

[2019] UKFTT 0591 (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 2018/0584
BETWEEN

JOHN ESSERY

Applicant

and

PHILLIP NICHOLAS THOMAS
HELEN JANE THOMAS

Respondents

Property: Bidwell Barton Far, Upton Pyne, Exeter

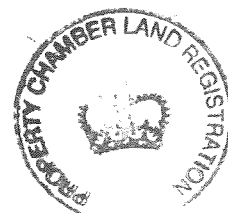
Title numbers: DN540614 and DN539400

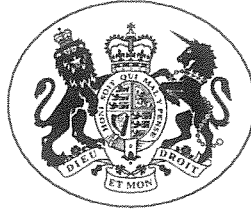
ORDER

For the reasons given in the decision dated 7 August 2019 the Chief Land Registrar is ordered:

1. To cancel the application dated 15 May 2017 to be registered as proprietor of part of title number DN540614 under section 97 and paragraph 1 of Schedule 6 to the Land Registration Act 2002.
2. Pursuant to Rule 40(3)(a) of the Tribunal Procedure (First Tier Tribunal (Property Chamber) Rules 2013 to alter the general boundaries of DN540614 and DN539400 to show the general boundary in a more accurate position, namely along the line marked A-B on the plan attached to the Statement of Truth made by the Applicant, being the same plan as that referred to in the letter dated 25 March 2008 from Land Registry and being the same line A-B as shown on the survey plan attached to HM Land Registry Survey Requisition.

BY ORDER OF THE TRIBUNAL
Ann McAllister
Dated this 7th day of August 2019





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Respondents

Property: Bidwell Barton Farm, Upton Pyne, Exeter

Title numbers: DN540614 and DN539400

**Before: Judge McAllister
Exeter Magistrates Court
4th, 5th, 6th June 2019
9th July 2019**

Representation: Mr Russell James of Counsel instructed by Kitsons Solicitors appeared for the Applicant; Ms Lara Spencer of Counsel appeared for the Respondents.

DECISION

Introduction

1. The Applicant, Mr Essery, is the registered owner of a parcel of land known as 'The Paddock' registered with title number DN539400. The Respondents, Mr and Mrs Thomas, are the owners of Bidwell Barton Farm, Upton Pyne, ('the Farm') which is registered with

title number DN540614. Mr Essery has lived at a property known as 'Bethany' since 1984. The Paddock lies to the north west of 'Bethany'.

2. The Paddock and the Farm were in the common ownership of members of the Tucker family (Joyce Maud Tucker, Cecil James Tucker and Audrey Joan Tucker) until the sale of the Paddock (also known as Langford Down) to Mr Essery on 12 September 2006. The sale of the (remainder of) the Farm was made on the following day, 13 September 2006, to the Respondents, Mr and Mrs Thomas.

3. By an application dated 15 May 2017 Mr Essery applied in form ADV1 under section 97 and paragraph 1 of Schedule 6 to the Land Registration Act 2002 to be registered as owner of part of the land registered under title number DN540614. The land which was the subject of the application was shown marked red on the plan accompanying the letter dated 25 March 2008 from Land Registry to Mr Essery's solicitors, Kitsons. I will refer to this as the 'disputed land'.

4. Although this was the subject of some discussion both on the site visit and at the hearing, it is clear, in my judgment, that Mr Essery's claim extends only and no further than the fence on the (south) east of the Paddock running north to south. I will refer to this as the eastern boundary, albeit that it is referred to on occasion as the 'south eastern' boundary. It is, and in my judgment has always been, Mr Essery's case that this fence was erected by the vendors prior to the purchase by him of the Paddock and that it marks the boundary between his property and the adjoining field owned by Mr and Mrs Thomas, known as Top Down field.

5. Mr Essery's Statement of Truth in support of his application dated 23 April 2017 makes his position clear: the land in dispute is marked by fence marked A-B on the accompanying plan. There is no claim to any additional land. Further, the same statement makes the point that if an inspection had been carried out by Land Registry at the time of his first contact with Land Registry in 2006, it would have been obvious that the fence marked the boundary.

6. Mr and Mrs Thomas's case is that the boundary fence was along the remains of an old hedge bank on the Top Down (or east) side. Although there are some inconsistencies in Mr and Mrs Thomas' case, it appears that their case is that Mr Essery erected a new fence to the east of this line in or about August/September 2007. If this is right, and if Mr Essery's claim that the true boundary has always been the fence, his claim for adverse possession would fail in that he has not had exclusive occupation (which is in any event disputed) of the disputed land for a period of 10 years prior to the application.

7. It is common ground between the parties that the principal issue in this case is the position of the eastern boundary of the Paddock. If the boundary is not the fence in its current position, the issue becomes whether Mr Essery can make a claim under Schedule 6 to the 2002 Act to the disputed land, and in particular whether he can fulfil the condition set out in paragraph 5(4) of the Schedule.

8. This paragraph requires the applicant to show, so far as relevant, for at least ten years of the period of adverse possession ending on the date of the application the applicant reasonably believed that the disputed land belonged to him.

9. The disputed area (between the boundary as contended for by Mr and Mrs Thomas and the fence) is a strip approximately 4/5 metres by 80 metres. It is shown, subject to the general boundaries rule, as part of Mr and Mrs Thomas' land on their filed plan.

10. For the reasons set out below, I have come to the conclusion that the boundary between the Paddock and Top Down was, at the date of the conveyance to Mr Essery, marked by the fence which is still in place today. In the circumstances, and in view of this conclusion, I do not need to consider in any detail the claim for adverse possession. However, in the event that I am wrong, in relation to the boundary, I find that Mr Essery has made out his claim for adverse possession of the disputed land.

The position of the boundary: legal analysis

11. The starting point in establishing the boundaries of land conveyed is the parcels clause of the relevant conveyance, which is to be considered in the context of the conveyance as a whole. Where the description is by reference to a plan, the question is whether the plan is determinative and sufficiently clear. It is often the case that boundaries are inadequately defined, particularly so if small scale plans taken from Ordnance Survey maps are used.

12. Where neither the verbal description of the land conveyed, nor the plan, is sufficient, the court will adopt an objective test. Taking into account the surrounding circumstances, including the topography, the language of the conveyance, and the representation of the plan, what would a reasonable person believe they were buying? (see *Alan Wibberley Buildings Ltd v Insley* [1999] 1 WLR 894 at 896, *Stratchey v Ramage* [2008] EWCA Civ 284 and *Toplins v Green*, unreported 14 February 1992 CA).

13. Extrinsic evidence is also admissible to establish the true intention of the parties where the boundaries are inadequately defined: see *Pennock v Hodgson* [2010] EWCA Civ 873. This may include other documents, such as agents or auction particulars, and may also

include evidence of the subsequent conduct of the parties to the original conveyance, but only in so far as they cast light on their intentions at the time of the conveyance (*Ali v Lane* [2006] EWCA Civ 1532).

14. Where the land is registered, and unless a boundary has been determined under the statutory provisions set out in section 60(2) of the Land Registration Act 2002 and rules 118-120 of the Land Registration Rules 2003, all boundaries shown in the register of title are general boundaries and do not indicate the exact line of the boundary. The courts have not accepted that there is any limit in relation to the land which may fall within the scope of the general boundary rule. This depends on all the circumstances, including the quantity of land involved: see *Drake v Fripp* [2011] EWCA Civ 1729.

15. It follows from the general boundaries rule that an alteration of the register which does no more than to produce ‘another general boundary in a more accurate position than the current general boundary’ is not a rectification, in that it does not prejudicially affect the title of the registered proprietor, but an alteration (see *Derbyshire County Council v Fallon* [2007] EWHC 1326 and *Strachey v Ramage*). In consequence therefore the alteration must be approved, unless there are exceptional circumstances to justify not making the alteration (see paragraph 3(3) and 6(2) of Schedule 4 to the Act).

The conveyance of the Paddock

16. Clause 1 of the conveyance dated 12 September 2006 (‘the Conveyance’) between the Tuckers and Mr Essery reads as follows: ‘*In consideration of the sum of THIRNEEN THOUSAND FIVE HUNDRED POUNDS (the receipt of which the Sellers hereby acknowledge) the Sellers with full title guarantee HEREBY CONVEY unto the Buyer ALL THAT land forming part of Bidwell Barton Farm which is shown edged red on the plan (‘the said plan’) attached hereto (including the whole of old OS Number 653)...*

17. Clause (6) of the recital clause further provides that the sellers had agreed to sell and the buyer had agreed to buy all that land hereinafter described comprising part of Bidwell Barton Farm and comprising approximately 1.891 acres for the sum of £13,500.

18. Clause 5 of the Conveyance provides that the buyer covenants with the seller that the buyer will maintain the boundary which is shown marked with the inwards ‘T’ mark on the said plan in a good and stockproof state of repair and condition,

19. It is accepted by the parties that the relevant plan is that signed by the Tuckers. It is marked ‘For identification purposes only – not to scale’. No OS number is shown on the

land edged red. The inward 'T' marks are on the disputed boundary and on the north west boundary.

20. It is important to note that the eastern boundary on the plan shows a slight kink at the south eastern end where the line cuts slightly into Top Down. This was to allow the creation of a vehicular access into the Paddock.

21. It follows therefore, and is common ground, that neither the description of the land to be sold, nor the plan, are sufficiently clear to preclude reference to, and reliance on, extrinsic evidence. This evidence includes the contemporaneous correspondence, and the recollection of the parties and their witnesses, so far as relevant and admissible.

22. Both parties have placed considerable reliance on the correspondence and other documentary evidence both before and after the Conveyance (albeit that Mr James submitted that the evidence post Conveyance was of limited probative value) and accordingly I will consider this in some detail. I am particularly grateful to Ms Spence for preparing an annotated chronology which has made this task considerably easier.

Events and evidence prior to the Conveyance

23. By letter dated 16 March 2006 the agents dealing with the sale of the Paddock (Stags) wrote to a number of nearby owners offering two fields for sale. The first, Yonder Narraway, comprised some 7.12 acres. The second was the Paddock. The plot was landlocked, and it was therefore necessary to create a vehicular access through a newly created access at the south east corner (from the lane leading to Langford Road). This new access is shown on the plan, annotated by hand, attached to the letter. The size of Langford Down was said to be 1.87 acres. The letter also stated that it would be the responsibility of the purchaser to fence the boundaries.

24. Mr Essery had been hoping to extend his property by purchasing the Paddock. He had visited it on a number of occasions and knew it to be wet and neglected. His evidence was that the field had in effect become part of the adjoining 22 acre field (Top Down). Cattle grazed and roamed the two fields together. The boundary between the two was the remains of an old bank which had been undermined by cattle. The line of trees was not the boundary.

25. There are, to this day, 5 mature trees on the eastern side of the Paddock which are not in a straight line. In particular, the fourth tree, an Ash tree, (going north) is significantly out of line with the others.

26. In March 2006 Mr Essery was on holiday. A neighbour, Mr Lee (who gave evidence) contacted him to tell him that the Paddock was for sale. On his return Mr Essery was given a copy of the letter of 16 March 2006.

27. The Stags sales particulars described the Paddock as comprising approximately 1.93 acres. The sale price was £20,000. A plan was attached for identification purposes only. The particulars included a photograph which shows a fence and straining post. In the usual way, the particulars contained a disclaimer to the effect that they should be read as a guide only.

28. Mr Essery viewed the Paddock again on his return and noted that three of the boundaries were secure; the eastern boundary was marked by a new fence; the western fence with barbed wire, and the north western boundary with a well maintained bank and hedge. The fence on the eastern boundary, he assumed, had been erected by or on behalf of the vendors, and included the dog leg at the south eastern corner.

29. The eastern boundary was marked with a post and pig wire fence with barbed wire along the top. Mr Essery's evidence is that the strainer post which is there now was there in 2006. It is the same fence which can be seen in the Stags brochure. The fence also included the overgrown old gateway to what would have been the adjoining field, Top Down. It is Mr Essery's case that this fence, albeit in a deteriorated state, is still in place today and marks the boundary. He assumed that the fence was erected so as to ensure that the Paddock was comprised 1.93 acres.

30. Mr and Mrs Thomas first viewed the Farm in the late spring of 2006. At that time, they were aware that two fields were to be sold separately. They were also aware that, in order to allow access to the Paddock, direct access had to be given to the lane leading to Longford Road. This would require a small alteration to the boundary.

31. Mr Thomas' recollection is that, on the first visit, the change to the gateway to the lane had not been made. He recalled that repairs were needed to the boundary fence. The fence was along the remains of an old hedge bank on the Top Down (eastern side). The fence consisted of sheep netting and barbed wire. He recalled the oak trees. He also agreed that the fence had been trampled down and that, at least in one area, cattle could get through. At the end of the fence, on the Top Down side, was a small wooden gate leading to the lane.

32. In cross examination, Mr Thomas stated that the hedge bank was the boundary feature and that there was a fence along the bank. He was equivocal as to whether this represented the legal boundary and appeared to believe that Land Registry would establish the exact boundary. He was also critical of the filed plan of the Farm, in that it appears to show that

the additional land in the south east corner forming part of the Paddock goes across the Farm's own access to the lane.

33. Stags sent a notification of sale document dated 28 June 2006 to Mr Essery which stated that the sale price was £13,500 and, under the heading, 'Other Information' stated that *'New fence on south east of paddock is the boundary'*.

34. On 11 July 2006 Mr and Mrs Thomas walked the boundaries of the Farm with their solicitor, David Charlesworth. By this date the gateway had already been altered so that the gate now opened into the Paddock rather than Top Down. The fence, as Mr Thomas recalled it, had been slightly changed to allow for the fact that the gate had been moved. Rather than running straight up the eastern boundary it deviated, for a single post (possibly 3 to 4 metres) before changing angle and joining the new gate post. It therefore formed a 'dog leg'. There had also been some repairs to the original fence. Mrs Thomas' evidence is that she does not recall the disputed boundary in any detail prior to the purchase.

35. Mr Essery visited Kitson Hutchings, his solicitors, on 16 August 2016. (Kitson Hutchings are now Kitsons, and I will refer to them as such throughout the decision). The solicitor dealing with the matter was Mr Forward, who attended the site for the first time in August 2017. On the August 2006 visit Mr Essery informed Mr Forward that the eastern boundary was not correct in that the boundary should not be a straight line. He also annotated a plan by hand and believes this to be the plan showing the word 'gate' in the south east corner. The plan also shows the boundary as being wider at the south east end.

36. On 18 August 2006 Mr Essery's solicitors wrote to Foot Anstey, acting for the Tuckers, raising the question of the position of the boundary. The letter stated as follows: *'May we refer you to the track way leading to the side of the property from the public highway; at the top of such track way, and obviously in anticipation of this intended transaction, your clients have constructed a further fence within their field leaving a small gap between the defined boundary and such new fence. So as to avoid any doubt over the fact there is the existing boundary and then this new fence we should be grateful if you would confirm that all such existing boundary feature is deemed to form part of this property.'*

37. Asked about this letter, Mr Essery stated that it clearly referred to the 2006 fence along the length of the boundary, as was not only referring to the fence around the south eastern corner.

38. Foot Anstey replied on 23 August 2006 enclosing a new copy of the plan. This plan is missing. Paragraph 5 of the letter continues *'You will see that there has been a slight change*

in the eastern boundary of the paddock so that the paddock will incorporate all the land leading to the new fence. This also means that the paddock will include the gateway leading from the lane into the southernmost corner of the paddock. We have marked the position of the gateway.'

39. A copy of this letter was sent to Mr Essery by Kitsons. Mr Essery replied by email on 25 August stating '*All seems fine. Particularly the amended plan (eastern boundary).*' In evidence he stated that he was satisfied with this reply, as it confirmed to him that the Paddock included all the land up to the new fence. He also considered that the placing of the fence further to the east constituted a 'slight change'.

40. A further letter from Foot Anstey on 25 August 2006 enclosed a new copy of the draft conveyance which contained a re-drafted clause 1. The letter stated: '*We have re-drafted clause 1. We have done this as firstly we do not know the current OS number for the Paddock and secondly, strictly speaking, the land to be conveyed will include the tiny additional area up to the new boundary fence (no doubt forming part of a different OS number). You will see that we have now described the Paddock primarily by reference to the plan and we think this is better for your client*'.

41. A similar letter was written by Foot Anstey to Mr and Mrs Thomas' solicitors stating: '*The buyer of the Paddock has requested some minor amendments to the Conveyance in order to make it plain that the sale will include up to the line of the new fence which means that the sale includes a very small area in the adjoining field.*'

42. Shortly before or on 30 August 2006 Mr Thomas checked the boundary. He spoke to Mary Nation (who was acting for him whilst Mr Charlesworth was on holiday) from his mobile. His recollection is that nothing had changed since his last visit. The majority of the fence, he recalls, was in line with the trees and the only change was around the gateway.

43. On 30 August 2006 Mary Nation wrote to Foot Anstey saying that the '*amended fence is not quite as drawn. It runs along the original boundary shown on the Estate Agents' plan but then about 10 metres from the southern end it changes direction. It starts off heading towards the inner edge of the track to the south of the boundary and then changes to aim for the further edge of the track. I enclose copy plan to show this.*' No copy of that plan has been found.

44. Foot Anstey reply the following day. The relevant passage is as follows: '*Thank you for your comments concerning the plan of the two acre paddock. I am content with your description of the boundary of the same and also the plan. I need the buyer of the paddock also to agree these matters. I believe that, from this point of view, the most important point*

is that the gateway from the lane into OS Number 5254 (formerly OS 645) is incorporated in the two acre paddock (as you have shown on the plan to the draft Transfer).'

45. On 31 August 2006 Foot Anstey wrote to Kitsons in these terms: *'The Buyers of the remainder of the farm have requested us to make a further minor alteration to the plan. We enclose a copy of the remainder of the farm [sic] and you will see that the buyers of the farm wish the plan to the paddock to show that it includes a notch of land at the southern corner. If you are happy with the boundary of the farm (and thus the boundary of the paddock) would you kindly let us know as a matter of urgency.'* The plan shows the extension of the paddock into the neighbouring field (marked 'Down' on the plan) at the south eastern corner.

46. On 4 September 2006 Kitsons emailed Mr Essery in anticipation of completion. This letter reads, so far as relevant: *'Effectively at the last moment the solicitors acting for the sellers notified me that in fact they wished to include in the Paddock an additional area of land, ie just a widening and including of the section of land to the gateway entrance at the top of the existing lane'*. Mr Essery replied saying *'the area by the gate they refer to is, I presume, the existing 'new' boundary fence. They put it up during the sale process – I had always assumed that was the boundary line. That is why I queried it when I was down last'*.

47. The draft transfer was sent to Mr Essery shortly before completion. In an email dated 8 September 2006 Mr Essery wrote: *'I have only one query – you will see the document refers to 1.891 acres whereas the Stags flyer clearly stated 1.93 acres. The first Stags letter I have was 1.89 but then they put in the fence and gate for lane access. In the light of the need for us to tell them to move the boundary on the plan do we need to double check the acreage. I leave that with you.'*

48. Nothing further seems to have taken place between 8 and 12 September, and the sale of the Paddock was completed on 12 September.

49. I heard evidence from John and Bryan Down, and Christopher Lee for Mr Essery, and from Mr Rew of Stags for Mr and Mrs Thomas in relation to the position before (and in the case of Mr Essery's witnesses) after the Conveyance.

50. John and Bryan Down are nephews of Mr Essery. John Down recalls being shown the Paddock prior to the Conveyance. It was a neglected pasture. The boundaries of the paddock were overgrown hedges on the west and northern sides, and a new pig and post wire fence on the eastern side. Bryan Down also recalled the clear wire fence on the eastern side. Both have visited their uncle on a number of occasions since that date and both confirmed that the fence had not moved and is there to this day. Bryan Down's evidence

was at times confused in relation to plans and the aerial photographs which were shown to him.

51. Mr Lee is a neighbour, who has known Mr Essery for some 33 years. He received the Stags letter in early 2006 about the sale of the Paddock, which he took to Mr Essery, knowing that he would be interested. At that time there was, on his evidence, no real boundary between the Paddock and Top Down because cattle ran between the two. A new fence and gateway had been erected by early June, and a new gateway. These have remained in the same place since that date. Mr Lee kept a diary, which is how he can remember when the new fence was erected. The gateway was the start of the post and pig wire fence which ran the length of the boundary.

52. The witnesses were asked at great length to look at a number of photographs, including aerial photographs. It is said by Ms Spence that the witnesses became confused, in particular in relation to the strainer post shown in the Stags brochure, and to the spacing between the posts. It is the Respondents' case, of course, that the fence shown in the Stags brochure is not the same as the fence in place now. Particular emphasis is placed on a Google earth photograph dated 2 April 2007. This is said to show that there the fence now in place was not there on that date, in contrast with aerial photographs taken in 2010 which, it is said, shows the fence significantly to the east of the trees.

53. As indicated in the trial, both the aerial photographs and the other photographs are, in my judgment, of limited probative value. None show unequivocally that the Stags fence is different from the current fence; all require an exercise in interpretation, (depending on the time of the year, the angle at which they are taken, and the clarity of the photographs) and recollections which, in view of the length of time involved, are bound to be uncertain.

54. Mr Rew acted on behalf of the Tucker family in relation to the sale of the Farm and the Paddock. He does not have a clear recollection of the boundary between the Paddock and Top Down on his first visit prior to March 2016, but recalls a row of trees, a hedge bank and a fence along the old hedge bank. A precise recollection would be surprising: Mr Rew has been involved in selling 30 to 40 parcels of agricultural land per year over the last 24 years.

55. The OS plan showed 1.87 acres, and then the measurement was checked against Promap. This explains, he said, why 1.93 acres appears on the Stags brochure. The measurement is based on a desk top exercise: neither Mr Rew nor anyone else has ever surveyed or measured the Paddock on the ground, either in 2006 or since.

56. Mr Rew recalls meeting with the vendors to agree that they would improve the fence on the eastern side and put in a gate to allow access to the Paddock. Asked about the information given on the notification of sale document (namely that the new fence on south east of paddock is the boundary) he first stated that he believed this referred to the new access only but agreed, on further questioning, that the new fence could have been the entirety of the eastern boundary. His main focus was on the creation of a new entrance to the Paddock.

57. The fence was put in or improved by the Tuckers, and Mr Rew also stated that if there had been a new fence all the way along the boundary he would have noticed this. But he then added that he does not recall walking along the length of the boundary so cannot be entirely sure what work was done.

58. He recalls walking the Farm with Mr and Mrs Thomas but accepted that this would only have probably involved the main parts of the Farm.

59. Cecil and Audrey Tucker did not attend to give evidence but wrote a letter on 8 February 2019 to Mr and Mrs Thomas. This is not in the form of a witness statement and, importantly, does not contain a statement of truth. The letter states: '*We clearly remember the boundary in question when Bidwell Barton was sold in 2006. The boundary in being [sic] between your land and the paddock purchased by Me Essery. We don't have any of our photographs so we are sending some of the copies that you have provided which we have listed with our remarks.*' The first photograph is the Stags brochure photograph. They stated that this showed the old boundary fence. They marked the old boundary on the recent photographs (showing the inner fence built in 2016) as shown running along the edge of the trees. They also stated that the time of the Conveyance the fence was repaired and was not new.

60. Mrs Thomas' evidence was that Cecil and Audrey Tucker did not want to give evidence. She went to see them, with the photographs, and asked them to clarify the position of the boundaries.

Events and evidence post completion of the Conveyance.

61. On the 13 September 2006, Mr and Mrs Thomas completed their purchase of the Farm. The TRI defines the farm as '*ALL THAT land farmhouse and premises situate in the Parish of Newton St Cyres Devon known as Bidwell Barton Farm....All Which property is shown edged red on the attached plan.*' The plan again states that it is for identification

purposes only and not to scale. The plan, consistently with the Conveyance plan, shows that the south eastern end of the boundary deviates away to allow the new access to the Paddock. Clearly the Farm could not include land already conveyed to the Mr Essery.

62. Top Down is one of the more remote fields away from the house where Mr and Mrs Thomas live. They cultivate vegetables as a business. Top Down, however, is let out for grazing.

63. Mrs Thomas' evidence is that she has a clear recollection of the boundary between Top Down and the Paddock as it was in the autumn of 2006, following the purchase of the Farm. It was a sheep netting fence, supported by old posts. The base of the fence ran along the base of several mature oaks, that is to say the 5 trees which are still there, to the west of the fence. Some of the fence was in contact with the trees. In the case of one or two oaks, it was possible to stand on the grassy tump between the fence and the tree. These tumps marked, a hedge bank which had once run along between the line of trees. Mrs Thomas also recalls the boundary encompassing the gateway in the corner of the field.

64. Mr Essery had already lined up contractors to clean the Paddock, drain it, and build a pond in the north western corner. Ron Trickey, who gave evidence, was the digger driver. Work began on 14 September and ended on 22 September. Mr Trickey is elderly, and is suffering from a brain tumour. He had difficulty recollecting events, and, in truth his evidence was of very limited value. More recently, in about 2016, he put up the inner fence which now runs parallel with the disputed fence.

65. Friends of Mr Essery, Vernon and Sonia Clapp, visited during this period and took photographs. It is Mr Essery's case that these show the new fence and, in particular, a new post which, on his evidence, is the first post of the 'new fence' extending along the whole eastern boundary. I make the same point in relation to these photographs: they are of limited assistance, not least because they show the access area after it had been altered to allow plant and equipment to get into the Paddock.

66. The Paddock was registered on 3 October 2006. The title plan shows the eastern fence in a straight line, that is to say, it omits the dog-leg representing the south eastern corner. On 4 October 2006 Kitsons sent Mr Essery a copy of the title plan. This letter raised the query whether the plan should not show the small section 'co-extensive with the width of the footpath' (ie the south eastern corner').

67. The following day Mr Essery replied stating that the line 'should be drawn on the other side of the track. He continued: *'Where Land Registry may have got it wrong is because the old hedge for the field was as the red line but this was changed to include the*

access point from the lane (the lane is more than a footpath it allows vehicular access and is about 10 feet wide). It is important Land Registry recognise this – it means a change of boundary for the two fields my new one and the adjoining one. You asked me to mark on the map which I have obtained from my neighbour -it is that small it would not show. It is about 15 feet to the left of my shed running back over a distance of 15 feet.’

68. On 6 October 2006 Kitsons wrote to Land Registry, explaining the problem relating to the southeastern corner. This was on 6 October. On 23 October 2006 Land Registry accepted they had made a mistake and enclosed an amended plan.

69. On receipt of the amended filed plan, 2 November 2006 Mr Essery emailed Kitsons stating: *‘I have had the letter and map from Land Registry and I noticed the east boundary is still not totally accurate. They have included the lane gate and that is fine but they immediately revert to the old boundary line in fact the line should be about 10 feet inside that for the entire length of the east boundary. Do we need to get this absolutely accurate?’*

70. Mr Essery wrote again on 3 December 2006 attaching a plan on which he drew a variation of the boundary and stated: *‘The problem I have perceived with the Land Registry plan is that it was clearly drawn on the old line for the field shown on the ordnance survey map. There was a hedge, reduced now to a row of trees, consistent with the old line. However a fence was erected to include the lane and a new line extending the field on the east side by some 3m. The fence provided a clear demarcation line to facilitate the sale and ensure access was available to the field down the lane. The Land Registry plans keep reverting to the old line. I first drew your attention when agreeing the sale and your clarified it with the solicitors acting for the vendor. Hopefully this explains the position and we can accurately amend the Land Registry record.’*

71. Kitsons replied on 9 January 2007. In this the writer expressed concern about Mr Essery moving *‘an existing boundary structure almost along the whole line of such western {sic} boundary where my understanding was only at the bottom most section that the revised boundary had been formed.’*

72. Mr Essery remained dissatisfied, and, to some extent, was becoming impatient with his solicitor. He wrote again to Mr Forward on 12 January 2007, 11 March 2007 and 11 June 2007. In the letter dated 12 January 2007, he referred to the fact that the positioning of the fence might explain the discrepancy between 1.87 acres and 1.93 acres. He said: *‘I feel the new fence was erected to include the lane gateway and it was continued on the same line throughout the entire length of the boundary fence. We made sure we were clear on the boundary fence (the wire fence) with their solicitors before signing. However the Land*

Registry keep reverting to what appears to be the old boundary hedge... My concern is that if, what is no more than a post and wire fence is taken down the remnants of the hedge will remain and a claim could be made that the hedge is the boundary. I then question what redress I would have if I agree the land registry plan. Agreeing boundaries must surely be one of the most important aspects of the registration of land. How can a field of 1.87 acres become 1.93 acres within the same boundary. The letter indicating 1.87 acres pre dates the erection of the post and wire fence and the Stags brochure post dates the erection.'

73. Mr Forward replied on 22 January 2007 as follows: ' It was my understanding that the lower end ie the southern end... had been extended across so that as one faces the field the right hand boundary at such south eastern point was in line and adjacent to the top right hand section of the footpath. Such deviation only occurred for a short section of the eastern boundary and the remaining boundary was as existed hitherto. You refer to a new boundary fence... are you saying there are 2 fences or one boundary hedge and a replacement fence?.....HM Land Registry have notified us that the width of the red edging on a registered filed plan can be as much as one metre... '

74. On 9 February 2007 Mr Thomas wrote to Mary Nation on a number of issues, including the fact that it seemed to him that the owners of the Paddock had removed a gatepost which was there when he and Mr Charlesworth had walked the boundaries.

75. Mr Essery replied to his solicitor's letter of 22 January 2007. The letter states: ' I think we have got into a rather confusing situation. I want to take you back to my visit to your offices when I raised the issue of the boundary that was before 24 August and well before the signing of the contract... (Mr Essery then refers to the letter from Foot Anstey dated 23 August 2006, and continues): ' The changed plan referred to indicates the new boundary fence and I have no problem with that. It runs along the entire fence parallel with the old hedge and about 12 feet into the old adjoining field.... My issue is solely with the land registry plan which does not recognise the position of the 'new fence' and I think it is important the registration plan is accurate. If you think otherwise then I will accept your advice.'

76. The issue remained unresolved. Mr Forward replied on 13 March 2007 reminding him that the agreed form of plan approved by him was annexed to the contract and to the Conveyance. Mr Forward also referred (though not in terms) to the general boundary rule, and said that if Mr Essery was claiming that the line was 'out' by more than 3 feet , the only way forward would be to request the Land Registry to inspect the property.

77. In May 2007 Wayne Sanders and Eric Govier erected fencing along the other three sides of the Paddock. It is Mr Essery's case, supported by the evidence given by Mr Sanders, is that the existing fence on the eastern side met the fence running along the top end of the Paddock which Mr Sanders erected. He returned in 2008 to find that the fence he had erected remains in place and meets the same fence which was there in the spring of 2007. The fence he erected finishes against the corner post of the eastern fence, albeit that this fence is now in a state of decay. In evidence he stated that he knows his own work: he has his own style of fencing, and would know if someone else had added some fencing to join a new fence further to the east, albeit that he could not completely exclude this as a possibility. Mrs Thomas, in cross examination, stated that she believed it was possible that Mr Sanders' fence was extended later to meet the (new) fence on the eastern boundary but agreed that the photograph showing the point where the two fences meet does not suggest that there was any extension.

78. On 11 June 2007 Mr Essery wrote a further letter to Mr Forward in reply to the letter of 22 January. In this he stated: *'I know that the 'new fence' runs the entire length of the south eastern boundary but at the gate it starts a little wider than the rest of the line....In your letter you say 'such deviation only occurred for a short section of the eastern boundary and the remaining boundary was as existed hitherto'. That is not correct and the fence is at least 3 metres outside the old hedge. I am enclosing a copy of a plan of the field drawn to scale which has been prepared for planning permission for a pond.... I feel it is important to register the land accurately not necessarily for existing understanding between neighbours but later particularly if the land is sold. At the moment the Land Registry plan is inaccurate.'*

79. An application for retrospective planning permission in relation to the pond was made on 15 June 2007. The application attached two plans. The first is the Land Registry 'map of the area with the outline of the field' The proposed new pond is shown in the western corner. The second plan showed the pond in more detail. This plan is headed: 'Plan as proposed'. On the eastern boundary of the Paddock, the plan shows tree stumps and 'new fence'.

80. On 27 June 2007 Mr Essery wrote again to his solicitors, expressing surprise that he had signed an inaccurate plan, but repeating that it was essential that the Land Registry plan should be accurate. The letter also referred to the only visit Mr Essery made to the solicitors' offices in August, and to the copy of the pencil marked plan he made on the plans.

81. Mr and Mrs Thomas were concerned to obtain a right of way over the land leading to Longford Lane. In the spring and summer of 2007 Mr Thomas sold the grass from Top Down to a neighbour. The work needed to be topped, which Mr Thomas did in July 2007. He was clear in his evidence that there was no change of the boundary line at that time.

82. On 26 July 2007 Mr Forward wrote to Land Registry raising the question of the accuracy of the eastern boundary as shown on the filed plan and asking for an inspection. Land Registry replied on 7 August 2007, asking for full details of the discrepancy, including the location and precise dimensions, and asking whether the boundary was fenced.

83. On 6 September 2007 Mr Forward provided Land Registry with the second planning application plan in two versions (one on a larger scale) with dimensions. This was in support of an application to include the strip between the line shown on the title plan and the line of the new fence. In due course, on 25 March 2008, Land Registry replied, enclosing an illustrative plan, and stating that to give effect to the new boundary position (the 'proposed' fence being some 5 metres to the east) Mr and Mrs Thomas would need to transfer the disputed land to Mr Essery. It seems to me clear that the letter was written on the assumption that the 'proposed' fence resulted in more land being acquired by Mr Essery than was conveyed to him.

84. In November 2007 Mr Essery, with the help of Mr Cole and Mr Lee, planted 155 trees of 10 different varieties. On their evidence, the trees were planted along the eastern boundary just inside the fence, that is to say on the disputed land. Mr Cole returned a little while later to cane and guard the trees, in particular from the predation of rabbits.

85. Mr Lee produced a diary entry for 10 November 2007 in which he confirms the planting up to the 'wire' (the fence). Mr Cole also gave evidence. He is a water diviner and first went to the Paddock in October 2006 (as recorded in his diary) to advise on a field drainage system to feed a pond. The main wet area was at the top of the eastern boundary. He recalls the post and pig wire fence with a strand of barbed wire at the top. He also recalls trees along the boundary (4 oak and 1 ash) and that the fence was beyond the trees.

86. Mr Cole helped source the new trees to be planted and delivered them to Mr Essery on 10 November 2007. He confirmed that the trees were planted mainly along the fence with the help of Mr Lee. This, on Mr Cole's evidence, was the same fence which had been there in 2006 and which, albeit in a dilapidated state, was still there in November 2018 when he next visited.

87. Mr Cole was also shown the photographs taken in 2010, and stated (contrary to the parties' agreement) that this fence is not the same as the one on the ground at the moment.

88. On 2 May 2008 Kitsons wrote to Mr and Mrs Thomas' solicitors requesting the transfer of the disputed land. The letter was sent to Mr and Mrs Thomas enclosing the Land Registry plan dated 25 March 2008. Mrs Thomas visited Top Down and was, she said, shocked to see a new fence some distance into her field. It had taller posts and new netting. A larger wooden gate had been placed in the access to the Paddock which extended into their access to the lane. Mrs Thomas was so surprised that she described the fence to Mr Thomas as being 'in the middle of their field'.

89. Mrs Thomas wrote to her (new solicitor) on 20 May 2018. This letter is primarily concerned with the possibility that access to the lane from Top Down had been blocked. So far as the boundary with the Paddock is concerned, the letter stated: *'We really would like to retain access to this gateway/track, and the neighbour can get to the track as they have in their ownership the adjoining parcel of land... although I don't know exactly what extent their boundaries are... The neighbour did not check the position of the fence with us before they erected it.... We did not notice the positioning until it was done, at which point we questioned it with Charlesworth Nicholl.'* When asked about this letter Mrs Thomas stated she was not referring to the disputed boundary when she said she did not know where the boundaries were. She was adamant that the fence she had seen was a new fence. It was pointed out to Mrs Thomas that, in their letter of objection to the application for adverse possession dated 17 January 2018, her solicitors had written that the new fence was erected in April/May 2008, and went on to say that the fence 'did not exist' before that date. Her reply was that she meant to say that she had not seen it before that date. It was for this reason that the letter concluded by saying that Mr Essery could not show 10 years adverse possession.

90. It is also to be noted that in the NAP objection (dated 28 November 2017), no reference at all was made to the fence or to the boundary.

91. In February 2010 Mr and Mrs Thomas took photographs of the disputed fence. It appears that there was no response to the suggestion that the disputed land should be transferred to Mr Essery, and Mr Essery left matters at that. No other steps of any kind were taken by Mr and Mrs Thomas between 2008 and 2013. No real explanation for this silence was put forward by either Mr or Mrs Thomas.

92. Mrs Thomas was asked about the Stags brochure, which she had not seen prior to the dispute. She stated that it was hard to say whether the fence which was there in 2006 looked like the fence in the brochure.

93. The first time Mr Essery was aware of any issue with the position of the fence was in 2013 when he noticed that the fence was beginning to rot and lean, and was in danger of being penetrated by stock. He had been improving and the Paddock up to the fence, including protecting and strimming around the recently planted saplings. He drove to the farm house and introduced himself to Mr Thomas. Mr Thomas told him, for the first time, that the fence had been placed in the wrong place.

94. It is Mr Thomas' case that he agreed with Mr Essery that he, Mr Thomas, would repair and maintain the disputed fence until such time as the fence could be put in a new position, and that he, and his tenants, continued to do so until the application by Mr Essery was made. Mr Essery denies this: no work was done by the Thomas'. Mr Essery planted two more walnut trees in the disputed land, and strimmed the land and kept the weeds at bay.

95. There was an exchange of emails between Mr Essery and Mr Thomas from August 2014 to March 2015. Mr Essery was clear that the fence was in place before the Conveyance. He was also anxious to erect a new stock proof post and rail fence and wanted to do so on the line of the existing fence.

96. In 2016, and in order to protect his saplings, Mr Essery erected a further fence to the west of the saplings. It is his case that he was always in possession of all the land to the west of the fence and believed, from the date of the Conveyance, that the land formed part of what he had purchased. The boundary had to be moved to allow access, and the fence was erected where it was, he believed, to ensure that the Paddock comprised 1.92 acres.

97. Following Mr Essery's application for adverse possession, the Land Registry undertook a survey in early August 2017. The disputed fence, marked A – B, is said to be approximately 10 years old. The inner fence was said to be about 2 years old. The surveyor also concluded that there was no access to the land between the fences (tinted blue) as there was no access between the fences. As a result they stated that they would not include this land in the application. Kitsons objected on 22 August 2017. This letter made it clear that although the application was for adverse possession, it had been Mr Essery's case that from July 2007 he had been attempting to persuade Land Registry of the mistake regarding the eastern boundary. On 30 August 2017 Land Registry informed Mr and Mrs Thomas' solicitor that the application included the blue land.

The parties' submissions

The Applicant's case

98. Mr James, for Mr Essery, identified 5 issues to be decided: 1) the extent of the land claimed by Mr Essery; 2) the position of the boundary between the Paddock and Top Down on the date of the Conveyance; 3) the position of the fence on that day; 4) whether, (in the event that Mr Essery needs to establish adverse possession) he can show factual possession of the disputed land for at least 10 years prior to the date of the application to Land Registry and 5) whether, finally, he can bring himself within paragraph 5(4) of Schedule 6 to the 2002 Act.

99. It seems to me that the second and third issues are in reality the same. The fourth and fifth issues only arise, of course, if Mr Essery's claim in relation to the boundary fails.

100. As to the first point, Mr James submitted that there is, in truth, no issue to be resolved. Whatever Mr and Mrs Thomas may have believed, it has always been Mr Essery's case that his land extended up to and not beyond the fence, on his case, erected whilst he was away by or on the instruction of the Tuckers, which fence is in the same position to this day.

101. On the key issue as to the position of the boundary, Mr James submitted that this is plainly a case where recourse has to had to extrinsic evidence. The Conveyance plan is too vague. He relies on a number of points to support Mr Essery's case: the sales particulars, a number of letters written before and after the Conveyance,(albeit that, on his case, the correspondence after the Conveyance is not necessarily relevant, and certainly not relevant if Mr Essery was not a party to it.) Reliance is also placed on the plans prepared for the (retrospective) planning permission sought for the pond: it is fanciful to suggest that the reference to 'new fence' in the architect's plan is to a fence yet to be built. The planting of the saplings in November 2007, adjacent to the fence, is consistent and consistent only with the fence being in place by that date. If the fence was indeed in place, there can be no doubt that both the vendors and Mr Essery treated it as the boundary.

102. Mr James's central submission is that this is not a case where Mr Essery can be mistaken as to the position of the fence: it either was at all times where it now is, or it was not. The witnesses, in particular Mr Sanders and Mr Lee, are reliable witnesses, whose evidence corroborates the evidence of Mr Essery. The Respondents's case can only succeed, against the weight of the documentary and other evidence, if I am satisfied that Mr Essery has been dishonest throughout, and, even more improbably, capable of writing letters

referring to the position of the fence in a place where he had not yet moved it to. Why, he asked, would his solicitors ask Land Registry in July 2007 to inspect the boundary if the fence had not yet been moved? The allegation is a serious one, which requires cogent evidence. By contrast, the Respondents' case relies entirely on unreliable recollections. The position of the fence was not a matter of great importance to them until 2008 when they were asked to consent to removal of the disputed land from their title and even then they took no steps in relation to the boundary until Mr Essery made his application. It is entirely possible that they genuinely believe, or have convinced themselves, that the fence was moved but are mistaken.

103. The alternative case, that the disputed land has been acquired by adverse possession, arises only if I do not accept Mr Essery's primary case. The difficulty with this case is that it is not even clear when Mr and Mrs Thomas allege the fence was moved. Different dates have been given at different times, from April/May 2008, to August/September 2007, to the admission by Mr Thomas in cross examination that there was 'a wider window of opportunity.' In his written evidence, he was clear that the fence had not been moved July 2007 when he helped to cut the grass in Top Down up to the boundary.

104. There are a number of letters written at the end of 2006 referring to the new fence. If this is correct, and even assuming it had been moved, Mr Essery has been in possession of the disputed land for more than 10 years. He has acted at all times as an owner would have acted, by planting saplings, trimming the land, and using it generally as an occupying owner would do. The fact that an inner fence was erected in 2016 is irrelevant. He planted walnut trees in the disputed land since that time.

105. Finally, the question as to whether he can satisfy paragraph 5(4) of Schedule 6 can only be answered in the affirmative. The correspondence referred to above makes it absolutely clear that he believed the filed plan showed the boundary in the wrong place: he was becoming frustrated with his solicitor for not understanding the distinction between the increase of land in the south east corner, and the positioning of the fence. He has never accepted that the fence was in the wrong place. The test in *Iam Group Plc v Chowdrey* [2012] EWCA Civ 505 at paras 28 to 30 is met.

The Respondents' case

106. As I understand the Respondents' case it is not accepted that even if the fence was in place before the Conveyance, the fence marked the boundary. It is accepted that the plan to the Conveyance is too small a scale to be considered without the assistance of extraneous

evidence. The plan does however show that the boundary followed the old field boundary on three sides and then deviates to allow for the newly created access to the Paddock. The plan in short is, at least, consistent with the Respondents' case. It is also significant that the hand drawn plan made by Mr Essery in August 2006 (marked with the word 'gate') is again consistent with the boundary changing only on the south eastern corner and not along its entire length.

107. The Respondents' key argument is, and at all times has been, that Mr Essery decided to, and did, move the original fence to its current position, in order to ensure that the Paddock comprised 1.93 acres as set out in the Stags particulars. Ms Spence points to the fact that Mr Essery himself, in various letters and elsewhere, put forward the argument that the fence had been moved to increase the Paddock to 1.93 acres. On the Thomas' case Mr Essery moved the fence within the 10 year period prior to his application to Land Registry.

108. Ms Spence also submitted that the parties were concerned, before the Conveyance, with the additional land to be acquired as part of the Paddock in the south eastern corner, and that a proper reading of all the relevant correspondence shows that this and only this point was in issue between the parties. The tenor of the letters is not about changing the boundary, but resolving the issue of access.

109. It was also pointed out that the first application to Land Registry was to alter the south eastern corner, and the question is asked, why did this application not also include the eastern boundary? The explanation is that Mr Essery convinced himself that he was entitled to more land, and set upon moving the fence after this application. The original fence, on the Respondents' case, was along the field boundary, close to the line of trees. She submits that, looking at all the available evidence, the fence was moved in about September 2007. This is also consistent with the planting of saplings by Mr Essery in November 2007 and, it was submitted, with the plan attached to the planning application in May 2007 which refers to 'proposed' fence. Much emphasis is placed on the aerial photographs from June 2006 onwards which, on the Respondents' case, clearly show the line of trees and the first indication that the fence has moved are the 2010 aerial photographs.

110. The evidence of Mr and Mrs Thomas as to the position of the boundary should be preferred to that of Mr Essery and his witnesses. It was submitted that all the witnesses had been to some extent coached by Mr Essery and in the case of Mr Bryan Down and Mr Trickey were plainly unreliable. While Mr Sanders was more impressive, it is highly unlikely that he could have remembered fencing carried out some 13 years ago, given the hundreds of fences he will have erected since there. Mr Cole was confused as to the position

of the fence as shown in the 2010 photograph. He said the fence was not the same as the one there now, whilst in fact it is common ground that it is the same fence.

111. Mr and Mrs Thomas' evidence is supported by the fact that Mr Thomas spoke to Mary Nation and in turn she relied this information to the vendors solicitors on 30 August 2006. He would have noticed any change to the boundary if such a change had been made. As to when the fence was moved, her submission is that it was not in its present position in April 2007 (in that, it is said, the Google photos do not show this fence), nor was it there in May or June 2007 when the planning permission application was made, and that it was probably erected at some point after August 2007 when the Land Registry was asking if the land was fenced. In fact the erection or moving of the fence in its present position may have been prompted by this letter.

112. The Stags brochure, she submitted, shows a different fence to one there now.

113. Ms Spence characterised Mr Essery's evidence as bombastic and rambling, blaming others (Stags, and his solicitors) for the discrepancy on the Land Registry plan. The Clapp photographs, properly considered, do not assist his case. Moreover, the way in which disclosure was given (a number of relevant letters and documents were not disclosed until February/March 2019) suggests that he was reluctant to disclose letters which helped the Respondents. Again, it was said that the witnesses were coached, and could not in any event be relied on. Their recollection was limited and should not be accepted. Some, such as Mr Trickey and to some extent Mr Cole, were plainly confused and unreliable.

114. Ms Spence further submitted that, contrary to Mr Essery's evidence, his present claim to the Land Registry included land which went beyond the fence. I have already stated that O do not accept this proposition.

115. Turning to the adverse possession claim, the Respondents' case is that it fails in any event because Mr Essery cannot show ten years exclusive possession of the disputed land. Further Mr Thomas took back possession in 2013 when, on his case, he began to maintain the fence. Again, Mr Essery fenced himself out of the disputed land by creating the additional fence in 2016.

116. Finally, Mr Essery cannot have reasonably believed that the Disputed Land formed part of his title. This is because it was not in the filed plan, and because his own solicitor had repeatedly told him that the disputed land was not part of his title.

Conclusion

117. The first point to make, in my judgment, is this. If the fence was in its present position at the date of the Conveyance, the fence marked the boundary between the Paddock and Top Down. Any argument to the contrary is unsustainable. The two fields were in common ownership prior to that date; it is common ground that whatever field boundary existed before then it was in a poor state (particularly at the south eastern corner) allowing cattle to travel freely between the two fields; it was important to enlarge the south eastern corner to allow access to the Paddock from the lane; and the work of making this access and creating the fence was done by the vendors. Applying all the relevant tests, given that the Conveyance and the plan attached to the Conveyance were not detailed enough to establish the boundary, it follows that the fence marked the boundary. To the question: what would a reasonable person believe he was buying, the only answer (assuming the fence was where Mr Essery says it was) is: up to the new fence on the eastern side. The issue is not therefore whether or not there was an intention to change the field boundary.

118. In my judgment, to the next key question, namely where was the fence at the date of the Conveyance, having regard to all the evidence, which I have set out in considerable detail above, the answer is clear. The fence has always been in the same position. I say this having regard, in particular, to the following facts.

119. First, I fully accept the evidence of Mr Essery. Where there was any conflict between his evidence and that of Mr and Mrs Thomas, I have no hesitation in preferring his evidence. I found him to be an honest, straightforward, careful and meticulous witness. It is obvious, from reading the correspondence set out above, that he was concerned, on receipt of Land Registry plan, to explain the position to his solicitor, and to make it clear that the (new) fence marked the boundary. It is also clear that his solicitor, Mr Forward, remained focussed on the south eastern boundary. The suggestion that there is a distinction between 'the boundary' and the 'fence' in this correspondence is, with respect, fanciful. Mr Essery was concerned about this point from an early date as shown by the emails and letters dated 5 October 2006, 2 November 2006, 3 December 2006, 12 January 2007 and 22 January 2007. He also understandably believed that this view of the matter was supported by the vendors: see the Stags notification of sale, and Foot Anstey's letter of 23 August 2006.

120. Second, Mr Essery's evidence is supported by the evidence of the other witnesses called on his behalf. I accept that in the case of Mr Trickery, Mr Bryan Down and to a lesser extent, Mr Cole, their evidence was at times less than clear. However, on the central issue of

the position of the fence, all the witnesses spoke with one voice. I found the evidence of Mr Sanders and Mr Lee particularly clear and cogent and fully accept their evidence.

121. Third, the Respondents' case must necessarily involve the proposition that Mr Essery was referring to the current position of the fence *before* he moved the fence. Mrs Thomas accepted in evidence that her case involved Mr Essery telling a series of lies and laying a trail of deceit by referring to the new fence well before it was moved by him. It is difficult, if not frankly impossible, to think of any reason why he should have done this. If the fence was not moved until, say, August/September 2007, why was Mr Essery at pains to explain to his solicitor that the filed plan was inaccurate months before this date?

122. Fourth, it is also plain, it seems to me, that prior to and to some extent after the Conveyance the solicitors for the parties, and the vendors, were focussed with the creation of the new access on the south eastern corner. No-one (save for Mr Essery) turned their minds to the remainder of the boundary. This was left to the vendors to mark out on the ground. The focus on the south eastern corner is the reason why, in my judgment, the correspondence referred to it as only a slight change. It is not surprising that Mr Essery should have been particularly concerned with the position of the boundary, nor is it surprising that the boundary was a matter of less importance to the vendors or to Mr and Mrs Thomas who had acquired over 100 acres of land.

123. Mr and Mrs Thomas were only alerted to the possible issue when they received the letter dated 2 May 2008 from Kitsons. It is interesting that Mrs Thomas' reply, dated 20 May 2008, deals principally with their access to the lane, and assumes, without having checked this, that Mr Essery erected the fence. There is no clear and unequivocal assertion that the fence was in the wrong place, even though Mrs Thomas' evidence is that she believed, then, that the fence was 'in the middle of their field.' It seems to me that neither Mr nor Mrs Thomas were particularly concerned about the position of the fence until after they received this letter. For a number of reasons, they were leading busy and at times stressful lives. Even then, matters were really left in abeyance until this application was made. At that point, they became convinced that Mr Essery moved the fence to obtain 1.93 acres, and this conviction has been at the root of their case thereafter.

124. Mr and Mrs Thomas' case on when the fence was supposed to have been moved changed over time, and remained inconsistent. It was first said that this happened in April/May 2008; then in August/ September 2007, then, in evidence Mr Thomas accepted that the time scale could have been larger. Their case, in truth, is based on supposition, and

on the fact that they have convinced themselves, over time, and by reference to the photographic evidence, that the fence was moved.

125. I should also add that Mr Thomas' evidence was not entirely consistent as to the nature of the boundary feature at the time he first saw Top Down: in oral evidence he referred to the remains of an old Devon hedge (and indeed this is what he referred to in his email to Mr Essery in October 2014 where he said '*my memory is that the boundary was what remained of the hedge*') but then said that he had a clear recollection of a fence in place, certainly by the time of the Conveyance.

126. I place no weight on the letter written by Cecil and Audrey Tucker. The witnesses did not attend to be cross examined and could not be tested in any way on their recollection. We do not know, even with the assistance of their letter, who erected (or, on the Respondent' case, who repaired) the fence, on what instructions, and whether the vendors checked the work done. The letter seems to suggest that the fence shown on the Stags brochure was the old fence, and that no new fence was erected. The Stags photographs, in my judgment, show the fence where it is now.

127. I agree with Mr James that the nature of the case against Mr Essery requires clear and compelling evidence, and, at the end of the day, there is none of any real weight.

128. If I am wrong as to the position of the fence at the date of the Conveyance, I would in any event be satisfied that Mr Essery has acquired the disputed land by adverse possession. For all the reasons given above, I find that the fence was in place well before May 2007. I am also satisfied that Mr Essery used the disputed land up to the fence at all times an occupying owner would have done so and did not cease occupying the land when he erected the inner fence in 2016. There is no credible evidence that Mr or Mrs Thomas occupied any part of the disputed land at any time. Even if repairs were done on occasion to the fence, this would not give rise to any claim that the Respondents had retaken possession of the disputed land.

129. At no time did Mr Essery acknowledge Mr and Mrs Thomas's title. The letter of 2 May 2008 asserts the opposite: that is to say, that the disputed land forms part of the Paddock.

130. Finally, it is overwhelmingly clear that Mr Essery believed at all times that the disputed land belonged to him. The fact that it was not shown on his registered title is, in my judgment, irrelevant: his case has always been that the eastern boundary as shown on the filed plan was mistaken. It seems to me that, possibly, had his own solicitor* understood the



point earlier, or had Land Registry sent a surveyor in 2006, this dispute might have been avoided.

The order

131. Ms Spence in her closing submissions was concerned that the land claimed by Mr Essery should be clearly established. I have no difficulty in doing so. The eastern boundary of the Paddock is marked by the fence shown as A-B on the plan attached to the ST1 (the same plan referred to in the Land Registry letter dated 25 March 2008). The line A-B is also shown on the Land Registry survey plans dated July 2017. The line A-B is described as the stock fence, approximately 10 years old. This line does not mark a change in the area of land purchased by Mr Essery for all the reasons I have given.

132. The order, in my judgment, must be to the effect that the general boundaries of both titles are altered to show the line A-B as the more accurate general boundary. The application for adverse possession will be cancelled, and an order made under Rule 40(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2003 that a specified entry be made reflecting this change.

133. Mr and Mrs Thomas' title is not affected in that they were never the owners of the disputed land. This is a case where the alteration to the title should be made unless there are exceptional circumstances which justify not making the order. In my judgment there are none.

Costs

133. Mr Essery, as the successful party, is in principle entitled to his costs since the date of the reference (5 July 2018). A schedule in Form N260 or the like is to be filed and served on the Respondents by 28 August 2019. The Respondents may raise such objections and make such representations as they deem appropriate within 21 days of receipt of the schedule. I will then make an order without the need for a further hearing.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 7th day of August 2019

