REF/2016/0086

PROPERTY CHAMBER LAND REGISTRATION
FIRST-TIER TRIBUNAL
IN THE MATTER OF A REFERENCE
UNDER THE LAND REGISTRATION ACT 2002

BETWEEN

HWFA ANTHONY GWYN
ALEXANDRA MARGARET GWYN

APPLICANTS

and

STEPHEN CITRON

RESPONDENT

Property Address: Nos. 97 and 99 Keslake Road, London NW6 6DH

Title Numbers: MX390591 and MX464689

Before: Judge Owen Rhys

Sitting at: 10 Alfred Place, London WC1E 7LR

On: 9th December 2016

Applicant representation:	Ms Bowmaker of Counsel instructed by Howell Jones Solicitors
Respondent representation:	In person

D E C I S I O N

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1. This is a disputed application for a determined boundary between the two affected titles. The Applicants are the joint registered proprietors of 97 Keslake Road, Kensal Rise, under title number MX390591 No. 97"). The Respondent is the registered proprietor of the adjoining property, 99 Keslake Road, under title number MX464689 ("No. 99"). Keslake Road runs in a more or less east to west alignment – strictly more west-south-west to east-north-east. Nos. 97 and 99 are on the south side of the road, No. 99 immediately to the west of No. 97. The two

houses are in the centre of a block of six terraced houses, numbered from 91 to 101, the numbering in the road ascending from east to west. On 25th August 2015 the Applicants applied to Land Registry in Form DB to determine the exact line of the boundary between the two properties. They claim that the true boundary runs along the line A-B as shown in the plan lodged in support. This plan forms part of a report prepared by a Chartered Surveyor, Mr Richard Avenell FRICS ("the Avenell Report"). The Respondent has objected to the application, for the reasons stated in his letter to Land Registry dated 30th October 2015. The dispute was referred to the Tribunal on 8th February 2016. The case was heard on 9th December 2016, and I had the immeasurable benefit of a site view, together with Mrs Gwyn, Mr Citron and Ms Bowmaker of Counsel, on the previous day. At the hearing Mr Gwyn verified his witness statement upon which he was questioned. Mr Citron also gave evidence.

2. The dispute between the parties has been ongoing for several years. The Applicants purchased No.97 in 2011 when it was in a state of considerable disrepair having been unoccupied for several years. They commenced a total refurbishment of the house. As part and parcel of the work, they obtained the necessary consents to the removal of two trees in the rear garden – a cypress and a eucalyptus – and carried out the necessary work. According to the Applicants – and I do not think that this is challenged – when they bought No. 97 the rear boundary fence ran to the west of the trees, that is on the Respondent's side. However, after the trees were removed the Respondent re-erected the fence along a different line which the Applicants contended was in the wrong position, encroaching on their land by some 0.34 metres. The Respondent claimed that the fence had simply been placed in its historic position and represented the true legal boundary line.

3. There then ensued a great deal of ultimately fruitless correspondence between the parties. In September 2013 the Applicants instructed a surveyor to map the boundary, hence the Avenell Report. The Applicants' case in relation to the DB application is primarily based on the Avenell Report, although the report was not prepared for that purpose but simply to explain the thinking underlying Mr Avenell's "Plan 1" showing the boundary. On this application the Applicants also rely on the line of the boundary fence prior to its removal by the Respondent, as

being indicative of the true boundary line, although there is no formal claim to adverse possession. Both parties have adduced evidence as to the line of the fence, and that is an issue of fact which I must resolve.

4. This dispute over the boundary was complicated by an argument over the position of a side extension, constructed on No. 97 by the Applicants' predecessor in title as long ago as 2007. It seems that there were numerous problems with its construction. The then owner of No.97 did not comply with planning permission, and in the course of construction part of the wall of No.97 collapsed and damaged No.99. The Respondent claims that the extension encroaches on his garden. He was of course the owner of No.99 at the time that the extension was constructed, but does not appear to have taken any steps to prevent the alleged encroachment. However, this grievance regarding the position of the side extension – as to which the Applicants are of course entirely blameless, having purchased No. 97 some 4 years after the extension was built – has become an issue in the entirely unrelated dispute triggered by the removal and re-erection of the garden fence.

5. As Land Registry itself pointed out, in the letter dated 22nd June 2015, Mr Avenell's reasoning was not supported by reference to the pre-registration deeds, as would often be the case, nor was any detailed reasoning provided for the line A-B that he proposed. Nevertheless, the DB application was accepted by Land Registry, and I am bound to resolve it.

6. For his part, Mr Citron challenges the view expressed in the Avenell Report, and also disputes the historic position of the fence, as I shall explain. His reasoning is set out in some detail in his initial letter of objection, dated 30th October 2015. It is encapsulated in the following extracts: "*When the applicant first raised the issue, my expectation was that our two plots were meant to be rectangular by design, as they now wish to enforce with their plan 1. However, on a number of occasions even the applicant himself has stated that this is not the case. For this reason plan 1 should be rejected. There is nothing perpendicular about the design of the terrace of houses. Everything is at a slight angle..... The applicant has claimed that the walls of his house are parallel. All the measurements that have been supplied conflict with this. Our surveyor attempted to measure the inside width of the applicant's house, but was prevented by the applicant from*

completing this. Our surveyor (Rodgers & Associates Ltd.) said "The couple of measurements I was able to take before being asked to stop suggested, as I recall, that the walls were not parallel"."

7. His case with regard to the new fence is as follows: *"The previous owner of the applicant's house has stated in writing (see attached) that the fence was in the wrong position when the applicant moved in. This was because his own workers had incorrectly positioned it when they temporarily lifted the fence, its having been crushed to the ground due to the back of the house collapsing onto it. That is why we moved the fence back to its original position as soon as we realised that this had happened..... Our builder has stated in writing (see attached) that he moved the fence back to its original position, and has explained how he knew that this was necessary. The fence between the two properties is now back in the position that it had been in for at least the 25 years that we have owned the property. That is the de facto boundary."*

8. Although Mr Citron has supplemented his case with numerous calculations, diagrams and additional arguments, the essence remains the same, as set out in the original letter of objection.

9. The only formal evidence put before me as to the true line of the boundary was as follows:

    a. The Land Registry title plans – which show a general boundary only.

    b. The Avenell Report.

    c. The report prepared by Mr Citron's surveyor Mr Rodgers and set out in his letter dated 2nd July 2013.

    d. The lay evidence as to the position of the fence both currently and historically. This consisted of evidence from Mr Gwyn as to the position of the fence when he first bought No.97 in 2011, the evidence including some photographs. Mr Citron also gave evidence, and he also relied on two statements, one from a former owner of No.97, Mr Khan, and the other from his builder Mr Sek. These latter statements did not include statement of truth. I shall consider this lay evidence in due course.

10. As I have said, the Avenell Report is essentially an explanation of the plan attached to it. The key points are as follows:

    a. "3. *In view of the fact that No.97 lies centrally in a terrace of six dwellings, I have made the assumption that the boundaries dividing the properties are straight lines front to rear, running through the centres of the party walls dividing one property from the other."*

    b. *4. The Victorian construction style of the terrace provides for the party walls to project through the roofs of the residences, facilitating the establishment of their positions by survey at front and rear."*

    c. *"6. During the course of my analysis, I found that the distances between the centres of the party walls of the properties were not exactly equal although in my opinion, they were probably designed to be of equal width. I found that the maximum variance along the terrace frontage was 0.13m (5in.) and I have shown individual frontage widths in green on Plan 1."*

    d. *"7. At the rear of the properties, only the Nos.95/97, 97/99 and 99/101 party walls were visible and my analysis of these indicated a slight convergence of the 95/97 and 99/101 boundaries, which is projected to the rear, amounts to a difference from the combined frontage width of 0.29m (1Ft.). The 99/101 boundary has been shown as a red dashed line and the 95/97 boundary as a red solid line X-Y on Plan 1. The 97/99 boundary through the centre of the party wall is relatively short and its direction less reliable when extrapolation to the rear would magnify small errors in the alignment. As far as the combined rear boundary of Nos. 97 & 99 is concerned, I have bisected it, since it is my perception that it was the original intention that the properties be of equal width."*

    e. *"8. I have drawn a red solid line A-B on Plan 1 to show what in my opinion as to the most probable position of the disputed boundary."* This is the DB boundary line which the Applicants have applied to be registered.

11. I make a number of points about the Avenell Report. First, since Mr Avenell is unfortunately deceased and was therefore not present at the hearing, it has not been possible to explore his thinking beyond what is actually stated in the report. Secondly, the report is not in a format which satisfies the requirements of Rule 19 of the Tribunal Procedure Rules. Thirdly, there has been no direction for expert evidence in this case. However, no objection has been taken to the admissibility of the report by Mr Citron, and I have allowed it into evidence despite these shortcomings. However, it is primarily of value as a site survey, containing measurements which are largely agreed. Insofar as it purports to offer an opinion on the position of the legal boundary, its status is more doubtful. By the same token, I shall have regard to the report of Mr Rodgers (Mr Citron's surveyor) but subject to the same caveats.

12. As it happens, I have found myself unable to follow Mr Avenell's reasoning as set out in his paragraphs 7 and 8. I entirely follow the assumption in paragraph 3 that the original intention was to divide the plots along the line of the internal party walls. That would be the obvious solution, since the line of the internal party walls is easily ascertainable. As Mr Avenell points out, the party wall extends above the roofline both front and back and therefore the position is both known and easily visible. Manifestly the houses themselves are physically divided by the party wall and the centre line must (in the absence of some contrary indication) constitute the legal boundary. I can see no reason why the legal boundary should not therefore extend as a southwards projection along the same line through the rear gardens. In the absence of any specific indication of the boundary line, the original purchasers of the new houses would be entitled, indeed bound, to make this assumption.

13. That being the case, I do not understand how Mr Avenell moves from this entirely sensible assumption to the following statement: "*The 97/99 boundary through the centre of the party wall is relatively short and its direction less reliable when extrapolation to the rear would magnify small errors in the alignment. As far as the combined rear boundary of Nos. 97 & 99 is concerned, I have bisected it, since it is my perception that it was the original intention that the properties be of equal width.*" First, any competent surveyor could project the party wall line southwards without any appreciable errors in alignment. The length of the party

wall is approximately 7 metres which provides an adequate basis for the projection. Secondly, there is no explanation for Mr Avenell's "*perception*" that the properties should be of equal width. This perception causes him to create a boundary line that, as far as I can tell from Plan 1, deviates from the party wall line. Instead of using the known line of the party wall for the full length of the boundary, he has identified a specific terminus, namely the mid-point of the combined rear boundary of Nos. 97 and 99. I cannot see any justification for this solution. First, because it presupposes that the boundaries between Nos.95 and 97 and Nos. 99 and 101 are in the correct position without any real supporting evidence or measurements. Secondly, because in my view the parties are very unlikely to have intended that the boundary should deviate from a straight line. There is no evidence on the ground of such an intention in the form of an original fence or boundary feature. The fence referred to by the Applicant appears to have been constructed in 2007, probably more than 100 years after the houses were built. Its position cannot offer any guide to the original boundary position. The fact that the total plot – on which the six terraced houses are built – is wider at the north than at the south does not automatically lead to the conclusion that the original parties to the sale intended that the gardens should be of equal width. Uneven plots are quite common and it is not unusual for rear gardens to be of different widths and shapes. There is no principle of equality in such situations.

14. By the same token, I do not entirely follow Mr Citron's argument, and in particular this passage: "*When the applicant first raised the issue, my expectation was that our two plots were meant to be rectangular by design, as they now wish to enforce with their plan 1. However, on a number of occasions even the applicant himself has stated that this is not the case. For this reason plan 1 should be rejected. There is nothing perpendicular about the design of the terrace of houses. Everything is at a slight angle.....*" He goes on to refer to a conversation with his surveyor, Mr Rodgers, in which he allegedly expressed the view that "*..... the walls were not parallel...*" It is not clear what walls he is referring to. Mr Rodgers was not called to give evidence, and this hearsay statement is of minimal evidential value. Furthermore, there is in evidence Mr Rodgers's report of his site inspection which does not contain any reference to the main walls of the terrace not being parallel. In paragraphs 5.01 and 5.02 he says

this: "*The wall built at ground floor level of the rear addition is not straight. It is built at an angle and into the land of No.99. This line, if extrapolated, would lead to the conclusion that the existing fence is not on the boundary. However this line is not itself on the boundary. It deviates from the mid-point between the rear additions on the main rear wall of the houses, which is correct, and at an angle into the land of 99. The deviation is about 55mm over the length of the wall but if extrapolated to the end of the fence will increase significantly explaining why Mr Gwyn believes the boundary line is wrong visually. 5.02 The distance between the party wall and the flank wall of the addition at 99 are largely parallel. The wall was built in Victorian times and the remainder of the terrace will be aligned with this. It is a reasonable assumption that the newly built work is at fault and not the Victorian builders.*"

15. Making all due allowance for the informal way in which this evidence has been presented, nevertheless it is the only additional "expert" evidence that has been put before me. My reading of his report is that; (a) *"the mid-point between the rear additions on the main rear wall of the houses...."* – i.e the party wall line – is the correct boundary line; (b) the flank wall of the original rear addition on No.99 is broadly parallel (with a minimal 2 cm deviation) to the party wall line between No.99 and No.101; (c) the flank wall of the new (2007 built) rear addition on No.97 deviates from the party wall line and encroaches slightly onto No.99's side of the boundary line. However, there is categorically no evidence or support here for Mr Citron's view that "*There is nothing perpendicular about the design of the terrace of houses. Everything is at a slight angle".* It cannot be inferred from the fact that the total plot is not exactly rectangular that there is any discrepancy in the construction of the houses themselves.

16. It is quite apparent that the principal focus of Mr Citron's interest in this case is the position of the rear addition at No.97. For the Applicants, the Avenell Report appears designed to justify the position of the rear addition by drawing a boundary line which largely accommodates it. However, it is irrelevant to the determination of the legal boundary. Had it been an original feature, present when the houses were built and first sold, its position would have been highly material in seeking to ascertain the intention of the parties to the original sale and purchase. However, it is common ground that the work was carried out in or

about 2007, far too late to have any bearing on the original intended boundary line.

17. The Applicants also rely on the position of the fence as it existed prior to 2012. It is accepted by the Respondent that it did run to the west of the trees within the back garden of No.97. However, Mr Citron says that this line had been chosen recently – in 2007 – and relies on a statement of Mr Ali Khan, the previous owner of No. 97. Mr Khan says that the original fence ran from the internal party wall division to a post in the rear garden. When he came to replace the fence after constructing the side addition, a different line was chosen, avoiding the end post and the tree in No. 97's garden. Mr Citron also relies on a statement from Mr Sek, his builder, who carried out the re-positioning of the fence in 2012. He says that he positioned the new fence along "*a track on the ground which showed where the original fence was running*". He also says that "*there was a bracket for the fence on the post at the rear.*" and he attached the new fence to this bracket. Neither statement is supported by a statement of truth and neither Mr Khan nor Mr Sek attended the hearing. I can place very little weight on either statement. I also make the following observations. First, it is undeniable that Mr Citron has accepted the fence line as it existed prior to the removal of the trees in 2012. If it was manifestly in the wrong position one would have expected him to take some action. It may be that Mr Citron takes little interest in No.99 – which has at all material times been tenanted – but it seems curious that he would have acquiesced in a boundary fence which he now says is clearly in the wrong position. Secondly, I was unable to discern any signs of a "track" in the ground along the line of the new fence. Thirdly, the post at the rear to which Mr Khan refers is part of the boundary fence marking the end of the gardens in the parallel road (Kempe Road). In other words, it does not appear to bear any relation to the boundary fence between No. 97 and No.99.

18. Had there been evidence that the pre-2012 boundary fence was original, or had been in position for many years, it might have had some material effect on the finding as to the boundary. However, the Applicant can only say that it was in place in 2011, and there is no evidence that is was in position for more than a few years (accepting for the moment the hearsay statements). Accordingly, I am

unable to derive any assistance from the position of the fence in determining the boundary.

19. In the light of the evidence, it is my conclusion that the true legal boundary line between No.97 and No.99 runs along the internal party wall line between the two houses and then continues as a projection of that line to the end of the rear gardens. There is no plan which shows this boundary in sufficient detail, but such a plan will have to be prepared as part of the order for a determined boundary. On that point, it is apparent that I am rejecting the boundary contended for by Mr Avenell. I could simply cancel the DB application and leave the parties to fight out the boundary in some other proceedings. However, I do not consider that this would be in the interests of the parties, or indeed in the interests of justice generally. The parties have expended considerable time, effort and money on getting to this point, and I consider it would be a dereliction of duty to leave the boundary issue in limbo. I also have regard to the wise words of Megarry J in Nielson v Poole (1968) 20 P & CR 909, albeit spoken in a slightly different context: *"... in the construction of a parcels clause of a conveyance and the ascertainment of a boundary the court is under strong pressure to produce a decisive result. The prime function of a conveyance is to convey. As to any particular parcel of land, either the conveyance conveys it, or it does not; the boundary between what is conveyed and what is not conveyed must therefore be proclaimed. The court cannot simply say that the boundaries are uncertain, and leave the plot fuzzy at the edges, as it were."* (at page 915).

20. As a final point – and it is one to which I have adverted previously in this Decision – the position of the side extension to No. 97 is a red herring. It may transpire that part of it is constructed on the Respondent's side of the determined boundary. If that is the case, I very much doubt that this will not give rise to any right or remedy on the part of the Respondent. Having stood by and allowed the extension to be built in or about 2007, it is far too late to complain about its positioning. If it technically amounts to trespass, it is inconceivable that a mandatory injunction would be granted, and it is almost certainly too late to seek damages. When the Applicants purchased No.97, in good faith, they were clearly entitled to assume that the side extension was within the boundaries of the

property even if, as it now turns out, it may not be to its full extent. The practical outcome of this case may not, therefore, be of great impact.

21. I shall therefore direct the Chief Land Registrar to give effect to the DB application, but substituting a plan to be submitted by the Applicants showing the boundary as determined by me. The Tribunal has power to make such an order as was made clear in the Upper Tribunal decision in Bean and Saxton v Katz and Katz [2016] UKUT 168. I therefore direct the Applicants to obtain a revised plan, which complies with the Land Registry's requirements, showing the determined boundary in the line that I have specified. They shall submit this plan to the Tribunal no later than 18th March 2017, whereupon I shall make a final order. As to costs, I shall not make an order at this stage. Once I have seen the revised plan, and can establish where exactly the true boundary line runs, I will be in a better position to decide costs. This Decision shall be treated as an order to the extent that it directs a revised plan.

Dated this 20th day of February 2017

Owen Rhys

BY ORDER OF THE TRIBUNAL