



[2019] UKFTT 0019 (PC)

REF/2017/0783

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

KAREN STALLEY

APPLICANT

and

JEFFREY JAMES NAYLOR

RESPONDENT

Property Addresses: 18 & 20 Cheltenham Drive, Leigh-on-Sea, Essex SS9 3EH
Title Numbers: EX402452 & EX193994

Before: Judge Malcolm Sheehan QC
Sitting at: The Court House, Southend-on-Sea
On : 4 July 2018

Applicant Representation: Mr Lee Turner

Respondent Representation: In person

DECISION

KEYWORDS: Defined Boundary Application; Jurisdiction

LEGISLATION AND CASES REFERRED TO: Section 60(1) of the Land Registration Act 2002; Alan Wibbersley Building Ltd v Insley [1992] 2 All ER 897; Chadwick v Abbotswood Properties

Lid [2004] EWHC 1058 (Ch) at 43; Ali v Lane [2006] EWCA Civ 1532; Murdoch v Amesbury [2016] UKUT 3 (TCC); Bean v Katz [2016] UKUT 0168 (TCC); Lowe & Lowe v. William Davies Limited [2018] UKUT 206 (TCC)

Decision

1. For the reasons set out herein I direct that the Chief Land Registrar is to cancel the Applicant's application for a determined boundary.

The Reference

2. I am concerned with the Applicant's application ("the Application") for the determination of the exact line of the boundary between the rear of her property, 20 Cheltenham Drive, Leigh-on-Sea, Essex ("the Applicant's Property") (registered title number EX 402452) and the Respondent's neighbouring property at 18 Cheltenham Drive ("the Respondent's Property") (registered title number EX 193994). The Applicant and the Respondent are the respective registered proprietors of their properties.
3. In her application dated 13 December 2016 the Applicant contends that the exact position of the rear boundary between her property and the Respondent's property is between points F, I and M ("the application line") as shown on drawing number 1456-001 prepared by Mr Jack Bidston of THS Concepts Limited ("the application plan"). The Respondent denies that the application line is the exact line of the boundary between the rear of the two properties.
4. The parties could not reach a resolution and the dispute was referred to the First-tier Tribunal by the Chief Land Registrar pursuant to s.73(3) of the Land Registration Act 2002 on 17 August 2017 ("the Reference"). In the proceedings before the Tribunal both parties have acted in person. For the purposes of the hearing on 4 July 2018 the Applicant requested that permission be given for Mr Lee Turner, who lives with the Applicant at her property, to represent her. The Respondent did not object and I granted that request.
5. Having heard the evidence and the submissions at the hearing I indicated that I considered it would be appropriate to give these neighbours further time to see if they could resolve the dispute amicably between them, particularly in light of some of the difficulties with the evidence in this case that I will discuss in this Decision. Following written representations

from the Applicant I extended that time further. However, no agreement was reached within the extended time I made available and accordingly I have determined the Application. I would none the less encourage the parties to meet to discuss the outcome of this application and practical arrangements for resolving the dispute between them as both parties agree that the current position of the rear fence between 18 and 20 Cheltenham Drive is not in the correct position.

The Application and the Relevant Law

6. Section 60(1) of the Land Registration Act 2002 (“the 2002 Act”) provides that the boundary of a registered estate as shown for the purposes of the register is a general boundary unless shown as determined under section 60. A general boundary does not determine the exact line of a boundary, but a party may apply under s.60(3) of the 2002 Act for the determination of the exact line of a boundary. The current Application is such an application under s. 60(3), which provides that rules may be made enabling or requiring the exact line of a boundary to be determined.
7. The relevant rules are principally contained within rules 118 to 120 of the Land Registration Rules 2003 (“the 2003 Rules”). Rule 118(2) provides that application to determine the exact line of the boundary of a registered estate must be made in Form DB and must be accompanied by:
 - (a) *a plan, or a plan and a verbal description, identifying the exact line of the boundary claimed and showing sufficient surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map, and*
 - (b) *evidence to establish the exact line of the boundary*
8. The Applicant relies on the application plan for the purposes of Rule 118(2)(a) of the 2003 Rules. In addition, the Applicant’s form DB relies on the title plans for 18 and 20 Cheltenham Drive and three conveyances dated 1931, 1949 and 1989 respectively. These are considered below.
9. The Land Registry Practice Guide 40 sets out the requirements for a plan supporting a determined boundary application. Paragraph 4.4 of the Practice Guide provides that the

plan should have a scale no smaller than 1:200 and “*must not bear any statement of disclaimer or endorsement which cast doubt on the accuracy of the plan such as “for identification only”*”. Any measurements shown on the plan must be accurate to +/- 10 mm.

10. It is important to note that there has been some legal controversy about the extent of this Tribunal’s jurisdiction in relation to defined boundary applications. The nature of this controversy, and the cases in which it is addressed, are summarised in the recent decision of Mr Justice Morgan sitting in the Upper Tribunal, Tax and Chancery Chamber. In *Lowe & Lowe v. William Davies Limited* [2018] UKUT 206 (TCC) Morgan J. held at paragraphs 54-55 that this Tribunal has jurisdiction to determine “*all the matters in dispute before it*” whether they go to the accuracy of the application plan or the location of boundary. Where there is an issue as to the accuracy of the plan, the Tribunal has a discretion whether to solely determine the accuracy of the plan issue, if that can be determined separately and may dispose of the entire application, or to determine all of the issues in dispute. In cases where the Tribunal was not satisfied the application plan showed the exact position of the boundary, the Tribunal may both direct the Land Registry not to give effect to the application and make a finding as to where the exact line of the boundary in fact lies.
11. In finding that the Tribunal had such jurisdiction, Morgan J approved the Upper Tribunal decision of Judge Elizabeth Cooke in *Bean v Katz* [2016] UKUT 0168 (TCC) and held that the approach taken was “*altogether more persuasive as to the jurisdiction*” of this Tribunal than the earlier decision of HHJ Dight in *Murdoch v Amesbury* [2016] UKUT 3 (TCC). The current position, therefore, is that the two most recent Upper Tribunal decisions on this question both accept that the Tribunal has jurisdiction to determine the location of the boundary where it considers that it is appropriate to do so even where this is not accurately set out in the application plan. For the reasons set out by Morgan J. in *Lowe*, I accept that the Tribunal has the jurisdiction and discretion described in *Lowe* and I will determine the Application on that basis.
12. In the circumstances, the exercise required of the Tribunal in a defined boundary application is summarised by Morgan J in *Lowe & Lowe v. William Davies Limited* [2018] UKUT 206 (TCC) at paragraph 24. The Tribunal must carry out “*a consideration of the accuracy of*

the plan lodged with the application and the extent to which the boundary line shown on that plan [is] consistent with the true position of the boundary.”

13. As noted, the boundaries currently shown on the title plans for 18 and 20 Cheltenham Drive are general boundaries and so do not show where the exact position of the boundary between the rear of the properties lies. It is therefore necessary to consider the other available evidence as to the exact position of the boundary.

14. The Tribunal’s investigation of the position of the true boundary position will include a consideration of any relevant pre-registration conveyances and conveyance plans. However, it is frequently the case that the conveyance plans are not of sufficient scale or detail to be definitive in determining the exact position of a boundary. In *Alan Wibbersley Building Ltd v Insley* [1992] 2 All ER 897, Lord Hoffman stated:

“The parcels (clause) may refer to a plan attached to the conveyance, but this is usually said to be for the purposes of identification only. It cannot therefore be relied upon as delineating the precise boundaries and in any case the scale is often so small and the lines marking the boundaries so thick as to be useless for any purpose except general identification. It follows that if it becomes necessary to establish the exact boundary, the deeds will almost invariably have to be supplemented by such inferences as may be drawn from topographical features which existed, or may be supposed to have existed, when the conveyances were executed.”

15. Extrinsic evidence as to the background facts reasonably available to the parties to the original conveyance or conveyances will be admissible to assist in the construction of the deeds, see *Chadwick v Abbotswood Properties Ltd* [2004] EWHC 1058 (Ch) at 43. In the same case Lewison J stated that where the conveyance is not clear *“the court must have recourse to extrinsic evidence, and in particular to the physical features on the ground.”* The court must consider the position objectively and ask in relation to the relevant conveyance *“what would the reasonable laymen think he was buying”*.

16. Evidence of subsequent conveyances and the conduct of the parties may also be referred to if they are probative of the intentions of the original parties to the conveyance, see *Ali v Lane* [2006] EWCA Civ 1532. The court should also consider whether a relevant boundary agreement has been entered into between the parties to the dispute, or their predecessors, in

relation to the exact position of the boundary. Further, the position of the boundary may have changed over the years as a result of title to land in the vicinity of the originally boundary being obtained by adverse possession.

The Statements of Case and the Parties' Positions at the Hearing

17. At the hearing I explained to the parties that my jurisdiction was limited to the exact boundary application that was the subject of the Reference. I am accordingly unable to deal with allegations made about barriers placed in a shared access way, damage to front boundary walls, stolen fence posts and fencing, trespass by newly erected fences, personal injury or any of the other disputes referred to in the documents and submissions before me. I was invited to consider some of these issues because it was suggested that they would help me assess the credulity of the parties as witnesses but allegations about conduct of this nature do not assist me in considering the exact position of the rear boundary between the properties.

18. The Applicant's case on the Application as set out in her Statement of Case and expanded upon in submissions can be summarised as follows:
 - 18.1. The rear boundary between 18 and 20 Cheltenham Drive is depicted on the available conveyance plans as a straight line from the front to the back of the plots.
 - 18.2. The available conveyancing documents refer to the width of 20 Cheltenham Drive as 18 feet.
 - 18.3. The wire and post fence that was in place between most of the rear gardens between 20 and 18 Cheltenham Drive when the Applicant purchased her property in 2014 had only been in place for less than 10 years. It had been erected by a previous occupier of 20 Cheltenham Drive Mr Michael Ironman. He erected this fence within 20 Cheltenham Drive because Mr Ironman kept chicken and dogs and the picket boundary fence between 20 and 18 Cheltenham Drive had largely fallen down. The wire fence erected by Mr Ironman was not a boundary fence.
 - 18.4. The Applicant discussed her intention to install a boundary fence between 20 and 18 Cheltenham Drive with the Respondent in the Spring and early summer of 2016. There was an agreement that the new fence should continue in a straight line from a three wooden panel fence ("the three wooden panel fence") that stood at the rear of 18

and 20 Cheltenham Drive nearest to the houses. However, the Respondent considered that a new concrete post and wood panel fence erected by the Applicant at the eastern end of the Applicant's property extended into the Respondent's property and at this point relations between the Applicant and Respondent broke down.

18.5. The current bamboo fence at the rear of 20 Cheltenham Drive had been erected by the Applicant after the dispute with the Respondent. It is also placed entirely within 20 Cheltenham Drive and is not boundary fence. Indeed, the eastern extreme of the garden to the rear of 20 Cheltenham Drive is only 16.5 feet wide.

18.6. The Applicant invites the Tribunal to determine that the exact position of the boundary is as set out in the application plan.

19. The Respondent's position as set out in his Statement of Case and expanded upon in his evidence and submissions at the hearing is as follows:

19.1. The rear boundary between 18 and 20 Cheltenham Drive is a straight line.

19.2. The course of that straight line is an extension eastwards of the three wooden panel fence.

19.3. The course of that straight line is shown by the Respondent's manuscript markings on the photograph which appears at page 63 of the hearing bundle. It shows two manuscript lines projecting from the top of the three wooden panel fence eastwards.

19.4. The Respondent agreed with the Applicant in the Spring/early Summer of 1016 that the Applicant could straighten the wire and wooden post fence to continue the straight line of the three wooden panel fence.

19.5. The Respondent considers that part of the concrete post and wooden panel fence erected by the Applicant at the far eastern end of the rear garden of her property extends into his rear garden. As shown by the Respondent's manuscript markings on the photograph that appears on page 63 of the hearing bundle, the Respondent considers that the southernmost concrete fence post and more than half of the adjacent small wooden fence panel stands on his side of the rear boundary between 18 and 20 Cheltenham Drive and is accordingly trespassing on his land.

19.6. The Respondent considers that part of a rockery which was at the far north eastern part of his rear garden has been damaged by the erection of the Applicant's concrete fence post and wooden panel fence.

- 19.7. The Respondent considers that the position of the rear fences of the adjoining properties have all moved over the years and are no longer as originally laid out and are accordingly not reliable reference points for measurements to be taken from.
20. It will be apparent from the above that notwithstanding the dispute between the parties, there is considerable common ground between the parties. In particular:
- 20.1. They agree that the rear boundary between their properties is a straight line.
- 20.2. They agreed that the three wooden panel fence immediately at the rear of their properties is a boundary fence that is correctly placed on the boundary.
- 20.3. They agree that there were discussions between them concerning the rear boundary fence between their properties in the summer of 2016 in which it was agreed that the Applicant could straighten the boundary fence beyond the three wooden panel fence so that it proceeded in a straight line. The parties have, however, been unable to agree the course of the straight line.

The Site Visit

21. I have had the benefit of a visit to the site of the disputed boundary in the company of the parties on 3 July 2018.
22. Numbers 18 and 20 Cheltenham Drive are the third and fourth houses respectively on the eastern side of Cheltenham Drive as one heads northwards from London Road. Numbers 18 and 20 Cheltenham Drive are the middle two houses in a terrace of four houses of similar but not identical appearance.
23. I was able to view the rear of both 18 and 20 Cheltenham Drive. The three wooden panel fence which the parties agree is an accurately situated boundary fence was clearly visible and in reasonable condition. Beyond the three wooden panel fence a bamboo fence continues eastwards for the entire length of the rear garden of 20 Cheltenham Drive. Next to the bamboo fence a laurel or similar hedge has been planted which the Applicant stated in her evidence had been erected for privacy pending the determination of dispute about the position of the rear boundary between 20 and 18 Cheltenham Drive.

24. At the rear of 20 Cheltenham Drive a relatively newly erected concrete post and wooden panel fence was visible and this was identified by the Respondent as the fence that he considers trespasses in part upon his land.
25. I asked the parties to identify any features that they intended to refer to in their evidence. The Respondent explained that as a result of an injury he had been unable to maintain the rear garden of his property as he would have liked. It was overgrown in places, particularly towards the eastern part furthest from the Respondent's house. It was in this area that the Respondent pointed out what he stated was the position of a rockery which he alleges was damaged at the time that the Applicant erected her concrete post and wooden panel fence. Due to the extent of the vegetation I was unable to observe a rockery although I did see several individual large stones that may have previously formed part of the rockery. One of these stones was immediately to the west of and alongside the most southerly concrete fence post.
26. I was able to observe from the Respondent's rear garden two tall and two short wooden fence posts that were partially covered by convolvulus but which stood to the south of the bamboo fence. I was also shown a rosebush that is referred to in both the Applicant and the Respondent's evidence. I was able to observe a section of lower wire fencing attached to one of the shorter wooden fence posts behind the rose bush but to the south of the bamboo fence erected by the Applicant.

The Documentary Evidence

27. The application plan contains the following statements, the latter of which is accompanied by an electronic signature:

"the exact line of the boundary to be determined is between points F-M and runs along the southern face of the fence between points F-I-M"

"I certify that the measurements shown on this plan are accurate to 10mm, Jack Bidston of THS Concepts"

28. The application plan shows a straight line running between points F, I and M. The application plan also includes labelled reference points such as the corners of rear walls of 20 and 18 Cheltenham Drive and measurements of the distances between each alphabetically labelled reference point. I note, however that the application plan also records the following statement:

“Check all dimensions on site. Any discrepancies should be reported to THS Concepts prior to commencement”

29. I have been provided with a number of conveyances. The first is dated 28 July 1896 and is described as the *“conveyance of Plot 5 – 2839 and 2840 on the Leigh Hall Estate, Leigh Essex”*. The land conveyed is described in the conveyance as:

“All those two Plots of Ground situate at Leigh in the County of Essex which with the dimensions and abuttals thereof are delineated and shown in the Plan drawn on the third page of these Presents and therein coloured Pink be the said dimensions little more or little less as the said Plot 5 form Lots 2839 and 2840 on the Leigh Hall Estate”

30. Plots 2839 and 2840, which together are described as Plot 5, are shown on the Plan referred to in the conveyance. They are regularly shaped rectangular plots on the east side of Cheltenham Drive. Plot 2840 is the fourth plot on the east side of Cheltenham Drive as you enter from London Road to the south. Plot 2839 is immediately to the north and is the fifth plot on the east side. As noted above, as built, the Respondent’s property is the third property on the east side of Cheltenham Drive and the Respondent’s is the fourth property on the east side of Cheltenham Drive. The Plan does not state any dimensions other than the dimension of 10 feet which is the distance of the building line of each plot from the road. There is no stated width or length for Plot 2840 and 2839.

31. It is apparent from the language of the conveyance that at this time the Plots 2840 and 2839 had not been built on. There is a reference to a requirement on the part of the Purchaser to *“make and thereafter maintain boundary fences where marked T within the boundary and fronting the road”*. The Plan shows a “T” marks on the plot 2840 side of the boundary between plots 2840 and 2839.

32. The next conveyance in time is dated 17 April 1931 and is between Mr Edgar Culliford and Frederick May. It is a conveyance of 20 Cheltenham Drive which is described as:

“ALL THAT piece or parcel of land situate at Leigh-on-Sea in the County of Essex and having a frontage of Eighteen feet or thereabouts to Cheltenham Drive there and comprising part of plot 2840 of the Leigh Hall Estate the position and extent of which said piece or parcel of land are more particularly delineated by way of description but not of limitation in the plan drawn thereon coloured pink and blue TOGETHER with the messuage or tenement erected thereon or on some part thereof and formerly known as Number 3, Alexandra Villas but now known as Number 20, Cheltenham Drive”

33. The plan drawn on the 1931 conveyance records “18'0” as the width of the plot of 20 Cheltenham Drive. Number 20 Cheltenham Drive is recorded as being a regularly shaped rectangular plot. Number 22 Cheltenham Drive is described as being 19 feet in width, but no dimension is given for the width of 18 Cheltenham Drive. The 1931 conveyance records that the covenants in the 1896 conveyance above were to apply to the 1931 conveyance.

34. A further conveyance of 20 Cheltenham Drive took place on 17 December 1949. It describes the conveyed land:

“ALL THAT piece or parcel of land situate at Leigh-on-Sea in the County of Essex and having a frontage of Eighteen feet or thereabouts to Cheltenham Drive and comprising part of plot 2840 of the Leigh Hall Estate the position and extent of which said piece or parcel of land are more particularly delineated by way of description but not of limitation drawn hereon and coloured pink and blue.”

35. The plan attached to the 1949 conveyance is in all material respects the same as the plan attached to the 1931 conveyance.

36. The final conveyance in the documentary evidence before me is dated 30 March 1989 and also relates to 20 Cheltenham Drive. The description of the conveyed land contained in the 1989 conveyance is the same as that given in the 1949 conveyance and, rather than contain a separate plan, the 1989 conveyance refers to the plan contained in the 1949 conveyance.

37. The Respondent has been the registered proprietor of 18 Cheltenham Drive since December 1977 and accordingly he can give direct evidence about the land for more than 40 years. The charges register refers to the 1896 conveyance (albeit that it mistakenly refers to the date as being 18 July 1896 rather than 28 July 1896, which I take to be a typographical error) and includes the text of the 1986 conveyance which states that there is an obligation on the owner of 18 Cheltenham Drive to maintain the northern boundary fence.
38. The Applicant has been the registered proprietor of 20 Cheltenham Drive since 16 December 2014. As already noted, the registered title plan for 20 Cheltenham Drive shows the general boundary between 18 and 20 Cheltenham Drive being a straight line.

The oral and photographic evidence

39. I heard oral evidence from Mr Turner, the Applicant and from the Respondent. The Applicant did not call Mr Bidston, the surveyor who prepared the application plan, and I was accordingly unable to ask him any questions concerning the plan. Some of the evidence given by the witnesses related to matters that are outside of my jurisdiction or did not assist in my determination of the issues and I have not referred to such evidence.
40. Neither Mr Turner nor the Applicant provided a witness statement but they gave evidence that was consistent with the content of the Applicant's Statement of Case. At the hearing Mr Turner produced a photograph which was inserted into the hearing bundle at page 89. This photograph showed the rear of the Applicant's garden before any work had been carried out by her to her rear garden. This photograph shows a tall and a short wooden fence post which I find to be two of those I observed on my site inspection, with the taller wooden fence post to the north of the shorter wooden fence post. At the far eastern end of her garden the photograph shows a wooden panel fence which was in place before the concrete post and wooden panel fence the Applicant had erected in 2016.
41. Mr Turner's evidence was that when the Applicant purchased her property the wire and tall wooden post fence was "falling into" her garden. This is shown in the photograph on page 13 of bundle while the photograph on page 14 shows the pair of tall wooden fence posts I was able to observe on the site inspection. The Applicant and Mr Turner considered that

the condition of this fence was such that it needed to be repaired or replaced, hence their approaching the Respondent to discuss doing so.

42. Mr Turner gave an account of his discussions with the Respondent. Although he said that the Respondent agreed that a new fence could be erected as a continuation of the three wooden panel fence nearest to the rear of the houses at 18 and 20 Cheltenham Drive, he accepted that there was no attempt to mark out what course the new fence should take with posts, string or otherwise.
43. Mr Turner gave what evidence he could about the application plan. He confirmed that the exact boundary line sought by the Applicant is shown marked F-I-M on the application plan. He also pointed out that the distance between points K-M at the eastern extremity of 20 Cheltenham Drive was exactly 18 feet and that this was consistent with the width of 20 Cheltenham Drive as described in the conveyances. Point K is identified on the application plan as “existing fence line corner” of the fence between 20 and 22 Cheltenham Drive.
44. I asked Mr Turner whether there was evidence that the fence marked H-K on the application plan, being the rear fence between 20 and 22 Cheltenham Drive, was a boundary fence and whether there was evidence that it was accurately placed in relation to the dimensions of 22 Cheltenham Drive as set out in the conveyances referred to above. Mr Turner could not provide any assistance on these points.
45. I also asked Mr Turner to explain what the points I, J and L on the application plan related to. These are referred to as “existing fence line junction” in the case of I and J and “existing fence line corner” in the case of L. He stated that he believed that points J and L were the tall wooden fence posts that I had seen on the site inspection but he was candid in stating that this was only his understanding. He accepted that he did not know whether this was the case and also accepted that they were not labelled as such. He said that he considered that point I was the end of the three wooden panel fence.
46. Mr Turner related his conversations with Paula Howman, the partner of Mr Michael Ironman from whom the Applicant had purchased her property. His evidence was that Ms Howman had told him that the wire and wooden post fence at the rear of the property was “in the incorrect place”. Mr Turner also referred to an email from Ms Howman dated 16 July 2017 to the Applicant which stated that Mr Ironman “did put the fence up but he just

bodged it, he had no idea what he was doing and just made it okay for his dog". Mr Turner's evidence was that Mr Ironman had purchased 20 Cheltenham Drive in November 2012 and that he had "had it for just over two years".

47. Mr Turner pointed out that the Respondent had disclosed a photograph at page 12 of his list of documents (page 74 of the hearing bundle) which showed a wooden post and wooden panel fence to the north of the Respondent's rear garden. Although at least one panel section of this fence was missing, it appears otherwise to run along the length of most of the northern part of the Respondent's rear garden.

48. When cross-examined by the Respondent, Mr Turner denied that any part of the concrete post and wooden panel fence erected at the easternmost end of the garden of 20 Cheltenham Drive had been erected on land belonging to 18 Cheltenham Drive and he denied damage to the Respondent's rockery when this fence was erected. Mr Turner disagreed with the Respondent's case that the manuscript line drawn by the Respondent on photograph 63 showed the correct exact boundary line and stated that the photograph was taken at an angle from within 20 Cheltenham Drive and that this would, in his view, distort any attempt to project the exact boundary from the position of the fence.

49. I asked Mr Turner why the Applicant had not called any witnesses to give evidence about the position of boundary features prior to the Applicant's purchase of her property. I was told that the Applicant would prefer not to involve other neighbours in the dispute and that the Applicant still hoped that it would be possible to reach a compromise.

50. The Applicant gave evidence following Mr Turner and agreed with his evidence. Her understanding of the application plan was the same as that of Mr Turner but she accepted that she could not give direct evidence of the physical features Mr Bidston had used for points I, J and L on his plan. Rather, the Applicant could only state her understanding of what Mr Bidston had intended to do. The Applicant also accepted that she could not give evidence of the position of the rear fence between 18 and 20 Cheltenham Drive before her occupation, other than to make observations from the photographs that were available.

51. The Respondent was the last witness to give evidence. I should note that in his manuscript letter at page 34 of the hearing bundle the Respondent gives his age as 79 and he also refers to having been recently in hospital. That letter appears to have been written in 2017. At

the site visit and at the hearing the Respondent participated fully in the proceedings. He was able to give his evidence and make his submissions in a cogent and clear way and I was satisfied that he was able to represent himself at the hearing.

52. I explained to the Respondent that if he became tired at any stage during the proceedings it would be possible to take a break. He was able to cross-examine the Applicant and Mr Turner and put to them what he considered to be the weaknesses or inconsistencies of their position and he was able to address me on the points that I put to him during his evidence and his submissions. There were, however, times where his evidence was not consistent with the photographic evidence as I describe below.
53. As noted, the Respondent accepted that the rear boundary between his property and that of the Applicant runs in a straight line. His evidence was that this straight line is that shown by his manuscript markings on the photograph on page 63 of the hearing bundle.
54. The Respondent has a much longer knowledge of position of the boundary features between his property and that of the Applicant. He has been the registered proprietor of 18 Cheltenham Drive since December 1977. His evidence was that the position of the west to east fences at the rear of 16-22 Cheltenham Drive had changed over the years, as the adjoining properties were extended or the fences were replaced.
55. As far as the three wooden panel fence closest to the houses at 18 and 20 Cheltenham Drive is concerned, the Respondent's evidence was that he had arranged for these to be erected by professional builders. He said that this was done 5 or 6 years before the Applicant moved into her property. The Respondent explained that he had offered to continue with a wood panel and wood post fence along the whole length of the boundary but that this was not necessary as Mr Ironman had 3 large sheds at the rear of his property to the north of the continuation of the rear boundary between 18 and 20 Cheltenham Drive.
56. The Respondent's evidence was that Mr Ironman had been a tenant at 20 Cheltenham Drive for approximately 15 years before he had purchased the property from his landlord, a Mr Ketley junior. On that basis his occupation would have commenced in around 1997 given that the parties agree that Mr Ironman purchased 20 Cheltenham Drive in or around 2012. In fact, a solicitor's letter addressed to Mr Ironman at page 42 of the hearing bundle suggests that he may have purchased 20 Cheltenham Drive in 2013.

57. The Respondent stated that the wire and wooden post fence at the rear of their properties had been erected approximately 5 or 6 years after Mr Ironman commenced occupation of 20 Cheltenham Drive. The Respondent's evidence was that he had supplied the wire for this fence and that Mr Ironman had helped him by putting in the fence posts. On the Respondent's evidence this would have been in approximately 2002/3. In cross-examination the Respondent stated that Mr Ironman placed three fence posts in total. The Respondent also stated that the purpose of this fence was to keep Mr Ironman's dogs under control. The Respondent stated that "terriers are buriers" and that Mr Ironman wanted a secure fence because the wire and wooden fence that was then in place was "rickety" and not capable of keeping Mr Ironman's dogs in place.
58. The Respondent's evidence was that prior to the wire and wooden fence post there had been what he described as a picket fence that ran at the rear of and between 18 and 20 Cheltenham Drive. The Respondent could not say where the footings of this picket fence were nor the exact line that the picket fence took or whether it was in a different position from the wooden post and wire fence that was erected with the help of Mr Ironman. The Respondent also said at one point in his evidence that he had also put up a wire fence "before Mr Ironman" went into occupation.
59. The Respondent was asked about the photograph that appears at page 74 of the hearing bundle. As noted, this shows a wooden panel and wooden post fence running along most of the length of the rear gardens between 18 and 20 Cheltenham Drive. The Respondent was unable to say when this photograph had been taken and I found his answers in relation to questions about this photograph to be unsatisfactory.
60. After some questioning, the Respondent stated that the photograph did not show the rear of his property at all but rather showed the rear of a neighbouring property. I note, however, that the Respondent's own list of document describes this photograph as showing his "rear garden". Having had the benefit of seeing the rear garden of 18 Cheltenham Drive and observed features on the houses shown in the background of the photograph at page 74 I am satisfied that the Respondent was mistaken in his evidence at the hearing and that the photograph does show the rear of his garden although I have no evidence that allows me to date this photograph.

61. The Respondent was cross-examined by Mr Turner about written statements he had made. Mr Turner put to the Respondent that in his statement of case at page 75 of the hearing bundle he refers to “wire” that marks his boundary having been in place for “at least 15 years” whereas in his letter to the Applicant dated 13 September 2016 he states that he had told the Applicant that “the fence had been there over 40 years and my rockery and rose trees over 60 years”. The Respondent’s explanation was that his reference to 15 years was to the time when Mr Ironman put up the sheds in the rear of his garden which was at the time when new fence posts and a wire fence were put in place between 18 and 20 Cheltenham Drive.

Conclusions

62. I understand that both parties in this dispute are litigants in person who are largely unfamiliar with the normal practices of the Tribunal and the kind of evidence that is usually presented in exact boundary applications. I therefore mean no criticism of either party when I say that the nature and quality of the evidence presented in this case falls significantly below that which is usually presented in defined boundary applications. The Tribunal can only decide the Reference on the evidence before it, but the paucity of evidence in some respects means that in this case I am unable to make findings at all on some of the questions that arise.

63. Starting with the conveyancing documents summarised above, the 1896 conveyance provides little assistance as it does not include any relevant measurements and it relates to plots 2839 and 2840 whereas the 1931 conveyance of 20 Cheltenham Drive refers to that property as being only “part of” plot 2840. The 1896 conveyance does show plots 2839 and 2840 as rectangular shaped plots with apparently straight boundaries.

64. The 1931 conveyance is of more assistance in that includes measurements of the frontage of 20 Cheltenham Drive. There is a conflict between the description in the parcels clause of the conveyance, which refers to the frontage as being “eighteen feet or thereabouts”, suggesting an approximate measurement, and the writing on the conveyance plan which states that the frontage is “18’0”” which suggests a more precise measurement.

65. The parcels clause states that the parcel of land conveyed is “more particularly delineated” on the plan. The plan is not stated to be for the purposes of identification only, rather the

plan is said to be “by way of description but not of limitation”. The words “more particularly delineated” suggests that the plan was intended to take precedence over the written description in the parcels clause of the conveyance. However, the reference to the plan not providing a “limitation” on the identification of the conveyed land suggests that the plan could not restrict the scope of the land to be conveyed.

66. There is accordingly some ambiguity in the 1931 conveyance as to whether the extent of the frontage was precisely 18 feet or the more ambiguous 18 feet or thereabouts. What is clear is that neither the plan nor the words of the conveyance determine the exact position of the boundary between 18 and 20 Cheltenham Drive. The plan has no stated scale but the position in this case is the same as that described in *Wibbersley v Insley* above, with the scale being too small and the lines too thick so as only to be useful in assisting in the identification of a general rather than an exact boundary. Further, I note that the 1931 conveyance and the distance marked on the plan refer to the width of the frontage alone and do not provide any other relevant dimensions.

67. As noted above, the subsequent conveyances of 20 Cheltenham Drive essentially repeat the relevant contents of the 1931 conveyance. Accordingly, the overall position on the conveyancing documents is that they contain statements about the width of the plot of 20 Cheltenham Drive but do not show the exact position of the intended boundary between 18 and 20 Cheltenham Drive.

68. As the position is not clear on the conveyancing documents it is necessary for me to consider what other evidence is available as to the intentions of the relevant original parties and what evidence there is that the position of the boundary between 18 and 20 Cheltenham Drive has changed over time and/or that there has been a valid boundary agreement between the parties establishing what the exact position of the boundary should be.

69. As far as the evidence of the parties and Mr Turner is concerned, they were unsurprisingly unable to assist in relation to the intentions of the original parties to the conveyances. I find that they were all honest witnesses who were doing their best to assist the Tribunal and recall relevant events and observations. The Applicant and Mr Turner have only lived in 20 Cheltenham Drive since the end of 2014 and accordingly only have recent direct knowledge of the history of the boundary between 20 and 18 Cheltenham Drive. They did not call any evidence from other persons with a longer knowledge of the position of possible

boundary features at 20 Cheltenham Drive and adjoining properties. While their reluctance to involve other people in their dispute with the Respondent may be considerate on their part, the effect is that they have not called any evidence that contradicts important aspects of the Respondent's evidence.

70. I have noted above that I found the Respondent's evidence in relation to the photograph that appears at page 74 of the application bundle to be unsatisfactory. Although I do not accept his evidence in relation to that photograph, my impression was that his answers to questions about that photograph were confused and distinct from the generally clear and succinct evidence he gave in relation to the other matters I have set out above. Like the Applicant and Mr Turner, I found the Respondent generally to be a truthful and reliable witness. It was notable that his account of his dealings with the Applicant and Mr Turner was, in the important respects, largely consistent with their evidence.

71. Mr Turner suggested that the Respondent's credibility should be doubted because he had made contradictory written statements concerning how long the fence between 18 and 20 Cheltenham Drive had been in place, as set out in paragraph 61 above. While I accept that the wire and tall wooden fence post installed by or with the assistance of Mr Ironman had not been in place for 40 years, it is clear from the photograph at page 74 of the application bundle that there was a fence in place prior to the wire and tall wooden post fence and I find that the Respondent was referring to his more than 40 year direct knowledge that there had been a fence between 18 and 20 Cheltenham Drive.

72. Having found that the Respondent was a generally truthful and reliable witness there are several parts of his evidence that are, in my view, important both as to the exact boundary application and to the question of whether I should use my discretion to make findings as to where the true boundary between the properties is, if I hold that it is not as set out on the application plan.

73. I accept the Respondent's evidence that the position of the boundary fences at the rear of the adjoining properties has changed over time as the buildings were extended and/or the fences renewed. The Respondent has been in occupation of 18 Cheltenham Drive for more than 40 years and has been able to observe this. Indeed, it would be surprising if the boundary fences of adjoining properties had not moved to some extent over the years given that the age of the properties.

74. I also accept the Respondent's unchallenged evidence that Mr Ironman had been in occupation as a tenant prior to his purchase. The Applicant's position was that the tall wooden post and wire fence that was erected by or with the help of Mr Ironman could not have been in place for 10 years because Mr Ironman had only purchased the property in 2012 or 2013. However, the Respondent's evidence was that this fence had been in place since approximately 2002/3. I also accept the Respondent's evidence that this fence was erected to assist with keeping Mr Ironman's dogs in place. Accordingly, I find on the Respondent's own evidence that the tall wooden post and wire fence erected in approximately 2002/3 was not intended to be a boundary feature.

75. This conclusion is consistent with my observations on site. While much of the boundary area is overgrown it was possible to observe several lower wooden posts and sections of lower wire fence in the general vicinity of the boundary and to the south of the tall wooden posts placed by Mr Ironman. These posts and sections of wire are consistent with the "rickety" fence described by the Respondent and the fact that they are located to the south of the posts placed by Mr Ironman suggests that the posts sited by Mr Ironman were not intended to be boundary features.

76. There were, however, only a few of the shorter wooden fence posts visible in the rear of the Respondent's garden and their position does not enable a reliable determination of the boundary position to be deduced from them. I asked the Respondent whether he could now say where the footings for the previously existing fence posts were and he was frank in saying that he could not do so.

77. I therefore conclude, as far as the true position of the rear boundary beyond the three wooden panel fence is concerned, that the boundary lines along the line of the fence that stood in place prior to the erection of the tall wooden post and wire fence erected with the assistance/by Mr Ironman in or around 2002/3. This fence stood on the Respondent's evidence for several decades and formed the boundary between the properties. The evidence before me does not, however, allow me to determine with any reliability the exact position of the boundary beyond the three wooden panel fence because the Respondent, who was the only witness before me who could speak to this issue, honestly accepted that he was unable to identify the course of the previously existing boundary fence.

78. The Respondent's position at the hearing was that true position of the boundary was shown by his manuscript markings on the photograph at page 63 of the hearing bundle. However, I accept Mr Turner's submission that drawing a straight line on a photograph taken from one side of the fence and at a height and an angle will not produce a reliable delineation of the boundary. Further, this approach does not assist on the position of the boundary fence that the Respondent described in his evidence.

79. It follows from my conclusions above that the application plan does not accurately show the exact position of the rear boundary between 20 and 18 Cheltenham Drive. In addition, the following matters also lead me to conclude that the application plan could not be relied on as describing the exact position of the boundary:

79.1. The rear boundary line specified on the plan runs from points F to M. While point F is an identifiable physical point, being the terminus of the three wooden panel fence at the wall of 20 Cheltenham Drive, point M appears merely to be a point calculated by measuring 18 feet at a 90 degree angle from point K, which is the eastern corner of the rear fence between 20 and 22 Cheltenham Drive. Accordingly, the accuracy of point M as the terminus of the exact boundary shown on the application plan is dependent on point K being an accurate reference point. However, as noted above, I accept the Respondent's evidence that neighbouring fences have moved over time and therefore I can have no confidence that point K is an accurate reference point from which to calculate the distance of 18 feet.

79.2. If point M is unreliable because point K is not an accurate reference point, then the entirety of the application line is similarly unreliable because it is a straight line drawn between point M and point K.

79.3. Further, I note that the application plan itself includes the words set out in paragraph 28 above that it would be necessary to "check all dimensions on site". It is not clear to me whether this statement is intended to qualify the measurements stated on the plan and I note that, as set out in paragraph 9 above, an application plan should not contain any endorsement which casts doubt on the accuracy of the plan.

79.4. I also note that while the distance between points M and K is exactly 18 feet, presumably based on the wording of the conveyances set out above, this is not the width of 20 Cheltenham Drive as recorded in other places on the application plan. The distance between points A and B on the frontage of 20 Cheltenham Drive is 17.59 feet

(when converted from metres as stated on the plan). Also, the distance between point H, being the start of the rear boundary fence between 20 and 22 Cheltenham Drive and point I, being a point on the application line, is recorded on the application plan as 17.93 feet. Point I is not at a 90 degree angle to point H and therefore the fact that this distance is less than 18 feet suggests that the distance between point H and the point at 90 degrees to it on the application plan would be somewhat narrower still. On this basis, the application line has the effect of making 20 Cheltenham Drive somewhat wider at its eastern extent than is the case by reference to a physical feature proximate to the house.

79.5. Finally, I note that the application plan did not identify points I and J as fence posts. While Mr Turner and the Applicant may be correct in understanding that points I and J were intended to reflect the position of fence posts this was not clear and I am unable to assume that this was the case.

79.6. Had Mr Bidston been called by the Applicants as a witness at this hearing he may, by his evidence, have been able to address and explain some or all of the points set out above to my satisfaction. In his absence these points remain unaddressed.

80. As noted in paragraph 11 above, in cases where the Tribunal determines that the application plan does not show the exact line of the relevant boundary, the Tribunal has a discretion whether to go on and determine the actual exact position of the boundary. I would far prefer to be able to use this discretion to determine the actual exact position of the boundary in this case as that would give the benefit of finality to the parties. However, for the reasons I have set out above, the evidence that is available to me does not allow me to determine the exact position of the boundary and accordingly I cannot use my discretion in this case.

81. The result is that while I have found that the application plan does not accurately set out the exact rear boundary I cannot on the evidence determine where the exact line of the boundary should be. In the circumstances the general boundaries rule will continue to apply to the rear boundary between 18 and 20 Cheltenham Drive. As I have already noted, although it is not possible for me to determine the exact position of the boundary on the evidence presented, the parties agree that the boundary should follow a straight line from the three wooden panel fence. Although they have not done so to date, it is open to the parties to reach a boundary agreement to this effect and to plot out on the ground where such a straight line would run and I would encourage them to do so.

Costs

82. I have set out my conclusions on the principal issues that arise on this Reference above. The Respondent has successfully opposed the Application.
83. The parties were informed in writing at the start of the proceedings that the general rule in this Tribunal is that the losing party will pay the successful party's costs as well as his own. I have found that the Respondent has succeeded and the application of the general rule in this case would result in an order that the Applicant pay the Respondent's costs.
84. I note that both parties have acted as litigants in person. This does not prevent a party applying to recover costs. I direct that the parties are to make written submissions on costs supported, where the party seeks an order for costs in its favour, by a Statement of Costs in form N260 (which can be easily obtained on the internet) or in substantially similar form. Copies of all submissions and Statements of costs are to be filed with the Tribunal office and served on the other party. The submissions should address the incidence of costs including whether there are any reasons for departing from the general rule described above, the basis of the assessment (whether standard or indemnity) and the quantum of costs that should be awarded.
85. As the successful party I direct that the Respondent shall file his written submissions as to costs and any Statement of Costs by 21 December 2018 or to write by the same date confirming that no application for costs is made.
86. If the Respondent files written submissions seeking costs by 21 December 2018 then I direct that the Applicant is to file her written submissions as to costs and any Statement of Costs by 18 January 2019.
87. The Respondent is to file any additional written submissions as to costs limited to commenting on the Applicant's submissions and any Applicant's Statement of Costs by 8 February 2019. The Tribunal will consider the materials received pursuant to these directions and issue a written determination on costs.

88. In the event that there is non-compliance with the directions given for the determination of costs the Tribunal gives notice that it may give a direction debarring the defaulting party from taking any further part in the determination of costs and may proceed to determine the costs issues without further reference to the defaulting party.

Malcolm Sheehan

BY ORDER OF THE TRIBUNAL



DATED THE 27TH DAY OF NOVEMBER 2018