



Neutral Citation Number: [2024] EWHC 1014 (Ch)

Case No: PT-2023-CDF-000018

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

Cardiff Civil and Family Justice Centre
2 Park St
Cardiff
CF10 1ET

Date: 03/05/2024

Before:

MR JUSTICE ZACAROLI

Between:

(1) CERI JAMES CHARLTON
(2) LOES CHARLTON
- and -

Claimants

(1) BILLY FORREST
(2) MATTHEW FORREST
(3) ANNE MARIE FORREST

Defendants

Gwydion Hughes (instructed by **Robertsons Solicitors**) for the **Claimants**
Kate Parker (instructed by **Red Kite Law LLP**) for the **Defendants**

Hearing dates: 15 & 16 April 2024

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This judgment was handed down remotely at 10.00am on Friday 3 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Zacaroli:

1. The claimants, Mr and Mrs Charlton, are the registered proprietors of freehold land and a house at Ty Chwarel, Castleton Road, St Athan in the Vale of Glamorgan (“Ty Chwarel”). They have owned Ty Chwarel since 31 July 2018.
2. The defendants, members of the Forrest family, are the registered proprietors of adjacent freehold land and buildings, which they trade as the Castleton Residential Park, mostly for people in retirement (“Castleton”).
3. Ty Chwarel and Castleton share a common boundary, with Ty Chwarel to the west and Castleton to the East. This case concerns the precise location of the southern section of that boundary. If the boundary is located as per the claimants’ claim, then the defendants have encroached upon the claimants’ land in order to cut down trees and erect a new fence. If the boundary is where the defendants say it is, then there has been no encroachment.
4. Annexed to this judgment is a plan that the parties agree is an accurate representation of the features that existed on the site as at December 2022 (the “Plan”). The boundary between the two properties is shown, according to the defendants, by the continuous line (red on the colour version of the Plan) which extends from top to bottom. I will refer to this as the “Red Line”. The Red Line can be divided into four sections, from north to south, as follows: (1) the northern section of the boundary, adjacent to caravan No.2 as far as the 90 degree dog-leg in the Red Line just above caravan No.3 (“the Northern Section”); (2) the middle section of the boundary, adjacent to caravans No.3 and No.4 (the “Middle Section”); (3) the southern section of the boundary, adjacent to caravan No.5 (the “Disputed Section”); and (4) the section to the south of the Disputed Section, which extends beyond the defendants’ southern boundary and marks the boundary between the claimants’ land and land held by the Welsh Assembly.
5. Although the claimants contend that the defendants have in the past encroached upon their land in relation to the Northern and Middle Sections, they do not seek to dispute in this action that the Red Line marks the boundary so far as those sections are concerned. The Disputed Section relates, therefore, only to the part of the Red Line that is adjacent to caravan No.5 (and runs between Point “A” and Point “B” on the Plan).
6. It is the claimants’ case that the true line of the boundary within the Disputed Section is the line which bulges out on the eastern side of the Red Line immediately to the left of caravan No.5 (shown in blue in the colour version of the Plan). For ease of reference, I will call this the “Blue Line”.
7. It is common ground that the predominant physical feature which marks the boundary is a line of trees. The catalyst for this dispute was the removal by the defendants of a substantial amount of trees, shrubs and other growth on, or towards the eastern side of, the boundary. Some of this (adjacent to the Middle Section) occurred in about April 2021. Of direct relevance to this action, it occurred adjacent to the Disputed Section in about September 2021.
8. The removal of these trees and other growth had the result of creating gaps in the screen of foliage that had by then built up between the two parcels of land so that the claimants

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could see the caravans on the defendants' land and, perhaps more importantly to the claimants, the claimants' house could be seen from the defendants' land.

9. The claimants contend that the trees cut down by the defendants formed part of the boundary in the Disputed Section, and were thus in the joint ownership of the parties. It is common ground that if that is what the Defendants did then it was done without consent and constituted a trespass. The defendants contend that the trees they cut down were wholly on their own land, to the east of the boundary. They contend that the trees that remain (as shown by the circles marked on the Plan) constitute the boundary.

Evidential sources

10. Ordinarily, the starting point for determining the boundary between two parcels of land is the conveyance by which the separate parcels were created. In this case, however, the conveyance by which Ty Chwarel and Castleton were divided into separate parcels is lost in the mists of time. The oldest conveyance that has been found dates from 1928, and relates to a sale of Ty Chwarel, which by then already existed as a separate parcel.
11. The parties agree that the Land Registry title plans are subject to the "General Boundaries Rule" (i.e. the boundaries identify only the general position, and not the exact position, of a boundary feature). They are also agreed that ordinance survey maps do not show the exact location of boundaries, and that the plans annexed to the 1928 conveyance of Ty Chwarel, and a conveyance in 1985 of Castleton, are too indistinct to provide any help in resolving the dispute in this case.
12. In these circumstances, it is necessary to have regard to such evidence as exists of any topographical features marking the boundary between the properties, which it is inferred existed at the time of the conveyance when the land was divided into the two parcels.
13. The parties each instructed an expert building surveyor to assist in this process. The claimants' surveyor, Mr Roger North, produced a report in which he concluded that the boundary lay along the Blue Line. The defendants' surveyor, Mr Rhys Jones, produced a report in which he concluded that the boundary lay along the Red Line.
14. After a meeting between the experts, however, Mr North changed his mind. He accepted that the method by which he reached his conclusion – overlaying a survey of the current land on an ordinance survey map – is flawed. He now agrees with Mr Jones that the boundary in the Disputed Section lies along the Red Line.
15. Mr Jones has not been called to be cross-examined and his evidence is not challenged. His conclusion is based principally on the analysis of various aerial photographs which have been taken from time to time (and to which I refer in more detail below).
16. The reports of the experts are useful, to the extent that they identify and collate potentially relevant evidence in the form of ordinance survey maps, plans from prior conveyances and photographic evidence, and provide an explanation as to why much of that evidence is of no assistance. I do not think, however, that their conclusion (essentially, that is, the conclusion of Mr Jones with whom Mr North now agrees) constitutes admissible expert opinion. The ultimate question in this case is where the boundary lies. That is a question of fact to be determined by the Court. Expert evidence

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may be of assistance insofar as it consists of matters of “scientific, technical or other specialised knowledge which are outside the judge’s expertise” (*TUI UK Limited v Griffiths* [2023] UKSC 48; [2023] 3 WLR 1204, per Lord Hodge at §36. There does not appear to be any particular specialised knowledge which the experts have brought to bear in expressing their conclusion based on the evidence they have collated. Accordingly, I am not bound to accept their conclusion, but must analyse the evidence myself in order to decide where the boundary lies.

17. Witness statements were provided by Mr Charlton, the first claimant, and four witnesses who gave evidence on his behalf: (1) Julie Edwards, who lived at Ty Chwarel from 2000 to 2018; (2) Julie Pritchard, who has kept horses on the land belonging to Ty Chwarel since 1994 and lived in a caravan at Castleton from 1989 to 1994; (3) Caradag Fox, an arborist who undertook work at Ty Chwarel in 2021 and in 2022; and (4) Edward Jones, a friend of Mr Charlton, who visited Ty Chwarel in around January 2020 in order to advise on whether it would be safe to shoot on his land. Each of these attended for cross-examination.
18. Witness statements were provided by the first two defendants (William Forrest and Matthew Forrest) and two others: (1) John Watters, who has lived at Castleton for 16 years and (2) Michael Higgs, who in 2021 undertook work in clearing away trees and foliage and building a fence for the defendants in the area adjacent to the Middle and Disputed Sections.
19. For reasons I develop below, the evidence from the witnesses of fact is of peripheral, if any, relevance in determining the location of the boundary. Of principal relevance is the evidence, insofar as it survives, as to the historical location of the boundary, in particular aerial photographs and early ordinance survey maps.

Aerial photographs and ordinance survey maps

20. The earliest photograph of the boundary is an aerial photograph dated 25 September 1945. At that time, although the two properties existed as separate parcels of land, they were under the common occupation of the military.
21. In the area adjacent to the Northern Section, there is a wide access point between the two properties, which strongly suggests that at that time the land at that part of the boundary was flat. As Mr Hughes, who appeared for the claimants pointed out, however, if there had been any existing boundary feature in that area it had probably been removed by the military.
22. Various buildings are dotted over both sites. Those on what is now the defendants’ land have long since gone. One of the buildings on what is now the claimants’ land appears still to be there, however, and is identified as Concrete Bunker No.1 on the Plan (the “Bunker”), situated at an angle slightly to the left of the Red Line adjacent to caravan No.3.
23. Starting immediately to the south of the cleared space (adjacent to the Northern Section), the photograph shows a single line of trees, running slightly to the south-east of a southerly direction. The line of trees is, however, not continuous, there being a number of gaps in it.

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24. The earliest surviving record of a boundary is on a second edition of the ordinance survey sheet reference XLIK N.E. dated 1900. This shows a broadly straight line running southwards from Castleton Road, but with a dog-leg in it (so that it shifts slightly to the east) at a point which appears to be in the region of the join between the Northern Section and the Middle Section.
25. A similar boundary is shown on an Ordinance Survey sheet, ref: XLVIII dated 1951, showing a roughly straight line running south from Castleton Road, with a dog-leg in the same place as on the 1900 Ordinance Survey sheet. The 1951 version, however, includes a number of buildings on the eastern side of the boundary in the same positions as shown on the 1945 aerial photograph.
26. There is no evidence that there was originally a man-made boundary such as a dry stone wall or fence. The most likely inference, from the available evidence is that in 1945 the boundary consisted of the row of trees that can be seen in the photograph from that year. In the absence of any other evidence, I infer that this was the line of the boundary when the land was divided (at some point in the 19th Century) into the two separate parcels.
27. The critical question, then, is where – on the Plan showing the land as it stands today – is the line upon which the tree-line stood in the 1945 photograph.
28. The evidence most relevant to this question consists of subsequent aerial photographs, showing the same tree line with varying degrees of clarity at points in time since then.
 - (1) An aerial photograph dated 11 July 1956. This also shows what appears to be a single line of trees in roughly the same place as the 1945 photograph, with similarly placed gaps. This photograph is taken at a slight oblique angle, so that greater care is needed in interpreting it.
 - (2) An aerial photograph dated 22 May 1969. It is harder to make out the features on this photograph, but it still appears to show a single line of trees in roughly the same place as in the earlier photographs. It additionally shows, however, increased vegetation spreading eastwards onto the defendants' side of the tree line.
 - (3) An aerial photograph dated 30 July 1981. This continues to show a single straight line of trees, which now appears to extend northwards to meet the boundary of the road. This also shows additional trees/shrubs planted in various places to the east of the tree line, on the defendants' land.
 - (4) An aerial photograph dated 30 September 1991. This shows the same line of trees, in a relatively straight line until it reaches the southern end of the defendants' land, when it curves back to point in a southwards direction. This photograph shows more extensive growth of trees and vegetation in various place to the east of the tree line, particularly in the area which is now adjacent to the Disputed Section. It also shows the Bunker being surrounded by much increased vegetation, so as to narrow the gap between the Bunker (plus the vegetation growing around it) and the west side of the tree line.
 - (5) A google-earth photograph from 2001. This shows even more growth eastwards from the tree line, some distance into the defendants' land, particularly adjacent to

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the Disputed Section. It also shows considerably more growth around the Bunker, such that it is difficult to make out the gap between it (plus the vegetation growing around it) and the west side of the tree line.

- (6) Another google-earth photograph from 2018 shows a similar picture, although some of the trees to the east of the tree line in the Disputed Section have by this time been removed. The extent of the growth around the Bunker is such that there appears to be virtually no gap between it and the tree line. Both the google-earth photographs are taken from a slightly oblique angle, compared with the other aerial photographs and need to be treated with some caution.
- (7) An aerial photograph dated 2022, which identifies the configuration as it currently exists (except that it was taken before caravan No.5 was erected). This continues to show a relatively straight line of trees, but all growth to the eastern side has been removed. As with the 2018 google-earth photograph, there is no discernible gap between the Bunker (and the vegetation around it) and the western side of the tree line.

The witness evidence

29. None of the witnesses can speak to the true position of the boundary. They have all come to the land long after the boundary was established. The most that any of them could speak to was their opinion of where the boundary lay, based on their knowledge of physical features of the area within which the disputed boundary sits within the relatively recent past.
30. That is equally true of the two main protagonists – Mr Charlton and Mr William Forrest. While each has a strong opinion as to where the boundary lies, neither knows where it actually is. Until this action, they had not had reason to investigate the historical evidence presented at trial as to the location of the boundary.
31. The claimants relied on the previous actions of the defendants in relation to the Northern Section and Middle Section to establish a pattern of behaviour, by which the defendants took what they wanted without asking, to see what they could get away with. Mr Hughes submitted that this was what the defendants had done in the Disputed Section: they cavalierly cut down trees despite knowing that this encroached on the boundary, while saying to Mr Charlton: “I’ll do what I like and if you don’t like it, you can take me to court. And, I warn you, I’m not short of a bob or two.”
32. None of this evidence assists, however, in deciding the central issue in this case, where – as I have explained – neither side knew, or realistically could know, where the boundary actually lay. In these circumstances, the defendants’ conduct in taking steps without first discussing it with the claimants, was high risk, but then so was the claimants’ action in causing both sides to incur the costs of litigation.

Conclusions

33. A main point of dispute between the witnesses was the extent to which the trees which marked the boundary sat upon a “mound” or “embankment”. The claimants contend that it did, but that it was removed by the defendants in the course of digging out so as to build the fence to the west of caravans No. 4 & 5. They contend that the experts’

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conclusions are flawed because they are based only on the physical features that remain *after* the defendants have cut away trees and dug into the mound.

34. The claimants' case is essentially that, accepting that the boundary ran along the mid-point of the single line of trees shown on the 1945 photograph, since then further trees have grown up on *both* sides of that tree line. In particular, by the time they came to purchase Ty Chwarel in 2018, there was a double line of trees along the length of the boundary: one (to the eastern side) was on the mound, and was the actual boundary, whereas the other (to the western side) was a secondary line of trees that had grown up over time and was wholly on the claimants' land. Accordingly, when the defendants cleared away trees and undergrowth in 2021, leaving just a single line of trees, they cleared away the tree line that formed the boundary, leaving only the secondary line of trees on the claimants' land.
35. The evidence of the witnesses as to the "mound" was somewhat inconsistent. Mr Charlton referred to the mound being about a metre high and between 1.5 and 2.5 metres wide. He – alone among the claimants' witnesses – also referred to there being two parallel mounds, a smaller one on his side of the boundary, and a larger one to the east, on which there was much greater and well-established growth.
36. Mrs Edwards said that when she purchased Ty Chwarel she considered that the boundary consisted of a thick hedgerow atop a mound. In particular, she referred to a tall mound – approximately a yard high and two yards wide, in the Northern Section, with a thick line of mature trees/hedgerow growing through it. That, however, is something which had been put in place since 1945, because the boundary at the Northern Section at that date crossed an open, flat area.
37. Ms Pritchard referred to a mound that was about two and a half feet tall and about two feet wide. On top was a hedgerow, although in places this had grown into substantial trees.
38. Mr Jones said that he recalled from his visit in January 2020 that the boundary consisted of a small copse and a mound, 6ft high and 4-5 metres dense.
39. The defendants accept that there were various piles of earth, ash, debris and branches that might be called "mounds" in various places in the vicinity of the boundary, but they deny that there was a continuous mound or embankment running north to south along the boundary. They certainly deny digging out any such mound or embankment when putting up the fence to the west of caravans No.4 & No.5.
40. I accept, as Mr Charlton and the witnesses called by him said, that at various points along the boundary (and along the boundary between Ty Chwarel and the Welsh Assembly land) there was something that could be described as a mound or embankment, and at certain points along the boundary there was (as seen from his land) a considerable rise in the ground in the vicinity of some parts of the tree line. I do not accept, however, that there was a continuous embankment along the boundary marked by the tree line.
41. The picture is complicated by the fact that the respective levels of the claimants' and the defendants' land along the boundary vary over its length. At some points the defendants' land is higher. As noted above when discussing the 1945 aerial photograph,

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however, the land was then broadly flat across the boundary at the Northern Section. It also appears to be the case (according, in particular, to the evidence of Mr Higgs which was not challenged on this point) that the ground levels of Welsh Assembly's land and the claimants' land (beyond the southern boundary of the defendants' land) are roughly the same: at this point the land generally slopes away down towards a stream or river at the bottom of the valley.

42. It is common ground that in the Middle Section, adjacent to caravan No.3 there is a rise up to the tree line from both sides. Mr Higgs, who has no interest in the case and could speak directly to what he did when putting in place the fence that runs along the eastern side of the Red Line, said that he erected the fence at that point further to the east than the remainder of the fence (as it continues southwards) precisely because it would have required the mound around the trees to be dug out.
43. Importantly, however, Mr Higgs said that the same mound did not continue southwards, so that from a point adjacent to caravan No.4 and beyond he was able to erect the fence a yard or so further to the west (with a dog-leg build at the join between the two sections). This suggests that if there was any mound at all at the Disputed Section it was different from, and smaller than, the mound that existed further north.
44. Having regard to all the available evidence, I do not think there was a clear, consistent mound or embankment across the length of the boundary. Ultimately, however, for the reasons I set out below, I do not think that the location of the boundary is dependent on the location and extent of such a mound.
45. Nor do I think there is much assistance to be found in the various ground level photographs said to show two levels of trees, one shorter (on the claimants' side) and one more substantial and taller (on the defendants' side). There was no doubt – as the aerial photographs described above show – that prior to the work undertaken by the defendants there was substantial growth to the east of the boundary. Looking eastwards from the claimants' land it is difficult to distinguish between a second *row* of trees, and a general growth of trees, standing behind the row in the foreground of the photographs.
46. Where a boundary was created, as in this case, more than a century ago, by reference to a row of trees, it is highly unlikely that the original trees survive. Over the years, as one tree falls or dies, and another grows up, a line drawn between the mid-points of the trees in the line will inevitably be subject to minor variations. The identification of the boundary today, therefore, is not an exact science.
47. Taking, for the reasons I set out at paragraph 27 above, the position of the tree line in the 1945 photograph as the boundary, I have concluded that the best approximation of where the boundary sits through the Disputed Section on the land today as shown on the Plan is indeed on the Red Line.
48. This is based principally on a careful review of the aerial photographs, from which I draw the following conclusions.
49. First, in all of the photographs, the western side of the tree line forms a relatively straight line.

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50. Second, for most of the length of the boundary, in the photographs up to and including 1991 it appears to consist of a single line of trees.
51. Third, all of the additional trees and vegetation that has grown up over the years appears to me to have occurred on the eastern side of the boundary, so that, whereas the western side continues to run in a relatively straight line, the eastern side bulges further east in a number of places, particularly in the Disputed Section. The only exception to this is that considerable vegetation has grown up around the Bunker, narrowing the gap with the western side of the tree line. Even then, however, the additional growth is outward from the Bunker, rather the tree line extending further west.
52. This suggests that it is the western edge of the tree line that has remained constant through time: in other words the single tree line in the earlier photographs is the western part of the sometimes broader and more varied line of trees in more recent times.
53. Of particular importance, in my judgment, is the fact that the western edge of the tree line in the 1945 photographs appears to be in a straight line along that part which represents the join between the Middle Section and the Disputed Section on the Plan. The claimants accept that the single line of trees that still runs through the Middle Section – particularly that part of it which is adjacent to caravan No.3 and the area between it and caravan No.4 – does accurately represent the boundary. On the claimants case, the boundary as it continues southwards from that point would then deviate from a straight line quite considerably. That appears to me to be less consistent with the appearance of the tree line on the 1945 (and subsequent) aerial photographs. Conversely, it is more consistent with the boundary being upon the Red Line through the Disputed Section.
54. Accordingly, on the central issue as to the location of the boundary, I find in favour of the defendants. The claim in trespass therefore falls away.

ANNEX

