Neutral Citation Number: [2019] EWHC 983 (Ch)

Case No: D31BS638

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**BRISTOL DISTRICT REGISTRY**

Civil Justice Centre
Bristol, BS1 6GR

Date: 29 April 2019

**Before** :

**PHILIP MOTT QC**
**Sitting as a Deputy High Court Judge**

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**Between :**

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| **(1) JACOB DE WIT** | **Claimants** |
| **(2) DINAH MARY DE WIT** | |
| **- and -** | |
| **(1) ROBERT KENNETH ARROWSMITH** | **Defendants** |
| **(2) JANET MARY ROSE ARROWSMITH** | |

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**John Sharples** (instructed by **Berry Smith LLP**) for the **Claimants**
**Edward Bennion-Pedley** (instructed by **Kidwells Law**) for the **Defendants**

Hearing dates: 11, 12 & 13 March 2019

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# Approved Judgment

**Philip Mott QC :**

1. In the ancient parish of Redmarley d'Abitot, in the Forest of Dean, Gloucestershire, is an 18th century farmhouse. This case concerns the northern boundary of the farmhouse garden, and the extent of rights of way over adjoining drives.

2. The farmhouse in question was built around 1700, and is Grade 2 listed. On the 1883-1884 Ordnance Survey map it is called Heart's Farm, but since at least 1903 has been known as Hart's Farm. History does not relate whether the difference is merely one of spelling, or whether the original name reflects a more romantic origin than is suggested by the current spelling.

3. In February 1999 the farm was bought by both Defendants in joint names. Most of the surrounding land was bought on the same day, from the same vendor, by Mr Arrowsmith in his sole name. At that date it was accessed by a north-south track from the public road, with a spur track running westwards from this some way down.

4. In 2004 an old barn was sold off by the Defendants after conversion to a dwelling. Hart's Farm Barn, as it was called, stood on land owned by Mr Arrowsmith alone. Its boundaries were adjusted slightly, when compared with the parcel marked on the OS map. It was also sold with title to the spur track, which was on land owned by both Defendants. The sale, to a Mr and Mrs Wright, was effected by means of a single transfer, to which both Defendants were parties and which they both signed.

5. Prior to that, the Defendants had obtained permission for, and had created, a new Main Drive from the public road. This started at the same point as the old north-south track, but diverged slightly to the west. Its southern end was approximately level with the end wall of Hart's Farm Barn, but a little to the north of it. As a result, the Defendants were able to, and did, expressly release their rights of way over the old spur track, whether in favour of Hart's Farm or the remaining land, to the Wrights. The western part of that track was then dug up, or grassed over, inside the new western boundary of Hart's Farm Barn. From that time there was no vehicular access to Hart's Farm from the old track and spur track.

6. A further adjustment of the access took place to the north of Hart's Farm. The old track running westwards from Hart's Farm Barn veered slightly to the south before edging northwards again to pass north of a pond at the north-western corner of the Hart's Farm curtilage. I shall refer to this feature of the old track, and the boundary which followed it, as a "dish". Instead of this "dish", a new track called the Stable Drive was created running in a straight line from the southern end of the new Main Drive to join up with the old track north of the pond (or rather, where the pond had been, as it been filled in by the time the Defendants had purchased Hart's Farm).

7. Those works were completed in about 2001. When completed, at the southern end of the new Main Drive was a roughly square area of tarmac from which two further drives led westwards. The northern of these was the new Stable Drive,

at this stage not covered with tarmac but surfaced with hardcore and chippings or scalpings. The southern drive started on the line of the old track, was surfaced with tarmac, and led into the yard in front of Hart's Farm. The line of the old track was not retained for any great distance, as the yard soon opened up to the south. The western continuation of the old track, leading back to the new Stable Drive, was dug up or grassed over, and in due course some ornamental trees were planted. Immediately south of the new Stable Drive was erected a new post and rail fence.

8. Hart's Farm was intended to be, and for a number of years was in fact, the home of the Defendants. By 2005, however, having obtained permission to build a new dwelling further to the west, where Mr Arrowsmith could more conveniently run a stud business, they decided to sell Hart's Farm. It was marketed with fields to the south at a price of £850,000. The sales particulars in 2005, it is agreed, show the northern boundary of Hart's Farm to lie on the line of the new post and rail fence. However, there was little interest in the property at that price and it was withdrawn from the market.

9. Meanwhile, construction progressed on the new dwelling to the west of Hart's Farm, which I shall refer to as Hart's Farm Stud.

10. The following year, in the spring of 2006, Hart's Farm was re-marketed at £745,000 for the farmhouse and curtilage alone, with further land being available by negotiation. There was limited interest, even at this price. I was told that the Claimants were the only ones who came back for a second viewing, and certainly the only ones to make an offer. In due course a sale was agreed at a price of £765,000, to include further land to the south, together with a narrow strip to the west on which the septic tank was situated. I shall need to return to the details of this later in this judgment.

11. The sale and purchase were completed on 12 October 2006 by means of two transfers. One of the transfers was of Hart's Farm itself, where the sellers were both Defendants. The other transfer was of the additional land to the south and west, where the seller was the first Defendant alone.

12. All seemed well for a number of years, until disagreements arose in early 2017. In short, the Defendants denied that there was any right of way along any part of the new Stable Drive, and allegedly interfered with the rights of the Claimants over the Main Drive and the Stable Drive.

13. On 24 October 2017, after these proceedings had been started, an interim application for an injunction was adjourned generally on cross-undertakings. Those have been in place until the trial of this action before me, and remain in place to date.

*The parties' contentions*

14. The Claimants point to express grants of rights of way in both transfers over land coloured brown on the attached plans, which taken together they claim cover the Main Drive and that part of the Stable Drive which lies north of the

post and rail fence on the northern side of Hart's Farm and north of the additional strip of land to the west. The terms of the express grant are very wide.

15. The Defendants, at least now, accept that there is a right of way over the Main Drive as claimed by the Claimants. Their only submission in relation to this is that injunctive relief should not be granted as its use by the Claimants has been in breach of the planning consents for Hart's Farm.

16. As to the Stable Drive, the Defendants claim that the express right of way relates to the line of the old track lying wholly or largely south of the new Stable Drive. They claim that the area of land over which this track ran was reserved from the sale of Hart's Farm. Although it was not marked on the ground by any form of permanent fence, and indeed crossed the entrance drive to Hart's Farm, it could be identified by taking a line from the southern gatepost at the entrance to a post at the northern end of an old hedge on the western boundary of Hart's Farm curtilage which is still in place.

17. The rationale for this, at first surprising, arrangement is that a public footpath ran along the line of the old track, south of the post and rail fence. That much is not in dispute. The Defendants say that their experience with another development where a footpath had to be diverted at great expense of time and money led them to insist on retaining control of the land on which this footpath lay.

18. I will need to develop the parties' submissions, and the evidence put forward in support, as I go through this judgment.

*Evidence*

19. I heard evidence from both Claimants, both Defendants, the Defendants' son Gareth and daughter-in-law Elizabeth, Mr Wright (the purchaser of Hart's Farm Barn in 2004), and Mr Maulkin (from the agents who marketed Hart's Farm for the Defendants). A Civil Evidence Act notice was given and accepted in respect of a statement from Mr Goodwin (also from the selling agents).

20. Expert evidence was available from Mr Bull, who had been instructed as a single joint expert, and produced a detailed report. Questions were asked of him on behalf of the Defendants and answered. Permission to call him for cross-examination was refused on the application of the Defendants before trial.

21. The Defendants had obtained their own expert report somewhat earlier. No application was made to call this evidence or have it admitted. Although it was copied as an exhibit to the first Defendant's statement, I have not studied it or taken it into account in reaching my decision.

22. Consideration was given to a site view. The Defendants opposed it, because the site had changed substantially since the date of transfer. The Claimants were neutral. I concluded that I was unlikely to be assisted by a view in deciding any of the contentious issues, and that the additional time and expense which would be caused was not proportionate.

*Legal principles*

23. The principles of law which apply to this case are not in dispute. I was referred in particular to *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; *Pennock v Hodgson* [2010] EWCA Civ 873; *Cameron v Boggiano & Robertson* [2012] EWCA Civ 157; *Liaquat Ali v Lane* [2006] EWCA Civ 1532; and *Chadwick v Abbotswood Properties Ltd & Others* [2004] EWHC 1058 (Ch), from which I take the following summary principles:

    i) The process of construction starts with the conveyance. It is only to the extent that the conveyance is unclear that extrinsic evidence may have a place.

    ii) In order to decide whether the conveyance is clear or unclear, I should look at the evidence of the actual and known physical condition of the relevant land at the date of the conveyance, as if looking at the material date with the attached plan in my hand.

    iii) The physical features on the ground may assist in deciding whether the plan is clear or not, but a mismatch between a clear plan and the actual physical features is not in itself a reason that could possibly justify ditching the title documents and determining the position of the disputed boundary by reference to the topographical features alone.

    iv) Where the plan is unclear, even after looking at the physical features on the ground, extrinsic evidence may be used to assist in making sense of the plan. Such extrinsic evidence is limited to the objective facts reasonably available to the parties at the relevant date. The parties' subjective beliefs, intentions or prior negotiations are not admissible. The question is to be answered objectively.

*The conveyancing documents*

24. I start, therefore, with the conveyancing documents. Since the property to be conveyed was comprised of parts of two registered titles, it was effected by two Land Registry forms for transfer of part of a holding, form TP1.

25. Each transfer described the property as being "defined on the attached plan and shown edged red". The property comprised in the other transfer was described as "the Blue Land", identified by blue edging on another attached plan. Thus each transfer used the same two plans, with the same edging lines, although of course the colouring was reversed between one transfer and the other.

26. In addition, each transfer included an express right of way over part of the land in the registered title which was retained by the seller or sellers. The terms of this right of way were very wide, as follows:

> "… at all times and for all purposes in connection with the use of the Property and the said Blue Land [*i.e. the property comprised in the other transfer on the same day*] with or without vehicles and animals and without

> restriction a right of way over the driveway shown coloured brown on the plan attached hereto for the purpose of obtaining access to and from the Property and the Blue Land"

27. The brown coloured areas were different for each transfer. The two must be put together to appreciate the total extent of the rights of way granted. The relationship between the two plans is further complicated by the fact that the base map for each is taken from a different edition of the OS map.

28. The plan showing Mr Arrowsmith's land, the parts of that title which were to be conveyed to the Claimants, and the parts over which there was to be the right of way, had as its base map the OS 1:2500 1972 edition. This showed the northern boundary of Hart's Farm following the northern line of the old track, beyond a verge on which at one point a shed or similar building is shown on the map. This northern boundary was in a "dish" shape, like the old track which it broadly followed. This map does not, of course, show the new Main Drive or the new Stable Drive.

29. The plan showing Hart's Farm, the part of the jointly owned title to be conveyed to the Claimants, and the parts over which there was to be a right of way, had as its base map a more recent edition of the OS map which is similar to, but not identical with, the current digital OS MasterMap. It is, I think, the same version as was used for Mr Arrowsmith's planning application for the new stud dwelling and other buildings. This appears in various places in the bundles before me, but particularly as the base map for what has been called the "Burley plan" at page 35 of the exhibits to Mr Arrowsmith's witness statement.

30. In the form in which it is used in the two transfers to the Claimants, the plan is headed "GR215806", which is the Land Registry title number for the property in the Defendants' joint ownership. I assume, therefore, that it started out as a copy of the registered title plan at that date. That assumption is reinforced by a comparison with the registered title plan as at 29 June 2017, in Bundle 2, Tab 5, page 55.

31. What is important at this stage is that this second plan, though it does not show the new Main Drive, does show the new Stable Drive. There is no sign of the "dish" apparent in the OS 1972 edition. It was fundamental to the Defendants' case that the Burley plan, using the same base map, showed the new Stable Drive, with a proposed northern boundary (as I shall explain later in this judgment) roughly parallel but significantly to the south of it.

32. If this is correct, the plan attached to the transfer to the Claimants clearly marks the northern boundary of Hart's Farm on the south side of the Stable Drive, along the line of the post and rail fence.

33. That reading of the plan is confirmed by the single joint expert, Mr Bull. He says in his report:

    i) At paragraph 6.4.18, "It is my opinion that the transfer plans are clear in their description and definition of the land to be transferred".

ii) At paragraph 6.6.2, "It is my opinion that the plans are quite clear with regard to the extent of land transferred and the boundary positions and rights of way".

iii) At paragraph 6.6.6, "A simple overlay exercise of the transfer plan from GR322055 [the Claimants' title] and the current OS MasterMap confirms that the land transferred was to the post and rail fence to the south of the Stable Drive". That overlay is shown in his report immediately after that paragraph.

34. A similar exercise has been carried out with the transfer plan and what has been called "the Ruxton plan" (the origin of which I shall explain later, but which is accepted as accurately showing the layout of the land at the time of the transfers). This appears in Bundle 2, Tab 5, page 56.

35. A useful further overlay provided by Mr Bull is at paragraph 6.5.8 of his report, and shows the 1972 OS map in relation to the current OS MasterMap.

36. Mr Bull's opinion accords with how the transfers were interpreted by the Land Registry, and are shown on the current title plan, at Bundle 2, Tab 5, page 41.

37. Mr Arrowsmith maintains that the Land Registry and Mr Bull have got it wrong, and that the 1972 OS map should be rotated slightly anti-clockwise to line up with the current OS MasterMap. He bases this assertion (made through his counsel in submissions, rather than in his evidence) on the following observations:

i) The eastern boundary does not line up with the boundary of Hart's Farm Barn without that rotation.

ii) The southern boundary does not line up with the boundary of Hart's Farm without that rotation.

iii) The garage appears to have moved slightly south-east unless that rotation is applied.

38. I reject that argument. It is clear from the transfer to the Wrights that the old boundaries were re-drawn to suit Mr Arrowsmith's preferred division of the land. The additional small pieces of land on the western boundary, shown in pink on the current title plan, are specifically included in the other transfer to the Claimants from Mr Arrowsmith alone. Both these pieces of land, and the additional sliver of land between the southern boundary of Hart's Farm and the boundary of the field to the south, are specifically shown as not covered by the transfer from both Defendants of Hart's Farm.

39. What clearly has not moved between the two OS map editions is the position of the farmhouse itself. This, I am aware from the survey report, dates from around 1700. Yet if the maps were to be rotated as Mr Arrowsmith submits, the farmhouse would be moved a little out of place.

40. I have no evidence about the nature or position of the garage in 1972. It is described in the survey report as being "of contemporary construction formed with cavity walling with brick outer leaf and dense concrete block inner leaf under pitched concrete tile roof covering". It certainly is not a period structure. It also appears to be significantly longer on the older OS maps, so may not have been the same structure then.

41. There is a further problem for Mr Arrowsmith's contentions in the extent and area of the brown shading on both plans, representing the right of way expressly granted. As I have already pointed out, these need to be aggregated to provide a full picture of a continuous right of way. The reason why they are split between the two transfers is apparent from an examination of Mr Bull's overlay of the 1972 OS map and the current OS MasterMap. From this it is clear that part of the new Stable Drive was constructed on land to the north of Hart's Farm owned by Mr Arrowsmith alone, but part followed the line of the old track within the original curtilage of Hart's Farm. Similarly, the roughly square area of tarmac at the southern end of the new Main Drive, from which both the Stable Drive and the entrance driveway to Hart's Farm emerged, was partly on land belonging to Mr Arrowsmith alone (the northern part of the "square") and partly on land jointly owned by both Defendants.

42. Mr Arrowsmith agreed in evidence that the original line of the track would have come back to the Stable Drive within the jointly owned land. None of it crossed the additional land to the west which was in his name alone.

43. For this reason, the plan attached to the transfer of Hart's Farm from both Defendants to the Claimants shows two separate brown-shaded areas. One is along the western part of the Stable Drive, which was part of that title. The other is the southern half of the "square", by the entrance gate to Hart's Farm. The uncoloured gap between these two brown-shaded areas is the "dish" shown on the 1972 OS map, and is the true boundary between the Defendants' jointly owned land and that owned by Mr Arrowsmith alone.

44. That gap is correctly filled on the plan attached to the other transfer of the same date, which shows brown shading in the bowl of the "dish" and then northwards along the line of the new Main Drive. That includes the northern part of the "square" where the main Drive meets the Stable Drive and the Hart's Farm gateway.

45. The location of this "square" in relation to the old track is in fact confirmed by a plan of Hart's Farm Barn boundaries, drawn for Mr Wright and signed by both Defendants as well as Mr and Mrs Wright (see Bundle 2, Tab 5, page 20). I do not rely on this as a document known to both parties at the time of the transfers, but as a broadly contemporaneous record of what I or they would have seen on site if walking round with the transfer plans in hand.

46. I therefore accept Mr Bull's conclusion that the transfer plans are clear. That too appears to have been the conclusion of the Land Registry title plan drawers, who have recorded the same layout.

47. It follows from the legal principles set out above that the plans, being definitive not indicative, and being clear in what they show, cannot be changed by extrinsic evidence.

48. It also follows that if, as I find, the northern boundary of the land conveyed was right up to the post and rail fence on the south side of the new Stable Drive, the right of way must have been granted over the Stable Drive, not over land south of the post and rail fence which was being transferred to the Claimants.

49. In case I am wrong in this conclusion about extrinsic evidence, I go on to consider the arguments raised by the Defendants in this respect.

*Extrinsic evidence*

50. Mr Bennion-Pedley relied on the following matters:

    i) The "Burley plan".

    ii) The "blue rope".

    iii) The plan in Bundle 2, Tab 6, page 109, assumed to be the contract plan.

    iv) The gate in the post and rail fence south of the Stable Drive.

    v) The extension of that fence across the northern boundary of the additional strip of land to the west of Hart's Farm.

    vi) Requests by Mr de Wit for permission to use the Stable Drive.

51. In reply, if necessary, Mr Sharples relied on "the Ruxton plan", which also appears as a contract plan at Bundle 2, Tab 6, page 153.

52. I shall deal with these various matters largely in chronological order.

<u>The Burley plan</u>

53. This is the plan appearing at various places in the bundles, but in its clearest and largest format at page 35 of the exhibits to Mr Arrowsmith's witness statement. It is important, first, to see how the assertions about this plan have developed.

54. The Defence and Counterclaim, dated 21 November 2017 and signed by both Defendants, asserted at paragraph 7.5 as follows:

> "In around May 2006 the Defendants offered land for sale again but reduced in scope and for a lower purchase price;
>
> > 7.5.1 They instructed a Mr Alan Burley of Gooch & Burley Limited to advise them as to how the land should be plotted up and sold;
> >
> > 7.5.2 Mr Burley's advice was that the Defendants should retain ownership of the land over which the

> public footpath passed (that to the south of the Stable Driveway) so as to be able to preserve and restore the original route of the footpath if called upon to do so. A copy of the plan prepared by Mr Burley showing the proposed parcels of land appears hereto as Annex F. The land to be offered for sale is shown edged with a purple dashed line;
>
> 7.5.3 Mr Burley also marked the proposed northern boundary of Hart's Farm (in order to exclude the route of the footpath) on the ground by way of two foot stakes linked by blue telecom rope …"

55. Mr Arrowsmith's witness statement dated 30 November 2018 gives a somewhat different account. He describes (at paragraph 55) a visit by Mr and Mrs de Wit on 21 April 2006, and says "we prepared a plan of what we were willing to offer". He continues at paragraph 56:

> "As a result of this the plan dated May 2006 was drawn up with the blue dotted line being the boundary and the gap at the north up to the motorway style fence being the route of the old track/footpath and no offer of anything outside of this blue line and motorway style fence was offered or implied as being offered for sale."

56. There is nothing in Mr Arrowsmith's witness statement alleging expressly that the blue dashed lines were drawn by Mr Burley. Indeed Mr Burley's name does not appear in this connection at all. Nor is it suggested in this witness statement that Mr Burley marked out the line on the ground. In paragraph 58 Mr Arrowsmith says that the line was marked out before the de Wits second visit "with a length of blue BT rope and roofing baton [sic] from the cherry trees to the gate post at the end of the historic hedge".

57. In cross-examination Mr Arrowsmith asserted that the blue lines were put on the plan by Mr Burley, and that he (Mr Arrowsmith) had added the red lines. Far from the blue line being intended to mark a boundary, he said "I take it that this was purely to indicate the land which had been agreed between me and Mr de Wit".

58. Gareth Arrowsmith, in cross-examination, said that it was not Mr Burley's advice to exclude the footpath land. It was his mother (the second Defendant) who told them not to sell it.

59. In closing submissions, Mr Bennion-Pedley accepted that it looks like a plotting up plan, not a detailed boundary plan. If the blue lines (or indeed the red lines added by Mr Arrowsmith) were intended to mark the boundaries precisely, there would be a number of significant changes to the OS field boundaries all round the land.

60. I therefore reject any suggestion (which was not in the end pressed upon me) that the apparent gap between the blue dashed lines and the location of the post

and rail fence to the south of the Stable Drive has any significance in terms of boundaries. They were clearly no more than rough marks to signify which of the already delineated OS fields and parcels should be offered for sale. It does nothing to support the Defendants' case on the northern boundary.

61. On the contrary, the attempt to use this plan to support that case involves putting forward assertions which in my judgment must be manifestly untrue. There is no documentation between Mr Arrowsmith and Mr Burley, nor was Mr Burley called to give evidence. The initial assertions that the plan was intended to mark a reduced boundary, though not in the end pursued strongly either by Mr Arrowsmith in cross-examination or by Mr Bennion-Pedley in closing, serve only to weaken Mr Arrowsmith's credibility generally.

The blue rope

62. As set out above, in his witness statement Mr Arrowsmith says that the boundary line was marked out with blue rope before the de Wits visited for a second time. In cross-examination he described pulling the rope across the entrance drive while the de Wits were there. Since it went to the southern gatepost, it would have included most if not all of what is shown as "tarmac drive" on the Ruxton plan. No one could drive in or out while it was up. It must have been taken down, at least in part, to allow the de Wits to leave, and was completely removed thereafter.

63. Gareth Arrowsmith supports this account of a blue rope being present on the de Wits second visit. He says in his witness statement that he and his father marked out a line using posts and blue BT string, based on the line on the Burley plan.

64. In general, I found Gareth Arrowsmith a much more credible witness than his father. It may well be that a blue rope was positioned at some point in the past. It may have been a temporary barrier while the post and rail fence was being constructed. It may have been put up for a short time at a later date for some reason.

65. However, it is agreed on both sides that on the second visit both Mr and Mrs de Wit were present. Both of them say categorically that they never saw a blue rope, nor was anything said about the possible presence of a public footpath. By then, as is agreed, all the signage showed the public footpath to be along the line of the Stable Drive.

66. Gareth Arrowsmith described Mr de Wit visiting about eight times in all, and raising all sorts of detailed queries about a lot of functional things. That confirms the impression I had of Mr de Wit from his evidence, which was given carefully, deliberately, and with precise detail where he could recall it. It also fits in with Mr Bennion-Pedley's description of Mr de Wit in closing, that he was very keen to be in control of anything affecting his property. A good example of this is his insistence on owning the land in which the septic tank was situated, rather than rely on a right to discharge into a tank on Mr Arrowsmith's land.

67. I find it incredible that there could have been a blue rope on one of his early visits, or a suggestion that the public footpath passed south of the post and rail fence, without Mr de Wit raising this with his solicitors and it being recorded in party and party correspondence. Yet there is not a single mention of it in the documents which have been produced. I therefore find, on the balance of probabilities, that there was no blue rope and no mention of a public footpath south of the post and rail fence at any visit by Mr or Mrs de Wit.

The Ruxton plan

68. Whatever the position about the blue rope, the position changed when Mr Ruxton was asked to prepare a plan. What he drew is dated July 2006, and entitled "Boundary Survey".

69. Mr Arrowsmith, in cross-examination, said that the only point of the Ruxton plan was to confirm the extent of the additional land to the west of Hart's Farm. I am prepared to accept that may have been a key reason for commissioning it in the first place, but what is more important is the purpose to which it was put thereafter.

70. Bundle 2, Tab 8, page 4 is a copy of the Ruxton plan with additional markings. Part of the land, around Hart's Farm itself, is marked with blue edging. Adjacent to this, and to the west, is an area marked with purple edging. Mr Arrowsmith says that he drew both edging lines. His purpose, he says, was to mark out the 1999 boundaries, not the boundaries being offered in the sale to the de Wits. He agrees that the blue edging goes right up to the post and rail fence, and the purple edging right up to the Stable Drive. He denies that they show the boundaries of what was being offered to the de Wits.

71. This is a most extraordinary explanation for what appears to be a clear document contradicting the Defendants' case. I cannot accept Mr Arrowsmith's evidence on this for the following reasons:

    i) The blue edging does not show the 1999 boundary of Hart's Farm. As explained above, the 1999 transfer included the western part of what was by 2006 the Stable Drive, yet that is wholly excluded from the blue edging. The eastern boundary of Hart's Farm in 1999 did not extend right up to the western boundary of Hart's Farm Barn as it was sold to the Wrights in 2004. As explained above, there were two pieces of land absorbed into the Hart's Farm curtilage from land owned by Mr Arrowsmith alone. These are not shown by the blue edging.

    ii) There are not just the blue and purple edgings added to the Ruxton plan. Mr Arrowsmith also agrees that he added the key, which described the blue edging as "HARTSFARMHOUSE BOUNDARY", and the legend "Land & Boundaries of Harts Farmhouse Sale".

    iii) The resulting marked up plan was signed by Mr Arrowsmith and Mr de Wit. There would be no point in Mr de Wit being asked to sign a plan setting out 1999 boundaries, when he knew nothing of the property at

that date. It only makes sense as an agreed plan showing in detail the boundaries to be conveyed to the de Wits.

72. Even if Mr Arrowsmith is right in saying that initially he wished to reserve the northern strip of land from the sale, and even if this had been marked out by a blue rope when the de Wits visited, it is abundantly clear from this marked up Ruxton plan that he had relented, as he did in relation to the land on which the septic tank was sited. Accordingly, no blue rope at an earlier date could possibly affect the interpretation of the transfer plan, even if that were unclear.

The conveyancing file

73. No conveyancing file is available from the Defendants, apparently because their conveyancing solicitors are no longer in practice. The Claimants obtained their conveyancing solicitors' file, but it was somewhat falling apart and it is not always easy to know what document went with which letter. Nevertheless, the party and party correspondence has been disclosed. Privileged solicitor and own client correspondence has been withheld, as it is acknowledged the Claimants were entitled to do.

74. I do not intend to take time going into the details of what is available, not least because negotiations between the parties cannot be admitted as extrinsic evidence even where the transfer plan is unclear. Nevertheless, the following documents have some potential relevance:

    i) The Claimants instructed a building surveyor, who provided a detailed written report dated 27 June 2006. This was after at least the first visit by the de Wits to view Hart's Farm, and probably after the second one when the blue rope is alleged to have been in place. In paragraph 2.4.1 the surveyor states; "We further understand that rights are to be granted along the newly formed access track leading to the retained stables, or thereabouts, however, this is a matter which should be clarified with your Solicitor independently".

    ii) By letter dated 8 September 2006 the Defendants' solicitors record that the contract has been signed in readiness for exchange. They confirm expressly that "The extent including measurements of Harts Farmhouse as prepared by Nigel Ruxton is the accurate extent".

    iii) The photocopy of the contract signed by the de Wits has, still attached to it, a copy of the Ruxton plan marked with edging corresponding with the blue edging marked by Mr Arrowsmith. In other words, so far as this dispute is concerned, the northern boundary was shown at the post and rail fence.

75. There is a loose plan in the file, at Bundle 2, Tab 6, page 109. Mr Bennion-Pedley says the Defendants had assumed that was the contract plan. It shows the 1972 OS map with an area edged in red. It excludes from the red-edged area a strip at the northern edge in which the old track is marked. At first sight that appears to be some support for the Defendants' case. However, I cannot accept

that it is a contract plan, or in any way could be used as a guide to the interpretation of the transfer plans.

i) It does not appear as an attached plan on either of the copy contracts signed by the de Wits. On exchange, both counterparts of each contract must have referred to the same plan.

ii) It is inconsistent with the Ruxton plan, which the Defendants' solicitors said within a week of exchange was accurate.

iii) It may represent an early attempt to show the northern boundary by reference to the 1972 OS map, without realising that the line of the track marked was not the same as the line of the new Stable Drive.

The gate in the post and rail fence

76. There is a photograph attached to the survey report, at Bundle 2, Tab 6, page 52, which shows a gap in the northern post and rail fence. The quality of the copy is not sufficient for me to tell whether what can be seen just to the right of the gap is a pedestrian gate propped open or, as Mr Arrowsmith asserted in evidence, merely rails cut out of a previously continuous fence prior to the installation of such a gate.

77. Gareth Arrowsmith, in his witness statement, says that "We have always maintained a small gate in the centre of the de Wits fence line which I myself put in and kept to act as an access on to the area of land where the retained old track/footpath was". He was not asked further about it in his evidence in court.

78. My assessment of Mr Arrowsmith's credibility, in the light of the case he was putting forward about the Burley plan and the Ruxton plan, does not permit me to accept his evidence about the date of installation of this gate. It may well have been put in at the time the fence was erected, as a more convenient way for the Defendants and their family to get from the farmhouse where they live to the western land where the horses were.

79. Even if it was put in at the time of the sale to the de Wits, that does not provide any substantial support to the Defendants' case. The de Wits had an extra piece of land to the west and, if their right of way was over the Stable Drive, it would be a convenience for them also to have a pedestrian gate as a short cut.

Extension of the post and rail fence westwards

80. Once it was agreed to sell the land on which the septic tank was situated, as shown on the Ruxton plan, something had to be done about marking and fencing the boundaries. I accept the evidence of Gareth Arrowsmith that he put in a post and rail boundary fence by hand. His witness statement annexes photographs, one of which shows a two-handed post rammer and a line of posts. The angle of the photograph suggests that this is the new western boundary, with the posts running roughly north-south, rather than a continuation of the northern post and rail fence westwards. Nevertheless I think it quite possible that this northern

boundary of the additional strip of land to the west of Hart's Farm was similarly fenced, without the provision of a gate at this stage.

81. Gareth's evidence, and the aerial photographs from Google Earth, suggest a fence line immediately along the south side of the Stable Drive. This accords with the red edging on the transfer plan relating to this land. I find as a fact that the northern boundary of the additional strip of land abuts the Stable Drive.

82. This is not now in dispute, but in Mr Arrowsmith's witness statement, at paragraph 150, he claimed that a gate installed by the de Wits by late 2009, was set back a little to the south of the Stable Drive at his insistence because that represented the true boundary line. This has effectively been abandoned as part of the Defendants' case, and in any event I reject it. It is quite clear to me that the gate was set back for the normal reason that a tight turn with a large vehicle, or with a trailer, is impossible. Setting back the gate allows such vehicles to make the turn without hitting the gatepost.

83. My rejection of Mr Arrowsmith's evidence on this point is a further blow to his credibility as a witness.

84. The existence of a continuous post and rail fence on this northern boundary of the additional land for a comparatively short period after completion of the sale would do nothing to undermine the Claimants' case.

    i) Once the northern boundary of Hart's Farm is established as the post and rail fence, the express grant of a right of way can only be over the Stable Drive.

    ii) The transfer plan in relation to the additional strip of land to the west shows a brown shaded portion of the Stable Drive immediately north to this land, marking a right of way.

    iii) An express right of way is not dependent on user or necessity.

    iv) During 2007 at least Mr de Wit was working in Manchester and only at Hart's Farm at weekends. He had no immediate need for a gate.

    v) There was no need for frequent access to the septic tank as it was a sophisticated Klargester BioDisc unit which did not need half-yearly emptying. In any event, it could have been emptied from the Stable Drive, through the fence, or with a long hose from Hart's Farm yard if necessary.

    vi) The contractor who maintained the fields to the south of Hart's Farm until 2010 gained access by permission across land belonging to Mr Arrowsmith, not from the northern boundary of the additional strip of land where the gate is now.

Requests for permission to use the Stable Drive

85. I accept the evidence of Elizabeth Arrowsmith that requests were made by Mr de Wit for permission to bring vehicles along the Stable Drive. I find that these

requests, and others attested to by Mr Arrowsmith and Gareth, related to access by contractors across Mr Arrowsmith's land. In addition, at that stage relations between the neighbours were friendly, and to some extent such contact might be merely a friendly warning that a vehicle was on its way, in case skittish horses were out for exercise.

86. Such requests, in my judgment, do nothing to undermine the Claimants' case that there was an express right of way over the Stable Drive, nor do they assist in the interpretation of the boundaries by extrinsic evidence.

*Conclusions*

87. It follows from the above that I find the northern boundary of Hart's Farm runs along the post and rail fence, and that this boundary extends westwards along the north of the additional strip of land adjacent to the Stable Drive.

88. I also find that the express right of way extends not only down the Main Drive but also along the Stable Drive for the whole length of the northern boundary of Hart's Farm and the additional land.

89. In those circumstances the alternative claims under section 62 of the Law of Property Act 1925, the rule in *Wheeldon v Burrows*, or as an implied easement, do not arise. Mr Sharples did not address me on them in closing and I need say no more about them now.

*Remedies*

Declaration

90. The Claimants ask for a declaration as to their rights. They are clearly entitled to this, and I will ask the parties through their lawyers to suggest an appropriate form of words.

Rectification

91. In addition, there is a claim for rectification of the transfers if necessary to include a right of way over the whole driveway. I doubt whether that is now necessary, but invite submissions in the light of this judgment.

92. There is an agreed error in the Land Registry MapSearch facility, which appears to show a strip of unregistered land covering part of the Stable Drive. Since the two transfers to the Defendants in 1999 were contiguous, there cannot be any unregistered land, as Mr Bull points out. I will invite the parties to agree how this should be dealt with, and whether I am invited to make any order for alteration of the Register under Schedule 4 of the Land Registration Act 2002.

Injunction

93. The Defendants oppose the granting of any injunction on the grounds that the Claimants are in breach of planning control. This control takes two forms. First, planning permission for the extension/annexe is restricted to use "solely for purposes ancillary to the occupation and enjoyment of the existing property

'Harts Farm' as a dwelling and shall not be occupied as an independent planning unit of residential accommodation". A similar restriction applies to the outbuilding. Secondly, planning permission for the construction of the outdoor riding school, or manege, does not allow it to be used commercially.

94. It is alleged that both sets of conditions have been breached, firstly because the annexe and/or outbuilding have been let to tenants rather than lodgers, and secondly because paid lessons using the outdoor school have been advertised to pony club members.

95. It is well established, and accepted, that individuals cannot enforce planning law by private action. There are statutory provisions enabling a local planning authority to take enforcement action. Until an enforcement notice is issued, there is no liability for breaches of planning law, and no enforcement notice has been issued here. Even if there had been a breach of planning law, I could not enforce it at the suit of these Defendants in a private law action.

96. For this reason, Mr Bennion-Pedley had to put his opposition in terms of the equitable principle that he who comes to equity must have clean hands. But, as Mr Sharples pointed out, the misconduct or impropriety of the claimant must have "an immediate and necessary relation to the equity sued for" (see *Royal Bank of Scotland v Highland Financial Partners & Others* [2013] EWCA Civ 328, at [159].

97. I fail to see how any breach of planning control relating to the use of the annexe or outbuilding at Hart's Farm could possibly affect the extent of user of the right of way over the Main Drive. Whether those living in the premises are family, staff, lodgers or tenants, the likely additional vehicular use of the Main Drive would be the same. Thus any misconduct in that respect bears no relation to the equity sued for.

98. The alleged excessive use of the outdoor school could potentially be a source of additional traffic, and at least some of this would be in heavy vehicles or vehicles with trailers. But I have no evidence of the extent of such use, only a few advertisements on social media relating to the local pony club. I cannot from this assume a direct relationship to the equity sued for, at least to the extent that discretionary relief should be refused.

99. The express grant of the right of way is extremely wide, and a refusal of relief would in effect be a way of enforcing planning control indirectly (assuming that the Defendants had sufficient evidence to prove a breach), when the Defendants have no right to enforce it directly. There is some analogy with the principle that the court will not grant an injunction which would indirectly enforce a contract for personal services, when specific performance is not available.

100. In any event, none of these possible breaches relate in any way to the right of way over the Stable Drive, which I have found exists as claimed. It is in relation to this right of way that there has been most obstruction, and it has been at the centre of the dispute in this court.

101. I therefore would not refuse injunctive relief on the grounds relied upon by the Defendants.

102. That leaves open the question of whether it is reasonably required now that the legal dispute has been settled. I raised that question with both counsel in their closing submissions. Mr Bennion-Pedley assured me that the Defendants would respect my findings, and there would be no need for a continuing injunction. Mr Sharples preferred the possibility that an injunction could be for a limited time, with liberty to apply.

103. I am very mindful of the wise words of Mummery LJ in *Pennock v Hodgson*:

> "[46] … The unfortunate consequences of a case like this are that, in the absence of any compromise, someone wins, someone loses, it always costs a lot of money and usually generates a lot of ill-feeling that does not end with the litigation. None of these things are good for neighbours.'

And again in *Cameron v Boggiano*:

> "[5] Suing and being sued by neighbours is a stressful and unpleasant experience. Bad feelings all round do not finish with the final judgment. The lawsuit could have unwanted long-term consequences that a sensible compromise might have avoided. One side "wins" at trial, and/or on appeal, but, in the long run, both sides lose if, for instance, litigation blight has damaged the prospects of selling up and moving elsewhere."

104. With those words in mind, it is important for the court not to put or leave an injunction in place when it is not strictly necessary. It is no answer to say that an injunction merely forbids one party from doing what would be unlawful. The existence of an injunction may deepen the hurt and make any sort of rapprochement impossible, and also may extend the litigation blight of which Mummery LJ spoke.

105. Of course there will be cases where an injunction will be needed, and the courts should not be slow in acting in an appropriate case. But the court can act swiftly, and in a case such as this, where the rights of way have now been clearly and definitively settled, I have no doubt that any court would act swiftly if there were any further interference.

106. For this reason alone I am on balance persuaded that an injunction is not required at this stage. The current cross-undertakings remain in force until further order, and I propose to order that they should be discharged three months after I formally hand down this judgment in court. If, during that period, there is any proper basis for apprehending further obstructions of the right of way, the Claimants can apply to vary the order in this respect.

*Orders*

107. I invite counsel to agree the form of order to reflect my conclusions. I also hope that it will be possible to agree any consequential orders, including costs. It seems to me to be clear that the Claimants have succeeded in their action in broad terms, and the basis for declining an injunction at this stage does not reflect on their conduct of this litigation.

108. If all matters are agreed, it will not be necessary for the parties to attend when this judgment is handed down, which will save some costs. If only costs remain in issue, I will decide them on written submissions.