the hedge line. He said that the footpath was a thoroughfare for miners when the nearby mine was active.

The Northern Boundary Line - Discussion

33. Weighing all the evidence, I have concluded on the balance of probabilities that there used to be ditch running alongside the hedge and that the hedge was planted on earth excavated from it. In essence, I accept Mr Wyn Thomas's reasoning. It is likely that the ditch was dug before 1800. Not much of it is apparent today but that is explicable by natural forces and farming operations over the last 200 plus years. However, the 1993 photograph marked 6A in the bundle clearly shows a ditch beside the hedge along the stretch of boundary visible in that picture.
34. The existence of the fence post remnant mentioned above suggests that sometime last century a stock proof hedge was erected up against the hedge, but that is where one would have expected a stock proof fence to be erected. I cannot be satisfied that the stock proof fence was intended to mark a legal boundary. Even if it was, it would have been erected a century or more after the date of the conveyance that created by the boundary and so is not probative of the intentions of the parties to that conveyance as

to the location of the boundary. Nor can I be satisfied from the existence of that fence post that the boundary was shifted to the hedge-line through adverse possession by an owner of the Field.

35. I do not doubt that both the Respondent and Mrs Sutton were giving me evidence to the best of their recollections when they denied the existence of a ditch. However, I consider it likely that they have misremembered because the trees in the hedge overhung and obscured the ditch. Neither of them would have had any particular reason to focus on the shape of the land in the metre or so closest to the hedge root line when passing through the Field before this dispute arose in 2016. I cannot place any great weight on Mr Lambert's written evidence which there was no opportunity to test by cross-examination.
36. I therefore conclude that the hedge and ditch presumption does apply in this instance. I find that the Northern Boundary Line runs along the northern border of a ditch adjacent to the hedge and so is of the order of 70 to 100cm north of the hedge root line.
37. That said, I cannot be satisfied of the exact line of the Northern Boundary Line based, as it is, on a ditch dug over two centuries ago the extent of which is no longer visible. The representation of the Northern Boundary Line on the DB Plan is based upon the ditch as re-dug by Mr Williams between autumn 2016 and spring 2017. The width of that ditch may or may not coincide exactly with the width of the original ditch but it has not been proved on the balance of probabilities that it does so. I cannot be satisfied on the balance of probabilities, therefore, that the boundary line depicted on the DB Plan between grid reference 368963.98mE, 269555.59mN and grid reference 369018.59mE, 269582.96mN is the exact line of the boundary; I will direct the Chief Land Registrar to cancel the application insofar as it relates to that line. The line shown between those grid references is probably, in my judgment, in the approximate position of the Northern Boundary Line but a determined boundary requires a level of exactness that has not been proved in relation to the Northern Boundary Line.

The Western Boundary Line

38. The Western Boundary Line is far less controversial. Mr Wyn Thomas explained that he had identified that line by surveying the hedge line and overlaying on his survey plan conveyance plans from 1968 and 1989 conveyances of Marble Cottage as a best fit.

While that is a process which, as Mr Wyn Thomas accepted, was merely the best that he could do with limited information, the Respondent did not seriously dispute that section of the Boundary. She has erected her fence on the Field Side of it as far as I can tell. There was an issue taken with the depiction of the boundary line in one of the photographs in Mr Wyn Thomas's report, which seems to have been mistaken, but I am concerned with the depiction of the line on the DB Plan, not the photograph.

39. In my judgment the Western Boundary Line is likely to follow the hedge line and on the balance of probabilities that has been accurately depicted on the DB Plan. I will therefore direct the Chief Land Registrar to give effect to the application insofar as it relates to the line between grid references 368963.98mE, 269555.59mN and 368965.57mE, 269525.68mM on the DB Plan.

Decision

40. For the reasons that I have sought to explain above, I will direct that the application is given effect to in part and cancelled in part. I am aware that both parties wished to achieve a conclusive determination of the whole Boundary through my decision and I am sorry not to have been able to provide that with reference to the Northern Boundary Line. In order to bring this dispute to a close in the light of my findings above, it would be sensible for the parties to agree that the Northern Boundary Line shown on the DB Plan, or some agreed variation of it, is the boundary and for them jointly to apply to the Land Registry to have their agreement noted on the register as a boundary agreement. Such an agreement would bind them and their successors-in-title. I cannot compel them to do that, however, and nor can I direct that the application be given effect to the application insofar as it relates to the Northern Boundary Line for the reasons stated above.
41. The usual rule in this jurisdiction is that costs follow the event: the loser pays the winner's costs since referral to the Tribunal. However, that is not the invariable rule. By para. 9.1 (b) of the Practice Directions, Property Chamber, First-Tier Tribunal, Land Registration I can make a different or no order as to costs. And it is not always obvious who is the winner. I have not yet heard any submissions on costs, which I propose to decide with reference to written submissions. So, if either party wishes to apply for costs they should make a reasoned application in writing, accompanied by a schedule of costs

within 28 days. Such an application should be served on the other party who will then have 21 days to respond to the application by way of written submissions sent to the Tribunal, copying any submissions to the applying party or parties. Any response to such submissions should be provided to the Tribunal and the other party or parties within 14 days of receipt of the submissions.



JUDGE DANIEL GATTY
Daniel Gatty

Dated: 24 July 2019

