[2018] UKFTT 425 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2016/0523

BETWEEN

1. ALEXANDRA JENNIFER LATHAM
2. ROSEMARY SUSAN BERG

Applicants

and

FRANCIS PATRICK LOUSADA

Respondent

Property address: 24 Salford Road, Aspley Guise, Milton Keynes MK17 8HZ
Title number: BD180444

Before: Judge Hargreaves

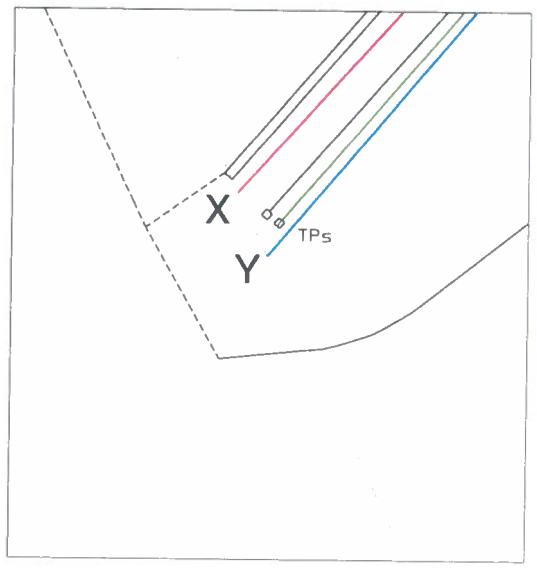
ORDER

The Tribunal directs the Chief Land Registrar to give effect to the Applicants' DB application made on 7th September 2015 in Form DB1 dated 7th July 2014 with the substitution of the line drawn B-C-D-E-X on the plan prepared by Sterling Surveys Limited drawn December 2017 at R30 of the bundle as the DB line, copy plan attached.

DATED 27TH JULY 2018

Sara Hargreaves
BY ORDER OF THE TRIBUNAL

PROPERTY CHAMBER LAND REGISTRATION



INSET AT 1: 100 SCALE

THE POPLARS

A

FOURWAYS

PANEL FENCE

GARAGE

32

30

B

HILLSIDE

C

PANEL FENCE

CONCRETE WALL

CONCRETE WALL

PAVING SLABS

K

TP
EP

TRELLIS FENCE

PARTY WALL EXTENSION LINE

PANEL FENCE

D

24

CONCRETE WALL

PANEL FENCE

POST/WIRE FENCE

E

TPs

G
IP

SLEEPERS

PANEL FENCE

PAVEMENT

F

TPs

PANEL FENCE

J

FRONTAGE LINE

PANEL FENCE

THE CORNER HOUSE (22)

PICKET FENCE

ROOT LINE OF CONIFER HEDGE

IP

H

SALFORD ROAD

0 1 2 3 4 5 10 20 30m

SCALE 1:250

STRAIGHT LINE BOUNDARY

BOUNDARY FROM FRONTAGE DIMENSIONS

DETERMINED BOUNDARY

SURVEYED BY
STERLING surveys
UNIT 9, OAKHANGER FARM BUSINESS PARK
OAKHANGER, HAMPSHIRE GU35 9JA
TEL 01428 604911. FAX 01428 605847.
Email: sterling@wlgh.demon.co.uk Internet: www.sterlingsurveys.co.uk

LEGEND

S10982

EP = ELECTRICITY POLE
IP = IRON POST
TP = TIMBER POST

REV	DATE	PREV JOB NO	REVISION DETAILS

CLIENTS
NAME
ADDRESS
AND
POSTCODE

JOB TITLE

24/30 SALFORD ROAD
APSLEY GUISE
MILTON KEYNES
MK17 8HZ

DRAWING TITLE

BOUNDARY SURVEY

DRAWING 1 OF 1		AUTOCAD DRAWING FILE NAME	
CLIENT JOB No.		SALFORD-ROAD.DWG	
SCALE 1/250		REVISION SUFFIX	
SHEET SIZE A3 297x420mm	DATE DEC 2017	SURVEYOR MEM	DRAWN MEM / CHECKED MEM

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Applicants

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Respondent

Property address: 24 Salford Road, Aspley Guise, Milton Keynes MK17 8HZ
Title number: BD180444

Before: Judge Hargreaves
Alfred Place
5th and 6th July 2018

Applicants' representation: Martin Strutt, instructed by Lyons Davidson
Respondent representation: Mr Lousada in person

DECISION

Key words – determined boundary application – part of boundary line on DB plan reflected the line of a fence erected by the Applicants in 2011 to avoid further neighbour disputes – this was a concession not the legal boundary – conflict as to line of legal boundary - both parties had instructed experts – Tribunal appointed single joint expert who subsequently reported –

Respondent rejected the concession and argued for a different line – Applicants wished to pursue expert's preferred line

Cases cited
Bean v Katz [2016] 0168 (TCC) Judge Elizabeth Cooke
Lowe and Lowe v William Davis Ltd [2018] UKUT 0206 (TCC) Morgan J

1. For the following reasons I direct the Chief Land Registrar to give effect to the Applicants' DB application with the substitution of the line drawn B-C-D-E-X on the plan prepared by Sterling Surveys Limited drawn December 2017 at R30 of the bundle as the DB line, copy attached to the accompanying order.

2. Page references are to the trial bundle, prefixed by the letter of the relevant tab.

3. The parties are neighbours and own properties on one of the main roads through Aspley Guise. The Respondent owns 30 Salford Road, registered with title no. BD217321 (F2, file plan at R19). This is a semi-detached house built just before the Second World War, it is thought. The Respondent bought it in 1973. At all material times it has had a garage, easily identified on the file plan (and in the photograph at P142, O79 for example). The Applicants' property was built in about 1977-1978 and is known as 24 Salford Road, though adjoining no. 30. It is registered with title no. BD180444 (E5). The obvious feature of the file plans is that the general boundaries of the two properties are straight if not perpendicular. The plot on which the Applicants' house was built was originally part of a substantial plot on the corner of Salford Road and Berry Lane, now registered under title no. BD173201, 22 Salford Road (old file plan at R20).

4. I had the benefit of a site visit which enabled me to navigate the various photographs in the bundle, particularly at R31-40, M11-20. Good photographs of the front elevation of both properties are at M11, and in particular at the top of M12. It is possible that the dispute which led to the DB application might not have evolved had the original frontage boundary features not been removed by the parties in the course of landscaping and improvement works to their respective front gardens in about 2004. So what I saw at the site visit bears no resemblance to

various boundary features relied on in particular by the Respondent, as identified in various additional photographs introduced by both parties. For example, the Applicants' property was fronted by curved walls and conifers when they bought it in 2002, all removed in 2004 to achieve an agreed open landscaping effect: see eg P153.

5. Chronologically, the following conveyancing documents are relevant. On 19th September 1945 the Respondent's property was conveyed (Thomas to White) on the following terms: *"ALL THAT piece of land situate at Aspley Guise ... and having a frontage to the road there ... of twenty five feet or thereabouts and having a depth therefrom of two hundred and thirty feet or thereabouts All which said piece of land abuts on the south west on the said road and is for the purpose of identification only more particularly delineated and described in the plan drawn hereon and thereon coloured pink TOGETHER with the dwellinghouse erected on part thereof and known as Field Cottage."* See R25, plan at R27, enlarged at R28with a frontage measurement outside the box (as it were) of 25 feet. As Mr Strutt submits, there is significance in this case in that the 25 feet is a *frontage* measurement, to be distinguished from the *width* of the plot. No other title documents are available or relevant for no. 30. According to the 1945 conveyance plan, there was a very large plot between no. 30 and Berry Lane which was undeveloped.

6. By 1949 Jane Chalk occupied "The Bungalow" on the corner site of Salford Road and Berry Lane. By a deed of gift dated 1st February 1949 she gifted the land edged pink to Frances Adams and retained the rest of the plot herself (coloured yellow): see tab H. The donee covenanted to fence the north west and north east boundaries of the plot gifted to her. It is debatable whether the 1949 deed is helpful because it is not clear what if any links it has in terms of fencing covenants to those in the 1977 deed (below); in any event, it appears that both the pink and part of the yellow land reverted to one owner by 1977, being known as "Tudum Wada", no. 22. But there is no evidence either to support the Respondent's contention (paragraphs 12 and 13 of the Respondent's skeleton argument) that the metal post *"is more likely the marking of the front point of the boundary line between the land the subject of the Deed of Gift and the land retained by the donor*

and not as a mark for the measurement of the frontage of no. 24." The Sterling measurements undermine this submission.

7. On 18th July 1977 Gweneth Gilbert as owner of Tudum Wada conveyed to Mr and Mrs Moore part of 22 Salford Road being *"ALL THAT piece or parcel of land being part of 22 Salford Road ... having a frontage to Salford Road of forty three feet six inches or thereabouts a depth therefrom of one hundred and thirty four feet or thereabouts and a width at the rear thereof of fifty six feet nine inches or thereabouts ALL WHICH said piece or parcel of land is for the purpose of identification only delineated on the plan annexed hereto and thereon coloured pink ..."* At clause 3 the Purchasers covenanted *"with the Vendor that they .... will within two months from the date hereof erect a close boarded fence five feet high between the points marked "A" and "B" on the plan annexed hereto and a post and wire fence three feet six inches in height between the points marked "B" and "C" on the plan annexed hereto ..."* These are precise measurements and there are three of them. The plot has straight lines but is wider at the back than across the frontage. The line A-B-C is the boundary between no. 24 and the retained corner plot, no. 22. A part copy of the 1977 conveyance with plan is at R22: see also tab I (a better complete copy was handed up at the hearing). So it appears that the plot sold to become no. 24 was unfenced at the time of the conveyance but that with these measurements it would be possible to erect the fences on A-B-C in the right place. This boundary is therefore relevant to the determined boundary application. The Respondent submits that the fence on the A-B-C line is in the wrong place, but I disagree (see below).

8. By 1977 the frontages of no. 30 and no. 24 are therefore fixed by conveyances containing measurements. There is no evidence that no. 30 had a boundary feature along its road frontage. The Respondent's evidence is that there was a chestnut paling fence running along his boundary with what became no. 24 and he produced a photograph (undated) to demonstrate it.[1] But its precise line is now unknown and it is clear from the photograph that it was far from upright or straight, or even whether it includes or excludes the laburnum tree which the

[1] The photograph includes a picture of an Austin Healey in the foreground but the registration number dates from 1964 so that does not assist with dating the photograph as it must be after 1973

Respondent says has always been on his side of the boundary. A site plan relating to the 1976 planning permission for no. 24 is at M37 and is a useful guide to the respective boundary features (straight) and shape of no. 24 as well as to the existing hedge features (the additional handwritten notes and line of "conifers" were added subsequently and I propose to ignore these additions). Contrary to the Respondent's submissions there is in my judgment no clear evidence of those "conifers" on the copy microfiche version of the 1992 site layout plan prepared for the demolition and rebuilding of the house at no. 22 (tab J) though care has been taken to record existing trees and planting. Again the 1992 site plan shows all boundary features as straight, which is important because (i) the DB plan contains a dog leg and (ii) the Respondent's assertions about the boundary between no. 24 and no. 22 are also based on a dog leg (both of these points are considered in more detail below).

9. In terms of "historical" photographs handed in at the hearing, I have referred to the photograph showing the chestnut paling fence. Next is a photograph said to be taken in the 1990s from an upstairs front window of no. 30 showing a close boarded fence between the two properties running down the drive past the laburnum (clearly within no. 30) into a line of conifers (which appear to be on the no. 24 side) and a hedge (apparently within no. 30). The conifers and hedge are still evident in 2002, as are ornamental walls at the front of no. 24. By 2004 the conifers and hedge have been removed from both properties, as have the front walls of no. 30, and the common boundary is open and landscaped from roughly the laburnum tree to the frontages. This was by agreement between the parties. Above the laburnum tree (ie towards the houses) is a close boarded fence running between the properties on top of a retaining wall which diminishes in height towards the frontages. These photographs identify previous and existing features but are not compelling evidence as to the precise location of a boundary for the purposes of a determined boundary application, though they provide a useful guide to the factual background of the dispute which prompted the application.

10. In the following account of the dispute and its progress towards the hearing, it is important to note that (i) the DB plan reflects in part the line of a close boarded fence erected by the Applicants in 2011 as a concession to the Respondent and to

avoid further confrontation (from point E to F on the Sterling Surveys plan and A-B-C on the Kempston surveys plan which is the DB compliant plan at A4) (ii) the parties' pleadings and witness statements were prepared before the Tribunal gave directions for the appointment of a single joint expert ie the Sterling Surveys report at tab R dated January 2018, the first hearing being listed for January 2018 but having been re-listed for July.

11. Stripping the witness statements of allegations about the disputed boundary and unneighbourly behaviour (because it adds nothing to what I have to decide), the Respondent's evidence and case is briefly as follows (see tabs B, D and O91). When he first moved into no. 30, the chestnut paling fence ran along the boundary for its entire length and it was still in place in 1977. Part was removed when no. 30 was first built because of the need to build a retaining wall, no. 24 being on land higher than no. 30. Mr Moore built a retaining wall (shorter than the current version) on top of which he erected a 3 foot high fence. The Respondent made no objection to the position of the retaining wall. When built, no. 30 had a side passage running along the boundary which was approximately 3 feet 6 inches wide (B2) though the Respondent contends that gap is now 4 feet 8 inches wide at the side gate measurement (B2). See the view of the side passage looking to the front, at R33 for example, and from the other direction at R34. On any view, the side passage widens towards the rear garden of no. 24, but the rear boundary is wider than the frontage anyway.

12. The Respondent replaced the paling fence along the rear section some years before 2015 (B1, D5) but he maintains that he did so along the line of the chestnut paling fence. The gap between the side of his garage and a fence has always been about a foot. There is a useful photograph of the garage, the gap, the replacement fencing and part of the retaining wall at M16. This is a post-dispute photograph and I point out that the new close boarded fence erected by the Respondent on the original fence line appears to line up (more or less) with and tie into the retaining wall. See also the photographs at R32 taken on the Respondent's property at no. 30.

13. After Mr Moore bought no. 24, the Respondent's case is that he did not comply with the fencing covenant in the 1977 conveyance but planted a line of conifers

within and on no. 24's land instead so he argues that the boundary line between no. 24 and the corner plot at no. 22 is on the latter's side of these conifers (B3). Subsequently the owner of no. 22 erected a picket fence on no. 22's side of the conifers: see R37. The Respondent argues further that the picket fence is the boundary between no. 22 and no. 24. (The conifers on the no. 22/no. 24 line are now most definitely excluded from no. 24 by a close boarded fence erected by the Applicants: see R39). The Respondent argues that an angle iron used by the Applicants for the starting point of their frontage measurement (identified as IP on the Sterling Surveys plan at R30) is nothing to do with a boundary.[2] Again, I find that it is.

14. The Respondent's case is therefore that the legal boundary is the purple line on the MK Surveys plan dated 5th February 2013 (to which I refer in more detail below) because it follows the line of the chestnut paling fence. The MK surveys plan was not in the trial bundle in colour: tab N is a copy of a letter to the Respondent dated 13th August 2012 with various plans which are hard to decipher. A full copy of the February 2013 report was however available at the hearing, the purple line being delineated in colour at Appendix 8, sheet 5. According to MK Surveys, the purple line is "the rear boundary fence of no. 24 extended to front". So it is a measurement based on a feature relating only to no. 30.

15. As to the current retaining wall, it was rebuilt in 2004 but the Respondent now denies it is in the right place, having reached that conclusion not before 2011-2013, as the result of considering various measurements well after it was rebuilt (D8-9). He says there was no reason for him to doubt otherwise when it was built, though it was extended further by the builder towards the front ie up to the laburnum tree, taking it upon himself to do so without instructions from the Applicants: see R33 (which appears not to have caused any particular problems on that account). The retaining wall issue is important to the Respondent's case and therefore I need to deal with the facts. I reject the Respondent's assertion that he had no reason to think the wall had been moved closer to the flank wall of no. 30 before the dispute flared up from 2011-2013: the gap between his house and the

[2] A larger A3 scale version of R30 was used at the hearing

retaining wall, considering the width of the drive to the garage, is and must at all times have been relatively narrow such that a change in position would be noticeable, particularly in relation to the Respondent's adjoining boundary features. In any case the Respondent has been at pains throughout the dispute and in the presentation of his written case to demonstrate that he is alert to detail: it is not really credible that the wall would "move" even a few inches towards his property without him noticing it, and even less likely therefore that he would notice it years later. In a 2011 letter at O20 (for example) he relies on *"a simple visual inspection from the rear of my garage [which] shows quite clearly that, from the point where it commences, the reconstructed wall veers at a considerable angle onto my property..."* If such a visual inspection produces such an obvious conclusion, then it is questionable why it took so long to raise the issue. Moreover, it was pebble dashed and painted to match no. 24 at the Applicants' cost and to improve the ambience for the Respondent; again, that shows a level of attention to detail by the parties to the wall, which was rebuilt from the Respondent's side by a builder known to them and introduced to the Applicants. The "front" door to the Respondent's property opens onto the side access and looks at the retaining wall: it is an obvious feature.

16. The retaining wall was rebuilt in 2004 because the Applicants had been advised on their purchase of no. 24 in 2002 that this would be required. The Respondent had embarked on instructing a Mr Jaycock to carry out improvement works to his driveway, and the Applicants decided it would be a good opportunity to instruct him to rebuild the retaining wall (at their expense) and then for him to implement improvements to the front of their property. So it was that the retaining wall was rebuilt in 2004, both parties carried out cosmetic works to the approaches to their houses, and the boundary features towards their front gardens were removed from the laburnum tree towards the road frontages to create more of an open planting area, as the more recent photographs show. This was at the suggestion of the Respondent's partner Mrs Davies, who had moved to no. 30 in 2000.

17. The boundary dispute erupted in 2011 when the Respondent accused the Applicants of over-pruning hebe shrubs allegedly on the Respondent's property. According to the agreed chronology the Respondent thereafter made his first

allegation about the retaining wall, and Giles Ferris was instructed to conduct a boundary survey. The Respondent installed a post and wire fence along the front section of the boundary, and a few months later the Applicants erected a close boarded fence on their side of the boundary with no. 30.

18. The Applicants' case was pleaded by Mr Strutt at tab C but in September 2016. So far as it pleads a boundary agreement, he no longer pursues that argument. The case he presented at the hearing, which is that the correct boundary line is the Sterling Surveys red line (R30), is not the A-B-C line on the DB plan relied on at paragraph 5 of his statement of case. That is the fence built to dog leg round the laburnum to the front of the properties to avoid further disputes: it is a concession which remains "on the table". It was clear by the time of the site visit that so far as the DB plan contains a dog leg, it cannot reflect the "exact" legal boundary.

19. The Applicants' account of the evidence so far as material, again stripping it of the detail relating to the dispute, is as follows. They firmly deny giving Mr Jaycock the builder instructions to move the retaining wall further towards no. 30 to widen the side passage to no. 24. They wanted to resolve the dispute which arose in 2011 and instructed Giles Ferris to prepare a plan. They erected a fence along the boundary with no. 22 and the contractors discovered old fence footings (see eg the photograph at R38) ie K-J-H on the Sterling surveys plan. In November 2011 they erected the D-E-F fence (Sterling) to avoid further confrontation (with the dog leg round the laburnum). By September 2012 the Respondent had decided that the retaining wall trespassed on no. 30. Court proceedings were issued by the Respondent over the damage to the hebe shrubs and since it will do no good whatsoever to go into the detail of those proceedings, including the valiant but doomed attempts by a county court judge to get the parties to mediate a boundary dispute, I am not going to refer to them. In any event the pleadings are not available, neither are any of the orders or directions.

20. There is a useful summary of the three sections of the boundary as the Applicants see it at O12-O16. In the paragraphs dealing with the most critical "Front Section" the Applicants explain their case on the iron post as providing a boundary marker at the point where no. 24 adjoins no. 22. In the paragraphs dealing with "The

Middle Section" they explain their case on the allegations relating to the allegation that the retaining wall was moved. The Respondent says it now veers towards no.30 whereas the line should be straight, without a "kink". In the "Rear Section" they explain that this has always been basically agreed, but that both parties have re-erected fences in 2012 (the Respondent) and 2016 (the Applicants).

21. In summary Ms Latham's main statement which is dated January 2017, refers to reports prepared by Ferris, Rosser Morris and Howard and concludes that *"I believe the boundary of our property and [no. 22] is marked by the concrete footings and iron post ... therefore the frontage of our property should be measured from there ... although as previously indicated I am happy for it to dogleg around the laburnum tree (leaving it on the Respondent's side rather than necessitate this being chopped down."* (See O16.)

22. Only the Respondent and the Applicants gave oral evidence, together with Mrs Davies, and Mr Broadbent. Mr Broadbent was asked by the Respondent to provide a statement for the county court proceedings: a version of this is dated June 2017 and is at O86. In this statement Mr Broadbent maintains that the conifers at the front between no. 30 and no. 24 were the boundary, the side gate at no. 30 *"has been increased in width considerably to the original gate"*, and the fence and the [retaining wall] when viewed from behind the Respondent's garage *"appear to veer towards no. 30 and should veer towards no. 24 flank wall."* He comments on the boundary with regards to *"approved building plan measurements"* and *"the architect's drawing."* These were documents put before him by the Respondent probably in August 2013. In October 2017 Mr Broadbent was telephoned by Lyons Davidson and as a matter of "politeness" answered some questions and signed another statement at O65 about driveway works he had done for the Applicants in around 2000 (which must be a mistake). He refers to the leylandii which *"from memory we assumed ... were on the boundary ... there was no obvious boundary feature."* He says he cannot comment on the retaining wall, the side path of no. 30, the side gate, or the fence running to the rear of the property.

23. The Respondent suggested that Mr Broadbent had been "nobbled" by the Applicants to change his evidence but the reality is that neither witness statement

assists me on the point I have to decide. Mr Broadbent was evidently doing his best to assist whoever asked him to provide a witness statement, but as a building contractor *his* views on the boundary location are not relevant, and where his evidence might well have been more helpful in providing details of the works he did with precise measurements if available, those details were not provided. Moreover he was last at the property in about 2004, according to this statement, so he evidently forgot that, according to his other statement, he re-visited in August 2013. I think Mr Broadbent is an honest person but highly suggestible. Either way, his evidence does not assist me to decide the DB application.

24. Of more relevance is Mr Dillon's statement for the Applicants at O61. He lived at no. 22 for 15 years until selling to the Bothas in 2010. He refers to *"part of the boundary [with no. 24 which] had a conifer hedge growing on it. This hedge was there throughout my ownership ..."* He gave little thought to the *"exact"* boundary. The Respondent suggested this was fanciful but there are no grounds for seeking to undermine Mr Dillon's evidence on that basis, particularly since his children went through the trees to play with the children at no. 24.[3] He says he installed various picket fences in about 2001 to keep Jack Russell puppies in the garden, not intended to be boundary features. Mrs Davis says (O70) that she spoke to Mr Dillon *"about ownership of the conifers and he confirmed that they belonged to 24 and not to him"* and suggests he back-tracked in his written evidence. Again, I take this into account when considering his evidence.

25. Ms Botha (a solicitor), one of his successors who still lives at no. 22 provided a statement at O56 (she was prepared to come to give oral evidence). The crux of her evidence is that she considers the conifer hedge between no. 22 and no. 24 to belong to no. 22. She does not consider the picket fence a boundary feature as she understands they were installed to stop the Jack Russells from escaping and there were various picket fences in the garden, some of which they have since removed. She does not accept that there is a dog leg on the boundary between no. 22 and no. 24 to incorporate the conifers within no. 24 because the boundary is straight. She describes the effect of redrawing the boundary if the conifers are within no. 24,

[3] The Respondent issued a witness summons but Mr Dillon was to be on holiday. I refused to adjourn the hearing to give the Respondent an opportunity to cross examine him.

because that would re-route an established straight line boundary (as the alternative to a dog leg) to slice through *"a large part of the garden, BBQ area and paved patio area, which as been in this paved status for over 24 years."* Again, her evidence is of limited use so far as she comments on the boundary (she uses the word *"believes"* deliberately), but provides useful evidence which I consider credible about the function of the picket fences and the practical implications if the conifers belong to no. 24. Since the conifers were planted and the picket fence erected before the Bothas acquired no. 22 it makes little difference to the Respondent's case that he did not cross examine her.

26. The Respondent also wanted to cross examine Mrs Liddie, who sold no. 24 to the Applicants, but she was not available and again, to adjourn the hearing would have been wrong and disproportionate. At paragraph 5 of a statement she made recently for the Applicants (O60) she says *"From memory we kept our bins to the front of the property. However, I do not think there would have been a problem in getting a wheelie bin through the gate if we had needed to."* The question of getting wheelie bins through the side gate to no. 24 is relevant to the Respondent's case that the side passage was widened when the retaining wall was built, so that wheelie bins could have access through the side gate. This case is explained in Mrs Davis' statement at paragraph 16 (O70): she says Mrs Liddie *"confirmed that the original side gate was of such a width that it was difficult if not impossible to take wheelie bins through the gate and while she kept the bins outside the side door on collection days she had to take them round the other side of the house. She also said that she considered the conifer trees (as planted by the original owner Mr Moore) were on her property.."* Again, there are apparent inconsistencies between what Mrs Liddie is said to have told Mrs Davis about the wheelie bins and what she told Lyons Davidson which ended up in the statement. But the question of the width of the passageway and whether the retaining wall was moved in 2004 is not going to depend on Mrs Liddie's evidence: for example, I simply have no idea what size those wheelie bins were, what size the gate or its aperture was then or is, and so on. I regard the "wheelie bin" evidence before me as so marginal that it can be put to one side. Measurements and precision are required. It is clear on any view that Mrs Liddie did not repair or move the original retaining wall.

27. This account of various witnesses saying different things ends with Mr Jaycock, whose whereabouts is currently unknown – again, granting an adjournment so that the Respondent could find him to cross examine him would in my judgment be another waste of time and energy. Mr Jaycock's statement for the Applicants is at O63 (September 2017). He was the contractor who was involved in landscaping at both properties and re-building the retaining wall. He simply describes the exercise as follows: *"A line was taken from a buried post at the front of the garden and the post marking the end of the fence at the rear. This was the line that the previous retaining wall had been on. The new retaining wall was built to the same line, on the footprint of the previous wall."* For the Respondent, Mr Jaycock's statement (June 2017) is at O83. Much of it is comment and recalling conversations over 10 years previously. I discount his opinions on various boundary features as having little evidential weight. As to the retaining wall his evidence for the Respondent is *"I confirm that the old wall was replaced with breeze blocks to provide better support than the previous single brick construction. The 3 foot close-boarded fence on top was replaced with a 4 foot close-boarded fence which has now been replaced by next door with a 5 foot fence."* He then alleges that Ms Latham *"asked about increasing the "pinch point" where there was a gate at the side ... she wanted to widen the gate so that it was easier to take wheelie bins and barrows through ...a wider gate was put in the same place as before. This could only have been done by the new wall following a line further away from the flank wall of her house ... it seems that my sub-contractor carried out what Ms Latham wanted by building the wall on a different line than before without my knowledge."* I intend to discount Mr Jaycock's evidence on the grounds that the accounts as to the retaining wall (same position/his contractor moved it) are inherently unsatisfactory. He himself did not act on the alleged conversation. He concludes without proof that his sub-contractor (Mr Broadbent) did. Again, asked to do so by the Respondent, he stands to the rear of the garage and comments on the wall veering towards no. 30: see paragraph O85.

28. Ms Berg's evidence as to contact with Mr Jaycock is at O2. Ms Latham's evidence is at O9. Both deny telling Mr Jaycock to build the retaining wall on a different line (towards no. 30) to widen the "pinch point". In addition Ms Latham denies telling police officers that they had "pinched a few inches". Having heard both Ms

Latham and Ms Berg give oral evidence I am also not prepared to give any weight to Mr Jaycock's allegations about the "pinch point" as I accept their denials about these allegations. They accept that the gate gap has widened, but that does not mean the wall was moved. Neither does the fact that standing behind the garage at no. 30 the wall seems to veer towards no. 30. It might always have done so. There is no hard evidence on this point but the likelihood is that it did: on any view the general boundary is straight but not perpendicular.

29. I have considered this evidence because the Respondent suggested he would not have a fair trial unless he could challenge all witnesses on their contradictions. That assumes their evidence is central to the critical issues which I have to decide, and it is not, though I will deal in greater detail with the Respondent's evidence as to the width of the side passage at no. 24. This really depends on measurements where the side gate is. But at no time has the Respondent actually measured the gap. He says there is a 14 inch encroachment because originally there were two 17 inch paving slabs (34 inches) and they were replaced by two 24 inch slabs (48 inches: the difference is 14 inches). Not only do I accept the evidence of the Applicants and Sterling Surveys that the 48 inch slabs were trimmed, I cannot see any reason for using such a basic measurement (which relates to the side passage and not to the wall itself) as a firm basis for concluding that the wall was moved towards no. 30. This explanation is set out in paragraphs 39 and 40 of the Respondent's statement at O97-8. In oral evidence the Respondent admitted leaning over the fence to obtain tape measurements. In his letter of objection to HMLR he relied heavily on the evidence of Mrs Liddie and "the contractor" which I regard as of no probative weight on this point. These conversations are similarly set out as supporting evidence in paragraphs 20-24 of the Respondent's statement of case (D8-10). In particular the Respondent contends in paragraph 20 that (at the side gate point) *"The width between these two points is now 56 inches (1.425m not 1.3m as measured by Ferris) compared with approximately 42 inches (1.07 metres) before."* Not only is there no explanation as to how the original measurement of 42 inches was obtained, the original measurement is subsequently said to be 34 inches.

30. In conclusion, the Respondent's allegation that the retaining wall was moved towards no. 30 in 2004 is rejected, in summary because (i) the witness evidence relied on by the Respondent is of insufficient weight to have any probative value (ii) there are no reliable measurements of the position of the wall originally, or as to the width of the side passage which suggest it has moved, particularly at the alleged "pinch point." I have dealt with this point because it is important to the Respondent's case. But from other perspectives, its relevance is doubtful.

31. Moving on from factual issues, there is a proliferation of survey reports to which brief reference should be made. At tab K is a copy of a report prepared by Giles Ferris dated 27th February/8th March 2013 on behalf of the Applicants as a submission to Ian Howard who was appointed as an arbitrator/mediator in the county court proceedings. At K4-K5 Mr Ferris explains in particular his reliance on the conveyancing measurements, and the fact that he is supported by the findings of other surveyors instructed by the Applicants, Rosser Morris, whose plan dated November 2012 is at tab L. Both Ferris and Rosser Morris use the iron post marked as such (H) on the Sterling Surveys plan at R30.

32. The Respondent had instructed MK Surveys (Mr Rust) to prepare a report for submission to Mr Howard, and that report dated February 2013 was produced in full at the hearing. The Respondent asserts that the purple line drawn on the plan attached to that report at Appendix 8, sheet 5 is the correct line of the boundary: see paragraph 6.9. Mr Strutt has a number of criticisms of this report, see below, including the fact that the writer, Mr Rust, only measured the boundaries of no. 30, and failed to distinguish between a "frontage" measurement and a "width" measurement in regards to no. 30. Those are valid criticisms which I accept. See paragraph 7.1, where Mr Rust treats the 25 foot measurement as the "only reliable" dimension in the documents reviewed but which leads him to determine that no. 30 is 25 feet *wide*. He does however take the dividing line between 30 and 32 as the party wall line between those two semi-detached properties.

33. At tab M is Mr Howard's report dated April 2013 but his job was to achieve a compromise outcome to the county court proceedings about the damage to the hebes, so his solution at 6.04 proposes something *"between two contrasting*

positions" and cannot be a guide to what should be the determined boundary. However, as Mr Strutt submits, Mr Howard broadly agrees with Ferris/Rosser Morris.

34. None of the above surveyors were called to give oral evidence. The Tribunal directed the parties to obtain the report of a single joint expert and the result, the report of Sterling Surveys Limited, replaced the previous reports as the focus of submissions at the hearing. The helpful and detailed letter of instruction (5th December 2017) is at tab Q and the report at tab R. The outcome is in the plan at R30, though I was given an A3 version for use at the hearing. If the Tribunal has directed that the parties obtain a report of a single joint expert as part of its case management of a DB application, that report is prepared for the Tribunal, and after detailed analysis provides a basis for finding the correct "exact" boundary, then it would be perverse to ignore its findings.

35. The Applicants now submit that the Sterling red line on R30 is the correct determined boundary line. The follows the DB line until the laburnum tree. I agree, for the following reasons.

36. As Mr Strutt submits, the legal boundary in this case can be fixed by measurements given in the conveyances which provide datum points, subject to changes due to adverse possession or a boundary agreement or estoppel, none of which are now relied on in this case by the Applicants. This was the starting point for the Sterling analysis as well. See generally the explanation in paragraph 8 (R11) which demonstrates a testing of various conclusions by reference to other boundary features including other measurements and established fences, as well as obvious straight lines. The iron post at H on the Sterling surveys plan is critical. Paragraph 8.15 of the Sterling report provides a convincing explanation, backed up by other measurements, as to why H is a solid starting point. The Respondent contends that the starting point for the frontage measurement of no. 30/no. 24 is either the central line of the conifers or the picket fence but those are not sustainable on the facts or measurements or any of the evidence I have reviewed. Above all, as the Sterling report demonstrates, they result in no. 30 having a wider

frontage than 25 feet by an unacceptable margin (paragraph 8.9). The case for the iron post at H is overwhelming on the evidence before me.

37. I therefore accept the Sterling reasoning as to the iron post at point H, and the next stage of the exercise as set out in paragraph 8.16, which is to take a measurement of 43 feet 6 inches across the frontage of no. 24 to area F: see the blow up of area F at a 1:100 scale. Cross checked to the party wall dividing line between no. 30 and 32, the Sterling measurement for the red line (paragraphs 8.16-17, point X on the enlargement) is based on combined frontage measurements from the iron post at H of 68 feet 6 inches, which is the combined frontage measurement of 25 feet and 43 feet 6 inches. It is also cross-checked to the rear measurement of B-K, which provides further support for point H (paragraph 8.15). The Sterling survey includes a frontage line to which measurements can be taken. The approach is to be contrasted with how Mr Rust arrives at the purple line relied on by the Respondent, which he describes as *"a "straight line" extension taken between the northeast corner fence post [of no.30] and the fence post to the front of your garage"*, and therefore underplays the 25 foot frontage measurement critical to no. 30. It also fails to consider the frontage of no. 24 even though Mr Rust had a copy of the 1977 conveyance. He does not explain his conclusion at paragraph 7.1 which fails to give any weight to the measurements in the 1977 conveyance, stating that the 1945 conveyance contains the only *"reliable"* dimension. Given the results of the Sterling exercise, that conclusion is demonstrably flawed. For the Respondent the purple line has the advantage of coinciding with the "concession" fence erected by the Applicants round the laburnum.

38. The Sterling report provides two lines for consideration. The blue line is considered at paragraph 8.18. Its main deficiencies are that it relies on the picket fence at no.22 as a boundary feature (which I reject) and also relies on the Respondent's case that the retaining wall was moved (which I reject). Further, as the Sterling report emphasises, the blue line widens the frontage of no. 30 by over 3-4 feet: see S20. There is nothing to support that margin as acceptable where the defined frontage is specifically 25 feet or "thereabouts".

39. The blue line is, as Mr Strutt submits an artificial line (like the purple line) but it does serve a useful purpose because it highlights the strengths of the red line, ie B-C-D-E-X. I agree with those points which are listed at (a) - (d) of paragraph 8.18 of the Sterling report (R13). As Mr Strutt submits, they echo the approach taken by MK Surveys in measuring 25 feet from the party wall line of nos. 30/32, except for the mistake made by MK Surveys in taking 25 feet as a width not a frontage measurement, and in failing to focus on the frontage of no. 24 as well.

40. The Sterling surveys report identifies certain deficiencies with the B-X red line, see R14. As to the fact that it conflicts with the Respondent's allegation about the movement in the retaining wall, that is not a deficiency because I reject that case on the facts. Similarly the problems identified as possible conflicts with the location of the old paling fence and Mr Jaycock's evidence are not deficiencies because I have heard no probative evidence as to either the precise location of the paling fence or the privet hedge and Mr Jaycock's evidence I have dealt with above. That leaves the question of the "kink" in the southern boundary of no. 30: as to that, the Sterling surveys response to the Respondent's first question about the report is in my judgment convincing: if the Respondent's southern boundary is absolutely straight from the road to point A on the Sterling surveys plan, then the result is to distort the frontage dimensions *"significantly"*: see S18, questions and answers 1 and 2.

41. As Mr Strutt submitted in closing, this case really boils down to the documents and datum points. As to the starting point for no. 30, if it was built before 1945 as the Respondent asserts, the party wall dividing line is a good starting point for measuring the 25 foot frontage. Point B on the Sterling plan is acknowledged by both sides as correct. Points B-K measure 3 inches short but within the "thereabouts" (of the 56 feet 9 inches measurement in the 1977 conveyance) and point K is therefore also compelling. Nothing in the MK surveys report contradicts this. I agree that the evidence supports the line K-J-H as being correct (and particularly in excluding the conifers). Once the line B-K-J-H is established, the frontage measurements fall into place and Sterling's X (red line) end point is the point at which the measurements coincide – not, as Mr Strutt says because it is

coincidental, but because it is correct. The Respondent contends it is a coincidence. I prefer Mr Strutt's analysis of the Sterling report.

42. The Respondent in closing appreciated that he had difficulty reconciling his case with the frontage measurements as set out in the Sterling report, but challenged the Sterling conclusions by relying on the questions he put in relation to the report at S18. His main attack is that a straight line along the red line from X to the rear would run across other well established boundary lines between no. 30 and Berry Lane properties. What I am dealing with however is the line from point B (Sterling). The attack on the Sterling line from C-E is dependent on the Respondent's evidence as to physical features (eg moving the retaining wall, widening the pinch point, location of the conifers on no. 24 land) which I have rejected, though he also accepted by closing that his evidence about the width of the pinch point was inadequate. In essence the Respondent's challenges to the Sterling conclusions rely on these factual issues, or what he described as several points which have sufficient "weight" to favour his alternative conclusion. The problem for the Respondent is that not only have I rejected certain fundamental factual issues on which he relies, I have also concluded that reliance on the chestnut paling fence location does not assist, due to the lack of hard evidence on that feature. In other words, although someone might have once said, standing in the front gardens of the respective properties, that the chestnut paling line was the boundary, that is no longer possible and the only way to determine the boundary is to adopt Mr Strutt's approach and the Sterling interpretation, which is thorough and arrives at a conclusion which is supported by the documentary evidence, backed up by relevant physical features.

43. It follows therefore that the line of the panel fence erected by the Applicants (E-F on Sterling, C-B-A on the DB application plan) is not along the line of the legal boundary, which is (Sterling) B-C-D-E-X. The question is therefore how to proceed: the Applicants are partly right but wrong so far as the "concession" fence is concerned.

44. Just prior to the hearing Morgan J's decision in *Lowe and Lowe v William Davis Limited* [2018] UKUT 0206 (TCC) was handed down. It contains a comprehensive

and useful resume of the Tribunal's determined boundary jurisdiction, and deals with any ongoing fall-out perpetuated by the approach taken in *Bean v Katz* [2016] UKUT 0168 (TCC) by Tribunal Judge Elizabeth Cooke, which is preferred to the earlier decision and approach taken by HHJ Dight in *Murdoch v Amesbury* [2016 UKUT 3 (TCC): see *Lowe* paragraph 54. There is no need to refer to *Lowe* in detail, as it deserves its own reading, but I do intend to follow its approach.

45. With this decision in mind Mr Strutt submitted that I had a number of options. First, I could give effect to the DB application in accordance with the DB application plan on the grounds that he is instructed not to withdraw the concession as to the location of the fence from the laburnum tree, which at least has the merit of some support from the Respondent (though that support is qualified on the pleadings and on the Respondent's evidence, and is not agreed as such). The problem with this is that this is not, from the laburnum tree to the road frontage, the legal boundary and I have not determined that as the boundary. I reject this option as inconsistent with the function of a DB application and my findings.

46. His second option is that I give effect to the application as drawn but I re-draw the line from E-X, in accordance with the *Bean v Katz* approach: see for example paragraphs 24-27 of that decision. His third option is to require a new DB plan in line with my findings and give effect to an application on that basis. His fourth option is that I give effect to the DB application along the Sterling B-E line (Kempston F-C), cancel the rest of the application, and leave the parties to do as they will with my findings as to Sterling E-X (the red line). This is undesirable where I have reached a clear decision as to where the boundary is and where there is a plan to reflect it.

47. What I am able to do is produce an outcome which is an amalgamation or variation of options 2 and 3. There is no need to direct the production of a further DB plan: no one has submitted that the Sterling surveys plan is technically deficient or any different to the DB plan except in plotting E-X which is not plotted on the DB application plan for obvious reasons. The plan is accurate and the dispute has been as to the location of the boundary. The scope of my jurisdiction is set out in

practical terms by Morgan J in *Lowe* paragraph 55 sub-paragraphs (1)-(11), particularly sub-paragraphs (7) and (8). I have made findings as to the location of the legal boundary and there is no point, when I have a compliant plan to deploy, in not providing a final solution to this long running and costly dispute, so far as I can. The dispute is four years old, and has now produced a decision on the boundary.

48. It follows that the solution is to give effect to the application but with the substitution of the Sterling surveys plan to avoid any further practical issues in recording the DB as B-C-D-E-X on the plan. It is preferable to directing the DB application to be given effect to so far as the DB application plan is concerned on the line H-C on the Kempston/DB survey plan and then substituting the Sterling plan or expressing the finding in words from point C (Kempston) or E (Sterling). The tools exist in the form of an expert report ordered by the Tribunal and it is right to use the Sterling plan to resolve the application. So far as the Applicants are willing to leave the current fencing in situ as a concession and with a nod to the laburnum tree, that is a matter for them.

49. That leaves the question of costs. The Applicants have been largely successful so far as the outcome of the hearing is concerned because of the adoption of the Sterling conclusions, but not wholly overall because the DB line I have found is not on the line of their original application so far as the fence from the laburnum tree is concerned. That is because on no account could that part have ever been on the line of the "exact" boundary: unless a "concession" is agreed it is not an ideal approach to a determined boundary application as that requires a determination of the "exact" line of a boundary (*s60 LRA 2002, LRR rule 118-119*). So the application was arguably flawed to that extent and there is arguably no clear winner or loser on that analysis. On the other hand the Respondent objected to the DB application as drawn for reasons he gave in his written responses and at the hearing, and on one analysis the Applicants have gained more from the proceedings than he has.

50. The best approach in terms of costs therefore is for any application for costs to be filed with the Tribunal and served on the other party by 5pm 20th August 2018, and

for me to deal with costs after that. All applications should be supported by a summary of costs claimed from 12th July 2016, the date of referral. In the Applicants' case they can use Form N260.

DATED 27TH JULY 2018

Sara Hargreaves

BY ORDER OF THE TRIBUNAL