Neutral Citation Number: [2024] EWHC 2928 (Ch)

Case No: PT-2023-MAN-000133

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Date: 9 September 2024

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

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Between :

LEE JAMES BOOTLE	**Claimant**
- and -	
(1) GHL PROPERTY MANAGEMENT AND DEVELOPMENT LIMITED	
(2) FI REAL ESTATE MANAGEMENT LIMITED	
	Defendants

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Caroline Shea KC and Wilson Horne (instructed by Lockett Loveday McMahon solicitors) for the Claimants

Philip Rainey KC (instructed by Addleshaw Goddard LLP) for the Defendants

Hearing date: 9 September 2024

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JUDGMENT

HHJ HALLIWELL :

1. I shall now give judgment on Mr Bootle's application for an interim injunction restraining two companies, GHL Property Management and Development Limited and FI Real Estate Management Limited, from entering onto or performing works on his property at Little Knowley Farm, 19 Blackman Road, Chorley in Lancashire.

2. Having issued substantive proceedings under Part 7 of the CPR, I shall refer to Mr Bootle as the Claimant. I shall refer to the two companies by their designation as Defendants or, specifically, as First and Second Defendants.

3. The hearing before me took place on Friday 30 August but did not conclude until after 5.30pm, by which stage it had not been possible for me to hear oral argument on all the issues that arise. The hearing was thus adjourned to enable the parties to file additional written submissions in anticipation that having considered those submissions, I would give judgment on Tuesday 3 September. However, I was subsequently advised, by email, that further time was being sought for the delivery of submissions and evidence. The parties agreed the basis on which this should be achieved with a revised time scale. They also submitted a draft order, which I approved, providing for the parties to file additional evidence in sequence followed by written submissions. At the same time, the date for me to give judgment was re-scheduled so as to take place today, Monday 9 September.

4. As envisaged, the parties took the opportunity to file further evidence and written submissions. These were entered on C File and, subject to an issue raised by the Defendant about the admissibility of expert evidence, I have taken into consideration the additional evidence and the parties' written submissions when giving judgment. This includes all the documentation entered on C File. For the avoidance of doubt, it also includes two email messages to the court from counsel, on Friday 6 September, in relation to the issue of expert evidence.

5. At the previous hearing before me on Friday 30 August, Ms Caroline Shea KC appeared with Mr Wilson Horne as counsel for the Claimant and Ms Shea continues to do. Mr Philip Rainey KC appeared before me as counsel for the Defendants on Friday 30 August but he does not appear today, having forewarned me, at the previous hearing, that he would not be available to attend later owing to holiday commitments. In Mr Rainey's absence, Mr Michael Buckpitt has acted as counsel for the Defendants and appears before me today. Mr

Buckpitt has also assisted in the preparation of detailed written submissions filed on the Defendants' behalf.

6. The factual background is as follows.

7. The Claimant is the owner of a house with substantial grounds in a semi-rural location at Whittle-le-Woods in Chorley, Lancashire.

8. The First Defendant owns adjoining land immediately to the south. On 30 April this year, it obtained planning permission to develop the land for a substantial project involving the construction of buildings for warehousing.

9. The Second Defendant is an associated company. It has allegedly been engaged as main contractor on the development.

10. The two properties were historically divided by a ditch. The main issue between the parties is to the precise position of the boundary, whether it runs to the north or south of the ditch. It is plainly an artificial ditch and appears to have been dug in order to drain water from a quarry to the east of the properties. There was historically a substantial amount of undergrowth and foliage to each side of the ditch, dense in places. To the southern side of the ditch, it is alleged there was, until recently, a hedge bounded by a post and wire fence.

11. On behalf of the Defendant, there is a witness statement from Mr Edwin Schofield who farmed the Defendant's land from 1974 until quite recently when the land was required for the development. In his statement, Mr Schofield confirmed that he put up the fencing himself on the south side of the ditch. This is described as a post and barbed wire fence. He says that he did so to prevent sheep and cattle treading in the ditch. He also states that the only fence between the properties when he first bought the land was on the top of the bank. I have taken this to be a reference to the land on the north side of the ditch.

12. There is uncertainty about the putative hedge on the southern side of the ditch. If there was a hedge, it has now been pulled down with the fence. However, to the extent it is relevant, it may emerge, when the parties' evidence is admitted in full and tested in cross-examination, that the hedge - as it has been described - was made up of a random spread of bushes and foliage which have grown sporadically over time.

13. In these proceedings, the Claimant originally maintained that he owned the entirety of the ditch together with the site of the alleged hedge and fence to the southern side of the ditch. Having instructed a chartered surveyor, Mr Hainsworth, to advise him about his title to

the boundary, his case was advanced on the basis that his title extends south for a distance of four feet measured from the roots of the hedge on the southern side of the ditch.

14. The Defendants have consistently maintained otherwise. Mindful that the title to both properties is registered, they rely on the filed plan. They submit it is apparent from the filed plan that the historic boundary feature or features ran to the north of the ditch and it is obvious that the entirety of the ditch and the land between the ditch and the historic boundary features can be taken to have vested in the First Defendant. They also maintain that, as freehold owner with an estate in possession of such land, the First Defendant is fully entitled to develop the site of the ditch and the land to the south of the ditch.

15. Since the Claimant has, until now, advanced his case on the footing that he owns the land, he does not advance an alternative case based, for example, on the proposition that he has rights in the nature of easement, such as rights of drainage, in respect of the land earmarked for development.

16. Be that as it may, the Claimant alleges that he was alerted, on 29 April this year, to the commencement of works on the southern boundary of his property involving the removal of two large mature trees on the southwest corner of his land. Other trees were also removed. He contends that the trees were on his side of the boundary and the works thus involved acts of trespass.

17. It is not in dispute that the works were carried out on behalf of the First Defendant. Nor is it disputed that the Second Defendant bears responsibility for the works as main contractor. The Claimant contends that the following day, 30 April, he went down to the boundary and pointed out that they had cut down trees in his ownership. When they stated that they were under the impression the boundary was marked by a palisade fence to the north of the ditch, the Claimant advised them that this fence was within his boundary and the true boundary was to the south of the ditch.

18. It is the Claimant's evidence that the palisade fence was constructed on his behalf and was built well within the boundary to his property. The Defendants do not challenge the Claimant's case that the palisade fence was built on his behalf. No doubt they have no knowledge of the circumstances in which it was first erected. However, they make no concession about its position with respect to the boundary.

19. Following the initial works at the end of April, the Claimant contends that there were no further works in the immediate vicinity of the boundary until the beginning of June when

he became aware some more trees had been cut down on his property. He arranged a site meeting with Mr Timothy Knowles on behalf of the Defendants at which, he says, Mr Knowles agreed the trees should not have been cut down and promised to arrange for the trees to be replaced.

20. Mr Knowles has himself filed witness statements in which he confirms that he is managing director of both companies. He takes issue with the Claimant's account but accepts he agreed to pay for the Claimant's gardener to plant a selection of trees.

21. Through his colleague, Mr Stephen Fells, the Claimant then instructed a chartered land surveyor, Mr Kevin Hainsworth, to attend the site and advise him about the line of the boundary. Having attended the site and considered some historic plan and conveyances, Mr Hainsworth initially concluded that the boundary was situated some four feet to the south of the fence on the southern side of the ditch. As I say, it is on this basis that the Claimant's case was originally advanced. In his witness statement, the Claimant has described this as as a picket fence but he can only have been referring to the residue of the fence Mr Hainsworth himself identified in his professional report.

22. On 31 July, the Claimant was advised some further trees were being cut down on the boundary. He asked his son, Mr Samuel Bootle, to go to the property as soon as possible. It became apparent a line of mature trees had been removed. Prior to removal, these screened off the land at the bottom of the Claimant's property. Unlike before, his house could now be viewed by anyone driving down a major road to the west of the properties, the A674, when headed north from a local motorway junction.

23. Mr Samuel Bootle has himself made a witness statement describing the circumstances of his visit. He contends that he was approached on site by Mr Knowles who was confrontational and aggressive. Mr Knowles does not dispute the occasion of the visit. His account of the visit is different although he does accept that, following a change to the tone of their conversation, he apologised for initially swearing.

24. In any event, the Defendants continued to carry out works in the area surrounding the ditch. This involved clearing the surrounding foliage or undergrowth, excavating the land, filling in parts of the ditch and laying an outlet pipe. The lower parts of the ditch were in places flattened. The nature and progress of the work can be seen from film captured by drone and the photograph exhibited at TK3 to Timothy Knowles' second witness statement.

25. It can be seen that, at least to the western end of the relevant boundary, the bushes and undergrowth to both sides of the ditch have now been almost entirely removed in the area to the south of the Claimant's palisade fence. It also appears that parts of the area to the south of the ditch have been scooped up and flattened.

26. The Claimant instructed solicitors to act on his behalf. Prior to the issue of proceedings, he applied for an interim injunction before Judge Cadwaller at Manchester on Thursday 22 August. This was prior to the bank holiday scheduled to take place the following Monday. Shortly before the hearing, the Defendants were given notice of the hearing and Mr Rainey was able to attend but, in the time available, he was in no position to assess or challenge the essential elements of the Claimant's case. Moreover, the Defendants were in no position to put in evidence.

27. At this stage, the Claimant's case in relation to the position of the boundary was based on Mr Hainsworth's report dated 21 August 2024. Mr Hainsworth's view, summarised in paragraph 36.2.25.1 of his report, was that "the boundary runs either along the *in situ* hedge remnants and fence or, if mereing applies, at an offset of four feet to the southerly side of the feature indicated by that line". Mr Hainsworth's reference to the *in situ* hedge remnants and fence was to the hedge and fence remnants he had identified on the southern side of the ditch. He reached this view on the basis that the boundary was correctly defined in the parcels to a conveyance dated 22 November 1929 in respect of land comprising the Claimant's property together with other land and delineated by a green line on the conveyance plan.

28. Mr Hainsworth also concluded, at paragraph 3.6.7, that the 1929 conveyance plan was based on the 1893 ordnance survey map but, having reached this conclusion, he observed that whilst the southern boundary to the land in the 1929 parcels was shown immediately to the north of two parallel lines, this was not the case with the 1893 ordnance survey map. Consistently with this conclusion, he appears to have taken the view that the parallel lines in the 1929 conveyance were not intended to show the ditch. In the absence of better indicia, the boundary feature ran along the remnants of the hedge and fence he had observed on the southern side of the ditch.

29. Mr Hainsworth also concluded, in paragraph 3.6.25.1, that if, as he put it, the boundary had been mered to an offset of four feet, the boundary was four feet to the south of hedge and fence. Whilst the remnants of the hedge and fence did not follow a straight line, he deployed them as points of reference for his "best fit" and deduced that the boundary was four feet to

the south. These were then entered on a plan - now denoted as Plan A - and used to define two alternative boundaries, one plotted as a continuous red line and the other, a series of red dashes. The dashed line was the most southern of the boundary lines plotted by Mr Hainsworth. From the Claimant's perspective, it provided him with the most generous area of disputed land. As a valuable cross-reference, Mr Hainsworth observed a boundary stone at the eastern end of the site by Blackburn Road which aligned with his dashed line on the southern boundary.

30. At the hearing on 22 August, Judge Cadwallader was persuaded that it was appropriate to grant interim injunctive relief in the Claimant's favour. He made an order prohibiting the Defendants from entering the Claimant's property and, consistently with Mr Hainsworth's view as to the line of the boundary, the Defendants were prohibited in the order from entering the land to the north of the dashed red line on Plan A. The dashed red line was four feet to the south of the best fit line based on the original remnants of fence and hedge to the south of the ditch.

31. At the hearing before me, on 30 August, the Claimant again relied on Mr Hainsworth's report dated 21 August 2021 together with the witness statement of the Claimant himself, his wife, Rebecca Bootle, his son, Samuel, and Mr Stephen Fells. Relying, so it appears, on the same case as before, the Claimant through counsel invited me to renew Judge Cadwallader's order so as again to prohibit the Defendants from entering the land to the north of the dashed red line on plan A.

32. The Defendants opposed the Claimant's application. On their behalf, Mr Rainey KC, submitted that there was no serious question to be tried on the merits. Unlike the Claimant, who will be adequately compensated in damages if injunctive relief is withheld, he submitted that the Defendants will not be adequately compensated on the Claimant's cross-undertaking if injunctive relief is granted and he submitted that the balance of convenience weighed in their favour.

33. Mr Rainey also sought to advance a case based on material non-disclosure although he did not have the opportunity to develop his case owing to the time constraints for the hearing. However, on this basis, not only did he seek to oppose the application; he contended that Judge Cadwallader's order should be set aside.

34. The Defendants' case on the merits was primarily based on the line of the boundary. Relying on the filed plan, he submitted that the boundary to the properties, reflected in the

boundary on the filed plan, is well to the north of the ditch. Whilst the development had commenced, it was at an early stage. However, on the basis that the boundary is correctly shown on the boundary plan, there will be no need for them to cross the boundary during the rest of the project and they do not intend to do so.

35. At the hearing before me, Mr Rainey relied upon an ordnance survey map of 1849 pre-dating the Claimant's plan on which the ditch is shown immediately to the south of the boundary. On this basis, he submitted that the parallel lines to the south of the boundary in the 1929 conveyance plan are indicative of the ditch and he submitted that the boundary on the filed plan is indicative of a physical boundary feature or series of features which would have stood proud of the land to the north of the ditch. This is consistent, he submitted, with the historic conveyancing plans.

36. By the time that the hearing on 30 August came to a close, the parties had not completed their submissions. I thus gave the parties permission to file additional submissions in writing and, after the hearing, a draft order was agreed and approved with provision for the delivery of further evidence and submissions prior to the delivery of judgment.

37. The parties each availed themselves of the opportunity they were afforded. As part of this process, the Claimant filed a supplementary report dated 3 September 2024 from Mr Hainsworth in which Mr Hainsworth presented a view different from the one he had previously presented about the line of the boundary. It appears he did so having reflected on the evidence admitted on behalf of the Defendants at the hearing on 30 August, in particular, the 1849 ordnance survey map.

38. Having now had sight of the surveyor's notebook and the 1849 ordnance survey map, Mr Hainsworth took the view it was more likely than he had previously thought that the parallel lines, shown on the 1929 conveyance plan, were indeed indicative of the ditch. On balance, he concluded, at paragraph 2.1, that the mereing boundary was four feet to the south of a hedge to the north of the ditch which had subsequently been removed. This was on the basis that he had observed the location of tree stumps to the north of the ditch which were not evident when he made his initial site visit on 6 July 24 owing to the dense vegetation at the time. Of course, this has since been cleared by the Defendants.

39. Mr Hainsworth thus recanted his previous view that the boundary was south of the remnants of the hedge and fence on the south side of the ditch. His view now is that that the

boundary is four feet to the south of the original hedge line to the north of the ditch. This is based on the location of the tree stumps which had not previously featured in his evidence.

40. Although the point was not taken until the delivery of written submissions after the hearing on 30 August, there is now an issue about the admissibility of Mr Hainsworth's report. *CPR Rule 35.4.(1)* provides that no party may call an expert or put in evidence an expert's report without the court's approval. This provision is not expressly qualified in any way. Consistently with the judgment of Andrew Baker J in *B.B. Energy (Gulf) DMCC v Al Amoudi* [2018] EWHC 2595 (Comm) at [49], Mr Buckpitt submits that the court's permission was thus required before Mr Hainsworth's report could be admitted in evidence.

41. Having taken this point, Mr Buckpitt has submitted that I should not admit Mr Hainsworth's report to be admitted for at least three reasons. Firstly, by his email on Friday 6 September, he contends that the opinion of an expert as to the location of a boundary does not constitute admissible expert evidence. Secondly, he submits that Mr Hainsworth's evidence is unreliable, not least given the inconsistency between his two reports. Thirdly, he implicitly submits that, in the light of his second report, Mr Hainsworth misled the court when stating, in Paragraph 3.6.20 of his first report that "having observed [during his inspection of 13 June 2024] remnants of a hedge…and barbed wire fence…on the southerly side of the ditch", he "did not see similar hedge remnants at or close to the northerly side of the ditch". If Mr Hainsworth has displayed a propensity to mislead the court, it is suggested I should not admit his evidence.

42. Whilst, on these issues, the case advanced in Mr Buckpitt's written submissions is a little overstated, it is not entirely without foundation. His submissions about the room for expert opinion evidence on the location of the boundary are based on the observations of Zacaroli J (as he was) in *Charlton v Forrest* EWHC 1014(Ch). In this case, following a two day boundary dispute between neighbours in which the reports of two experts were presented before the court, the judge concluded, at [16], that this evidence did not constitute admissible expert opinion since the ultimate question as to the line of the boundary, was a question of fact for the judge. However, drawing on Lord Hodge's observations in *Tui UK Limited v Griffiths* [2023] UKSC 48, Zacaroli J also stated that "expert evidence may be of assistance insofar as it consists of 'scientific, technical or other specialist knowledge which are outside the judge's expertise'". He also made the point that, in the case before him, the experts had not brought to bear particular specialist knowledge. He was not bound to accept their conclusions based simply on the evidence they had collated.

43. It appears from Zacaroli J's judgment that the experts had done little other than collate the evidence and reach a conclusion about the line of the boundary. They had not provided a specialist insight in relation to surveying practice or the historic methodology for the preparation of plans and the use of keys and symbols. This is in contrast with Mr Hainsworth who has gone to some length, having considered the 1849 ordnance survey map, to explain entries from combined photographs in respect of the surveyor's notebook in his second report. Mr Hainsworth has also sought to provide an insight in relation to the historic practice of mereing and an explanation of some of the more obscure historic symbols on ordnance survey and conveyance plans. Consistently with Zacaroli J's observations, Mr Hainsworth's evolving views about the line of the boundary are plainly not binding on the court but he has provided valuable evidence on at least some aspects of the preparation and plans and aspects of surveying practice which fall within the scope of his professional knowledge, sufficiently sequitur to be beyond the knowledge of most legal practitioners and judges.

44. In my judgment, this is an answer to the first part of Mr Buckpitt's challenge to the admissibility of Mr Hainsworth's report. There is more in the second and third of his points. If and when his evidence is tested at trial, it will almost certainly be put to Mr Hainsworth that he has been selective or insufficiently thorough in obtaining and examining the ordnance survey and conveyancing plans. It will also be put to him that he has not properly explained why he now identifies signs of a hedge on the north side of the ditch, having previously asserted that he saw no signs of such a ditch when he made his first report. If he were to respond by suggesting that the roots of the northern hedge only became evident after the site was cleared by the Defendants, it will no doubt be put to him that the site was cleared well before he signed his first report.

45. These questions will need to be answered and until they have been answered properly, it will certainly be open to the court to treat Mr Hainsworth's evidence treated with a measure of caution, particularly his evidence in relation to the position of the hedge to the north of the ditch. Since his analysis in relation to the line of the boundary is now different from his analysis at the time of the hearing on 30 August, the Defendant has been denied the opportunity to challenge it at a fully contested court hearing.

46. Mr Buckpitt's concerns are not without foundation. However, I am not persuaded Mr Hainsworth's evidence should be excluded. There was no challenge to the admissibility of his first report at the hearing on 30 August. His evidence was challenged on the basis that it

was inconsistent with the available evidence as a whole and can thus be discounted, not that it was inadmissible. Mr Hainsworth's second report was not, of course, prepared or presented until after the hearing on 30 August. However, if and once the Claimant was advised that Mr Hainsworth now took the view that his original conclusions were incorrect in the light of the evidence presented by the Defendants at the hearing on 30 August, the Claimant could reasonably be expected, as he did, to advise the court that this was the case and explain why. Mr Hainsworth's second report ought at least to be admitted for this purpose now the Defendants have had an opportunity, in counsel's written submissions, to address the issues to which this gives rise.

47. Of course, Mr Hainsworth's second report goes further than clarifying that, in the light of subsequent evidence, his first report was incorrect. It now presents an alternative case as to the line of the boundary based on a hypothesis which had not previously been advanced, a case which is inconsistent with the view Mr Hainsworth had previously taken. Indeed, it is based on factual inferences about the existence of a hedge to the north of the ditch which contradict the observations and analysis in his first report. However, this has been addressed by the Defendant's counsel in his written submissions. Although Mr Hainsworth's evidence has not yet been tested in cross-examination, his change of stance may ultimately diminish his credibility as an independent witness. Indeed, until his evidence has been properly tested, the court might be expected to exercise caution before accepting his uncorroborated observations on contentious issues of fact and the inferences to be drawn from them. However, his first report has already been presented before the court and admitted in evidence. It was also subject to extensive argument before Mr Buckpitt challenged the admissibility of his evidence. No doubt, it would be open to the court to exclude Mr Hainsworth's evidence altogether in the light of developments following the hearing. However, I am not persuaded that it would be reasonable or proportionate to do so. To the extent necessary for the purpose at least of this application, I shall give the Claimant permission, under *Rule 35.4(1),* to put in his evidence.

48. I shall now turn to the Claimant's application for injunctive relief. The application is specifically for an injunction restraining the Defendants from entering any part of his property and in particular, the land to the north of the dashed red line on Plan A. Following the submission of Mr Hainsworth's second report, the relief sought is implicitly for an injunction restraining the Defendants from entering the land to the north of the red line on his

survey plan INS1395/003/1, measured and aligned four feet to the south of the historic roots of the hedge on the northern side of the ditch.

49. On Mr Hainsworth's plans, the general boundary on the Land Registry plan is represented by a blue line. At one point, the blue line divides into two but it is common ground that, where it does so, the southern blue line marks the general position of the boundary as marked in the filed plan.

50. The Defendants contend that the boundary shown on the filed plan accurately delineates the precise line of the boundary. The boundary will obviously have to be scaled up from the plan but it is at least implicit in their case that, when this is done, the physical boundary will not transcend the boundary line marked on the plan. It is also implicit that the Claimant's title to the land to the north of the boundary, shown as a general boundary on the filed plan, is the lower blue line on Mr Hainsworth's plans.

51. It is now well established that where a landowner's title is not in issue, he is *prima facie* entitled to an injunction to restrain trespass on his land regardless of whether the trespass harms him. This can be seen from the judgments of the Court of Appeal in *Patel v WH Smith* [1987] 1 WLR 853 in which Balcombe LJ (with whom the other judges agreed) observed that the principle applies to claims for an interim injunction as it does to final injunctions. Since the Defendants did not have an arguable case that they were entitled to a general right to park cars on the plaintiff's land, the plaintiffs were entitled to an injunction restraining them from doing so. At page 861C-DBalcombe LJ stated that "if there is no arguable case, then questions of balance of convenience, status quo and damages being an adequate remedy do not arise."

52. If and to the extent there is any risk of transgression in the present case, it follows that the Claimant is entitled *prima facie* to an injunction restraining the Defendants from entering his land to the north of the boundary shown on the filed plan. This is for the full length of the southernmost blue line on Mr Hainsworth's plans. However, if and to the extent that there is a serious question to be tried in respect of the title of both parties to the land to the south of the blue line, it will be necessary to apply the remaining parts of the *American Cyanamid* test. It will thus be necessary to ask whether, if injunctive relief is withheld in respect of such land, damages would be an adequate remedy for the Claimant and if not, whether the Claimant will be properly compensated and the Claimant's cross-undertaking in damages. It will also be necessary to assess the balance of convenience.

53. I shall now deal with the Claimant's application for interim relief. The Defendants have also sought to present a case alleging material non-disclosure and this would ordinarily be heard with the application for interim injunctive relief. However, for reasons to which I shall come later, I am not satisfied it would be appropriate to deal with the allegations of material non-disclosure at this stage.

54. I shall first address each of the requirements of the familiar *American Cyanamid* test.

55. Firstly, I must ask first whether there is a serious question to be tried in relation to the parties' respective title to the disputed land. Whilst the parties have each set out to file a significant amount of evidence, there are limitations on the extent of the evidence they can have accumulated at this relatively formative stage of the proceedings in relation to the alignment of the boundary.

56. As Mr Rainey has observed, neither party is able to identify a point in time when the properties were in common ownership and the title severed nor, indeed, has evidence been admitted in relation to the circumstances in which the ditch was initially constructed although it appears to have served a neighbouring quarry. It is also unclear whether the ditch was ever in the ownership of third parties who did not have an interest in the land to each side of the ditch. The Claimant has obtained some historic title documents and ordnance survey plans but neither party has presented a comprehensive case in relation to the devolution of the title to either property.

57. Nevertheless, when considering whether there is a serious question to be tried, I am limited to the evidence the parties have submitted together with such factual inferences as can be drawn from the evidence. This includes the documentation filed with Mr Hainsworth's expert reports.

58. The Defendants have not yet had the opportunity to instruct an expert. In the short time available to them prior to the hearing on 30 August, this is not in the least surprising. If, indeed, it is suggested I should draw an adverse inference, I am certainly not persuaded I should do so.

59. At the hearing before me, Mr Rainey was able to make cogent submissions about the alignment of the boundary based on the evidence available. This included submissions about the inferences I can draw from the available evidence together with his submissions of law. Whilst there was a suggestion, at one point, that Mr Rainey was purporting to give expert evidence, this is not how I saw it. His submissions were based on the admitted evidence. He

invited me to draw inferences from the evidence and interpret the conveyancing documentation in a way favourable to his client. However, it was open to him to do so.

60. The critical point is that I must address the question of whether there is a serious question to be tried from the available evidence only. I must not speculate, in the absence of evidence, about matters which might subsequently come to light, for example, conveyances or other documents with a bearing on the history of the local area or the devolution of the title to both properties.

61. I can eliminate one possibility right at the outset. The parties each accept there is no room for the hedge and ditch presumption. Regardless of whether it can be shown that a hedge was planted on the land after the ditch was excavated, the ditch longitudinally extends well beyond the areas originally owned by the parties' predecessors in title and appears to have been created in order to drain water from a quarry on neighbouring land.

62. Mr Hainsworth's initial report is based, in particular, on ordnance survey maps of 1893, 1911, 1919, 1928 and 1962 to 1964 together with a conveyance dated 22 November 1929 of the Claimant's property and abstracts of title with details of conveyances dated 4 March 1930 and 2 February 1930. This is together with copies of the filed plans at the land registry. He also had the benefit of drone footage showing the progress of the Defendants' development and he has visited and revisited the site on 13 June and 5, 6 and 15 August this year. His second report was prepared after taking into consideration the ordnance survey map of 1849 and combined photograph extracts from the surveyor's notebook.

63. The Land Registry filed plans show the general position of the boundary only. The exact line of the boundary has not yet been determined. However, the boundary on the filed plan is marked to the north of the ditch. Mr Rainey submitted that, on this basis, his client was, as he put it, "presumed" to be owner of the "paper title" of the entirety of the land to the south of the boundary on the filed plan. However, in my judgment, this is not a helpful characterisation. The First Defendant has adduced evidence from Mr Schofield, a local farmer, in relation to the physical extent of the land historically forming part of his holding but the Claimant is not advancing a case based specifically on possession or adverse possession. His case is founded on the documentary title. In any event, it is unhelpful to suggest, as Mr Rainey does, that the filed plan gives rise to a presumption about the precise line of the boundary which stands unless rebutted by convincing evidence to the contrary.

64. *Section 60(2)* of the *Land Registration Act 2002* provides that a general boundary does not determine the exact line of the boundary. On this basis, Mr Rainey accepted in his submissions that the *2002 Act* does not involve any substantive change to the previous formula in *Rule 278* of the *Land Registration Rules 1925* which provided clarification, by way of example, that, on this basis, it remained to be determined whether the boundary included a hedge or wall and ditch or ran along the centre of a wall or fence of its inner or outer face, or how far it runs within or beyond it or whether the land registered includes the whole or any part or portion of any adjoining road or stream. No doubt, this includes an adjoining ditch, artificial or otherwise, or an adjoining water course.

65. In any event, as Ms Shea observed for the Claimant, it is unrealistic to rely on the precise line of the general boundary on the filed plan by scaling up from the Land Registry plan where a millimetre's difference might equate, on the ground, with a distance measured in feet.

66. However, the boundary on the filed plan is not without significance since it can be taken to be based on a physical feature or series of physical features which were identified when the land was surveyed. In his reports, Mr Hainsworth surmises that, historically, this is most likely to have been a hedge. Based on his knowledge of the site since 1974, Mr Schofield has asserted in his witness statement that there never has been a boundary hedge, only a fence at the top of the bank which I take to be the top of the bank on the north side of the ditch. It is conceivable there was a hedge there in the past. In his second report, Mr Hainsworth has identified a line of tree roots, since gone, which may have been indicative of a hedge. However, regardless of whether there was historically a hedge or a fence on the northern side of the ditch, it can be inferred that, historically, there was a relevant physical feature of some kind which stood proud of the land, not simply the ditch. This is for the simple reason that it was picked up when the land was surveyed and appears to have been to the northern side of the ditch.

67. It can reasonably be inferred this is the physical feature on the ordnance survey and the filed plan. It is inherently unlikely to be a fence or hedge in the southern side of the ditch since, as Mr Hainsworth acknowledged in his report, it is evident there is a distance of some 5.5 metres between the boundary feature on the filed plan and the dashed line leading to a point aligned with the position of the boundary stone first identified by him and mentioned in his first report, itself measured four feet to the south of the remnants of the putative hedge and fence at the southern boundary.

68. There does appear to have been a fence on the southern side of the ditch. The Claimant himself refers to a hedge and picket fence on the southern side of the ditch and, on surveying the land, Mr Hainsworth of course discovered the remnants of a fence and inferred they formed part of a historic hedge and fence. However, Mr Hainsworth appears initially to have reached this conclusion in his first report simply because he observed sections of fence alongside bushes or other vegetation.

69. More significantly, Mr Hainsworth accepted - again in his first report - that this particular fence cannot have followed a single straight line. According to Mr Hainsworth, it was likely to have changed direction in places. This is, of course, inconsistent with the proposition it marked the boundary, shown as a straight-line boundary, between the properties on the southern side of the ditch. However, it is consistent with Mr Schofield's evidence, as yet untested in cross-examination, and thus of limited corroborative value only, that the only fence on this side of the ditch was a stock fence maintained by himself for the protection of his livestock.

70. I can thus infer that, in all likelihood, the relevant boundary in the filed plan was plotted from a feature on the northern side of the ditch. Mr Hainsworth now accepts as much in his second report and it is obvious when the filed plan is compared with the plan appended to the conveyance of 22 November 1929 upon which he relies in his reports. By the 1929 conveyance, there was conveyed to the Claimant's predecessor in title the land "delineated and surrounded by green lines" save for the site of a settling tank. On this plan, the land edged green was bounded, at its southern end, by two parallel lines which appear to represent the line of the ditch. The land conveyed was thus defined so as to include only the land immediately north of the ditch or to the north of the water course in the ditch.

71. Elsewhere, Mr Hainsworth referred in his first report to ordnance survey plans showing that the parish boundary, represented by a series of dots, was aligned some four feet to the south of the remnant physical feature or features on the ground which he takes to be the roots of the hedge. At paragraph 3.6.15.2 of his report, he was also able to identify area braces and submitted that these can be taken to have included land to the southerly side of the linear feature. He also submitted that this would be consistent with the alignment of the boundary some four feet to the south of the root of the boundary hedge. If, as he now concludes, the boundary feature was itself to the north of the ditch, the boundary would potentially run alongside the ditch. It all depends on where the original boundary feature was. Of course, having identified the position of some root stumps, Mr Hainsworth now surmises that they

may constitute evidence of the historic boundary feature. However, there is no substantial evidence this is so. If the Defendants contend that the filed plan itself provides the best available evidence of the position of the original linear boundary feature, this is not without good reason.

72. On this basis, no doubt there is an element of uncertainty or ambiguity as to the precise alignment of the boundary. It could be aligned with the original boundary feature or measured some four feet to the south of the original feature and conceivably, evidence might emerge that it runs along the centre of the ditch but this would be to put the Claimant's at its very highest on the available evidence.

73. In these circumstances, the Defendants plainly have a good arguable case that the precise boundary between the properties is as shown on the filed plan. Conversely, the Claimant through counsel has done enough to persuade me that there remains a serious question to be tried as to the precise position of the boundary. On his best case, it could conceivably run as far south as the ditch itself and the historic water course but, if so, the supporting evidence is, at best, limited.

74. In any event, Mr Hainsworth now accepts, with good reason, that the boundary does not extend as far south as he originally considered. In his first report, he took, as his initial points of reference, the line of the fence and hedge remnants which he observed at the time of the inspection on 13 June and assumed this could be taken as to the location of the mereing boundary on the historical ordnance survey maps. In view of the fact that it was not straight, he sought to realign, in a relatively straight line as close as possible to the original co-ordinates – his "best fit" as he put it - and then measured four feet to the south. He took this line, represented by a dashed red line on plan A as the line of the boundary between the two properties.

75. These conclusions were flawed.

76. Firstly, there is no substantial evidence that the remnants of fence originally identified by Mr Hainsworth on the site to the south of the ditch were part of a boundary fence, particularly in the face of Mr Schofield's evidence that the fence on this part of the land was only a stock fence. No doubt, Mr Schofield's evidence has not yet been tested in cross-examination. However, on its face, it does provide an explanation for the configuration of the fence and why it is that, based on the fence and hedge remnants he had observed on site, Mr

Hainsworth could produce only a "best fit" so as to inform the boundary line in his first report.

77. Secondly, although it is now suggested otherwise, Mr Hainsworth certainly appeared to draw support for his initial analysis from the presence of the boundary stone on the basis this was aligned with the boundary at the eastern end of the two properties alongside the public highway to the east, Blackburn Road. In his first report, Mr Hainsworth observed that such stones are sometimes moved but had no reason to believe this might have happened in the present case. However, it now emerges from Google Street View imagery that the boundary stone was not in its present position as recently as 2009. It must have been moved and cannot now provide helpful guidance as to the position of the boundary.

78. If, as I have found, there is a serious question to be tried as to the precise position of the boundary between the properties - albeit it can now be taken that the boundary is significantly to the north of its position as initially identified by Mr Hainsworth – there is also a serious question whether or, at least as to extent to which, the Defendants have committed acts of trespass by entering upon the Claimant's property and carrying out works in connection with the current development. This includes removing trees, undergrowth and foliage to the side of the ditch and carrying out works in the ditch itself.

79. According to the Claimant, the Defendants continued to carry out works on the disputed land, including the removal of trees and foliage, after he and his son took issue with them. The sequence and extent of the work is demonstrated, up to a point, by the drone footage and the photograph exhibited to Mr Knowles' second witness statement. In any event, the development works are in progress and the project has involved a substantial amount of work close to the boundary between the two properties. It can thus be inferred that, if I do not award the Claimant interim injunctive relief or the Defendants do not make appropriate undertakings, the Defendants will continue to commit the putative acts of trespass. If, as I have concluded, the disputed section of boundary is now significantly narrower than appeared at the time of the hearings on 22 and 30 August, it remains the Claimant's case that significant acts of trespass have been committed on land in his ownership. It is by no means clear to what extent they were committed on land to the north of the southern blue line on Mr Hainsworth's plans, in particular, plan A. This is significant because the Defendants admit that the Claimant has title to such land. However, I can infer from their conduct leading to the application that, if I do not grant injunctive relief, there is a

significant risk that the Defendants will enter land to the north and south of the boundary marked by the blue line in connection with their development works.

80. Having determined that there remains a serious question to be tried in relation to the position of the disputed boundary and the extent to which the Defendants may have committed acts of trespass, it remains necessary to address the remaining parts of the *American Cyanamid* test in relation to the land south of the disputed boundary.

81. To the northern area, the Defendants do not dispute the Claimant's title and the principle in *Patel v WH Smith* applies. However, the Defendants' development plans are essentially confined to the south of the disputed boundary and they have not adduced evidence to suggest they will sustain any substantial loss if they are prohibited from entering land to the north of the disputed boundary in connection with the development works. It is conceivable the injunction will lead to a measure of inconvenience to the Defendants if they are restrained from entering land to the north of the disputed boundary. If so, there is no evidence to suggest that the inconvenience would be anything more than modest inconvenience.

82. So, would damages be an adequate remedy for the Claimant in the event that interim injunctive relief is withheld? The Claimant's counsel submits to the contrary. She says that damages would be an inadequate remedy for the Defendants' putative acts of trespass since, if the acts of trespass continue, the overall effect would be to expropriate his rights in property. She submits that, for the court to sanction such acts would amount to a breach of Article 1 of the *First Protocol* to the *European Convention of Human Rights* – his rights to the enjoyment of property - itself constrained by *section 6* of the *Human Rights Act 1998.*

83. In the event that the Claimant ultimately establishes his case at trial, he will show that the development works amounted to an interference with his rights of enjoyment. On this hypothesis, there is a significant risk that the court will decline to grant mandatory relief requiring the Defendants to restore the land to the condition in which it would have been had injunctive relief been granted to prevent further acts of trespass or, indeed, the condition in which it would have been had the Defendant not committed any of the putative acts of trespass at the outset. This may no longer be possible. It is also true that the courts will generally be astute to ensure a party is not ultimately presented with a *fait accompli* which significantly diminishes its rights of enjoyment.

84. However, following the shift in the Claimant's case with Mr Hainsworth's second report, the disputed area is a relatively narrow strip of land forming, for the most part, a steep slope on the edge of a ditch. It is situated some distance from the Claimant's house, upwards of 50 metres away, and the Claimant has himself fenced off the slope from the rest of his property.

85. It is regrettable that, without notice, the Defendants chose to cut down trees on the land so that the Claimant's house can now be viewed from the main road. However, this has now been done and it is irreversible.

86. The disputed land is now of little intrinsic value to the Claimant himself. Its primary value to him, in a financial sense, is that it potentially presents him with the opportunity to seek restitutionary or negotiated damages under the principle in *Attorney General v Blake* [2000] UKHL 45. However, this will remain open to him if injunctive relief is withheld.

87. In the event that interim injunctive relief is withheld, there is a significant risk that the Claimant's enjoyment of his rights in property will be diminished. However, as I say, the property is of only limited intrinsic value. Its amenity value is negligible and, if the Claimant thus becomes entitled to damages under *Lord Cairns' Act,* there is every chance, he will be awarded an amount which substantially exceeds the intrinsic value of the land as an interest in property.

88. In a narrow sense, damages would not compensate the Claimant for any non-pecuniary losses in the event interim injunctive relief is withheld since the trees have already been cut down. However, no such losses have been identified. In any event, this must be weighed against the limited intrinsic value of the land to the Claimant and the risks to which the Defendants will be exposed if they are driven to make substantial changes to the development.

89. Would the Defendants be adequately compensated on the Claimant's cross-undertaking in damages if injunctive relief is granted? The Claimant submits that the Defendants' interest is entirely commercial and, in the event interim injunctive relief is granted and the Defendants ultimately succeed at trial, their financial losses can be satisfied through an award of damages under the Claimant's cross-undertaking.

90. The Defendants cannot dispute the proposition that their interest is commercial. However, if the claim for injunctive relief is granted, there is every possibility, they will be required to take complex and somewhat nuanced management decisions in connection with

the project, including whether to modify the scheme in relation to this part of the phase or postpone this part of the development and, if so, what parts of the development and to what extent.

91. Following the shift in the Claimant's case with Mr Hainsworth's second report, the ambit of changes or modifications to the scheme is not properly addressed in the Defendants' evidence since the Defendants' evidence is shaped by the ambit of the original claim and the order of HHJ Cadwallader. The prohibition imposed by Judge Cadwallader's order based on the dashed red line in plan A operated to restrain the Defendants from developing a substantial area of land to the south and north of the ditch. This is no longer the case.

92. In response to the application for interim injunctive relief in its original form, it was submitted on behalf of the Defendants that such an injunction would put them to the unenviable choice of abandoning or modifying their current plans with the prospect of substantial delay and the risk of incurring very substantial losses and at that stage, they maintain that the disputed strip is integral to the development project and the need to lay out estate drains and roads. A retaining wall is to be built on the land at least originally in dispute.

93. Some idea of the scale of the whole project can be seen from the witness statement dated 29 August of Boris Alexander Byrne, the Second Defendant's development manager. The land as a whole is being developed in at least two phases. The works on the retaining wall and a new access road from Blackburn Road are part of the enabling works for Phase 2. The budget for development at phase 2 includes the site costs of £11,150,000, planning costs of £350,000, provision for £1.5 million in respect of agreements with the planning and highways authorities, £200,000 in respect of marketing costs and £3.5 million for site enabling costs. Elsewhere, Mr Byrne states that the current anticipated project for phase 2 is £21,448,464. In the event of a six month delay in the project, he contends the anticipated profit is projected to fall to £12,376,739. He refers, in particular, to loss of investment value and income. In the event of a 12 month delay, Mr Byrne projects a reduction to £11,645,331. It is not possible for me to test the headline figures. In reality, I anticipate the Defendants would seek to accommodate an order for injunctive relief by modifying the development works rather than entirely ceasing work on the project. This is likely to be significantly more limited if injunctive relief is limited to the land now in dispute rather than the more extended area for which Judge Cadwallader's order provided based on Mr Hainsworth's first report. However, on any analysis, the Defendants' losses under the Claimant's cross-undertaking

would be on a substantial scale if I were to grant an injunction south of the blue line on the plan.

94. If I am to grant an injunction following Mr Hainsworth's second report, the restrictions will be much narrower in their physical ambit. However, in the light of the evidence currently filed, it is now unclear precisely what bearing they will have on the development and, what steps the Defendants can reasonably be expected to take to mitigate such restrictions. The Defendants can hardly be criticised for failing to put in evidence on this since Mr Hainsworth's second report was only provided to them after the hearing before me. It is now too late for them to put in further evidence on this aspect.

95. There must be finality and, in these circumstances, the Defendants must be given the benefit of the doubt. It shall thus infer that if, as I am implicitly invited to do, I now grant injunctive relief in respect of a significantly narrower area than Judge Cadwallader provided based on Mr Hainsworth's second report, this will remain capable of requiring them to make complex and difficult management decisions. Quantifying their financial loss as a result of the injunction maybe be possible but it would not be a straightforward exercise. I can infer that if the Defendants set out to mitigate their losses through an alternative scheme, this will not simply involve assessing their losses on account of delays to the development.

96. Mr Rainey has advanced serious concerns as to whether the Claimant would be good for his cross-undertaking for damages. If the Defendants were to sustain losses equal to the headline figures in Mr Byrne's witness statement, there would be a measure of substance in Mr Rainey's concerns. However, I am not satisfied that, in the absence of a detailed description and an itemised breakdown of the costs of modifying the scheme of works to accommodate an injunction, the gross amount in these figures is a realistic estimate of the Defendants' projected losses. This is particularly so if the physical area subject to the injunction is itself reduced so as to include only the land now in dispute.

97. In his witness statement dated 22 August, the Claimant states that he has assets to a value exceeding £20 million including the value of his properties, his interest as sole shareholder of the James group of companies and his interest in a collection of extremely rare motor vehicles. Mr Rainey sought to challenge this evidence on the basis that the Claimant's property in the UK is subject to a mortgage with a tacking clause and the accounts on which the Claimant relies in respect of the James Group were filed as long ago as December 2022. It is conceivable the Claimant has overstated his assets and not done enough to identify his

liabilities. However, if the Defendants have specific concerns, those can be revisited later. For present purposes, I am satisfied that the Claimant has he has done enough to show he has sufficient net assets to satisfy his cross-undertaking in damages.

98. Nevertheless, in the event that I were to award the Claimant an injunction on the terms currently sought and he ultimately fails at trial, it would by no means be straightforward to evaluate and assess the Defendants' losses. Such losses are likely to be very substantial. Whilst financial in nature, the overall effect of such an injunction and its bearing on the whole scheme as a whole could be of some complexity. Moreover, the scale of the relevant losses could be substantial. I am not persuaded it would be simple and straightforward to adequately compensate the Defendants on the Claimant's cross-undertaking in damages if injunctive relief is granted.

99. In my judgment, the balance of convenience weighs in favour of the Defendants in respect of the land to the south of the dark blue line on Plan A. No evidence has been filed to show that the disputed land to the south of this line is of substantial value to the Claimant for the purpose of draining surface water from the property if, indeed, it has such a function. If it has no such function, it can be of no substantial value to the Claimant otherwise than to enable him to screen off the neighbouring A road and for the opportunity it affords the Claimant to negotiate a price for unlocking the Defendant's development. The trees on the land have now been cut down so trees or saplings will have to be replanted, as a long term project, if the Claimant's property is to be screened off. However, the opportunity for the Claimant to claim restitutionary damages will remain available. Conversely, for the reasons I have given, the Defendants are potentially exposed to serious financial risks or at least must now be taken to be exposed to such risks if interim injunctive relief is granted.

100. Before I rule on the issue of whether to grant an injunction and, if so, on what terms, I shall deal with the Defendant's secondary case based on the Claimant's duty to make full and fair disclosure.

101. It is well established that applicants for injunctive relief are under a duty to make full and fair disclosure of all relevant legal and factual material on an application made without notice or on short notice only.

102. The applicable principles are conveniently set out in *Paragraphs 25.3.5* to *25.3.10* in *Volume 1* of the *White Book.* At *Para 25.3.5*, the editors observe as follows.

"In *Mark Rich and Co Holding v Krasner* [1999] CLY 487, the Court of Appeal said that the duty was clearly described on the basis of the principal authorities by Bingham J in *Siporex Trade v Comdel Commodities* [1986] 2 Lloyds Reports 428 at 437. (1) The applicant must show the utmost good faith and disclose their case fully and fairly. (2) They must, for the protection and information of the respondent, in the evidence in support of the application summarise their case and the evidence on which it is based. (3) They must identify the crucial points for and against the application and not rely on general statements and the mere exhibiting of numerous documents. (4) They must investigate the nature of the claim asserted and the facts relied upon before applying and must identify any likely defences. (5) They must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are personally prepared and lodged with the court before the oral hearing and that at the hearing, the court's attention is drawn to unusual features of the evidence adduced, to the applicable law, and to the formalities and procedures to be observed (*Memory Corp Plc v Sidhu (No.2)* [2000] 1WLR 1443 CA per Mummery LJ above). The duty is not restricted to matters of fact and no clear distinction between non-disclosure of facts which the litigant has to bear responsibility and breach of the advocate's duty to the court can be maintained as these duties often overlap (*Memory Corp Plc v Sidhu (No.2)* [2000] 1WLR 1443 CA). Overseas lawyers seeking worldwide asset freezing orders in English courts should note that practitioners within the jurisdiction carry a heavy responsibility to the court and should not be encouraged to make ill-prepared applications (*Lewis v Iliades* (No 1)[2002EWHC 335,McCombe J. Carr J in *Togeshiv v Orlov [2019] EWHC 2031 (Comm)* at *[7]* described the law as "non-contentious" and distilled 13 general principles from the authorities, which may be regarded as a convenient summary and first port of call for the practitioner. Of note, Carr J emphasised that an applicant must, before making the application, properly investigate the cause of action asserted and the facts relied upon before identifying and addressing any likely defences ; the application must be presented in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably have anticipated the absent party would wish to make. A defendant seeking to set aside for material non-disclosure must identify clearly the alleged failures rather than adopt a "scattergun approach".

103. In the present case, the Claimants made their application for interim injunctive relief before Judge Cadwallader on 22 August without giving the Defendants proper notice of the application. They gave the Defendants informal notice shortly before the hearing and the Defendant did attend through leading counsel, Mr Rainey. However, Mr Rainey would have been in no position to take full instructions or properly challenge the Claimant's case.

104. This is obviously unfortunate because, on an application of this kind, where providing the Defendants with advance notice, does not realistically afford them the opportunity to take pre-emptive action, the Claimant can generally be expected to give the Defendants full notice of the application unless it is of such urgency that it must be dealt with immediately. This is all the more so where, as in the present case, there was a measure of delay before the Claimant brought the matter before the court.

105. However, I am not persuaded it would be appropriate for me to rule, at this stage, on the Defendants' submissions on this part of the case.

106. Firstly, as the editors of the White book make clear in the passage I referred to, at paragraph 25.3.5, a Defendant seeking to set aside for material non-disclosure must identify clearly the alleged failures rather than adopt a "scattergun approach". In the present case, the Defendants now make a battery of allegations spread across a number of documents. This includes the allegations in paragraphs 8 to 19 of the witness statement dated 28 August 2024 of Joane Elise Mills in which it is alleged that false statements were made - presumably by counsel - in relation to the Defendants' putative refusal to provide information prior to the hearing. It also includes an annex to Mr Rainey's skeleton argument of 29 August 2024 with multiple allegations about the presentation of the Claimant's case before Judge Cadwallader, both orally and by skeleton argument, and it includes additional allegations in Mr Buckpitt's written submissions dated 4 September arising from Mr Hainsworth's change of position following his second report including his new allegation about the stumps or the root stumps on the northern boundary.

107. If the Defendants intend to pursue this part of their case, they must issue a formal application comprehensively identifying each of their allegations of material non-disclosure. It is important that those allegations are all collected together in one document and the Claimant and his legal advisors are properly appraised of each of the allegations being made against them. Once that has been done, the Claimant and his lawyers must be given a full and proper opportunity to respond to them.

108. Secondly, it will be necessary for the Defendants to obtain a full transcript of the hearing before Judge Cadwallader. Ideally, the application should be listed for hearing before Judge Cadwallader himself because he will be better placed than anyone else to determine whether any non-disclosure could have had a material bearing on his decision. However, I appreciate water has now passed under the bridge. Having heard the return date, the application could also be listed before me. However, it would be unhelpful to list it before yet another judge.

109. Thirdly, for the reasons to which I shall come later when I reach my overall conclusions, the Defendants' case based on non-disclosure does not, in my judgment, have an obvious bearing on future relief. If the Defendants can show there has been material non-disclosure which merits a determination in their favour, this is likely to relate primarily to the question of whether Judge Cadwallader's order of 22 August should be set aside together, of course, with any attendant issues of costs.

110. In these circumstances, I shall not rule on this aspect of the Defendants' case at this stage. I appreciate that the allegation of non-disclosure was advanced partly to lend weight to the Defendants' resistance to the application for injunctive relief. However, to the extent this is so, the Defendants can now reflect on whether to issue and pursue their application.

111. This leads to my conclusion on the application for injunctive relief.

112. I am persuaded I should award the Claimant an injunction restraining the Defendants from entering his property to the north of the dark blue line on Plan A. This is the boundary shown on the filed plan but, for the avoidance of doubt, the line shown on the plan appended to the order will not be for general purposes only. It will identify the line beyond which the Defendants are forbidden from crossing. Where the blue lines diverge on plan A, I have in mind the southernmost blue line.

113. The application provides for the order to restrain the Defendants from entering "any part of the Claimant's property, in particular (but not limited) to the land to the north of the dotted red line on plan A". That is the formula in the application itself. In my judgment, it is inappropriate because, in restraining entry on the Claimant's property, it begs the question about the precise line beyond which the Defendants are forbidden entry whilst providing, in particular, that the Defendants must not enter beyond the specified line.

114. I am satisfied I should make an order restraining the Defendants from entering the land to the north of the blue line because the Claimant's title to such land is not in issue and to this

area of land, the *American Cyanamid* test does not apply. If the Defendants are willing to make an undertaking to enter such a land, this will avoid the need for an injunction but this will be a matter for them.

115. The Defendants may contend that they have no intention of entering the land to the north of the blue line but I am satisfied that, in the absence of an undertaking, it is appropriate for me to make such an order because they have not been open with the Claimant in the past about the works they intended to carry out on the land. They have removed trees without notice or consultation and they have effectively presented the Claimant with a *fait accompli* having cleared the ditch and land to the side of the ditch of all trees, bushes and undergrowth.

116. However, I shall not make an injunction restraining the Defendants from entering the disputed land to the south of the land defined by the blue line in the plan. For the reasons I have given, I am not satisfied the Defendants would be fully and properly compensated on the Claimant's cross-undertaking in damages if injunctive relief is granted and the Defendants succeed in trial and I am also satisfied that the balance of convenience weighs in the Defendants' favour.

117. However, there is another important consideration based on the way in which the Claimant's case in relation to the boundary has shifted since he obtained an interim injunction from Judge Cadwallader. It is, of course, only right that, when Mr Hainsworth reviewed the conclusions in his report in the light of the evidence brought to the attention of the court by the Defendants, his change of view was brought to the attention of the court. However, it is difficult to avoid the conclusion that, had the application before Judge Cadwallader been brought on proper notice, the Defendants would have filed evidence before the hearing. At least in part, this is likely to have included the evidence which caused Mr Hainsworth to reconsider his initial conclusions. In these circumstances, it is doubtful whether Judge Cadwallader would have made the order he did and imposed restrictions defined with reference to the dashed red line on plan A.

118. Moreover, had the Defendants been provided with the opportunity to file their evidence in advance, the evidence of both parties in relation to the issues of prospective damages and the balance of convenience would have been better tailored to the realistic range of possibilities for the line of the boundary. In view of the way in which the Claimant's case has evolved, this has not been achieved properly. The Claimant's case that the boundary should be measured south of some tree stumps, now removed, is highly speculative but it has,

at least, been plotted on the plan. However, if the real boundary is measured four feet to the south of the historic linear features, it has not been properly demarcated on a plan and it is unclear to what extent injunctive relief measured to the south of such a boundary would prohibit the Defendants from carrying out their works of development. The same is true if the boundary is measured from the centre of the original water course. As a consequence, the evidence has not been properly tailored to this range of possibilities. If this has happened because the Claimant chose to proceed peremptorily to the hearing on 22 August without giving the Defendants sufficient notice to enable them to put their evidence before the court, the Claimant and his legal advisors have effectively brought this on themselves. In these circumstances, I am disinclined to make an order restraining the Defendants now from crossing an intermediate boundary line somewhere between the red dashed line identified on plan A and the blue line in Mr Hainsworth's report, itself based on the filed plan.

119. I am satisfied that I should award the Claimant an injunction on this limited basis without ruling on the Defendants' case based on non-disclosure. The issue of whether Judge Cadwallader's original order should be set aside is distinct from the question of future relief. Moreover, I have only granted future relief to the Claimant on a narrow basis in respect of his undisputed title. The basis for such relief is logically separate from his claim for relief in respect of the land to the south of the boundary shown on the filed plan where it has been necessary for me to apply the *American Cyanamid* test.

120. However, if the Defendants intend to make an application to set aside Judge Cadwallader's order for non-disclosure, I must set a time limit for the application. I am currently minded to provide that any application must be issued no later than 4pm on 23 September. This is two weeks from today.

121. There shall be an order on those terms.
