



[2017] UKFTT 0884 (PC)

REF/2016/0772

**PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL**

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Edwin Harold James Sparrow

APPLICANT

and

Kuldeep Kaur

RESPONDENT

**Property Address: 130 and 132 Stonefall Avenue Harrogate HG2 7NT
Title Number: NYK58493 NYK376469 NYK418597**

ORDER

Upon hearing the solicitor for the Applicant, and the Respondent in person assisted by her daughter

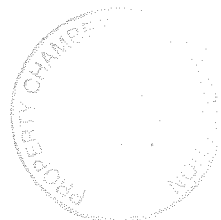
IT IS ORDERED as follows:

The Chief Land Registrar is to cancel the Applicant's application dated 16 October 2015 for a determined boundary.

Dated this 16 November 2017

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL





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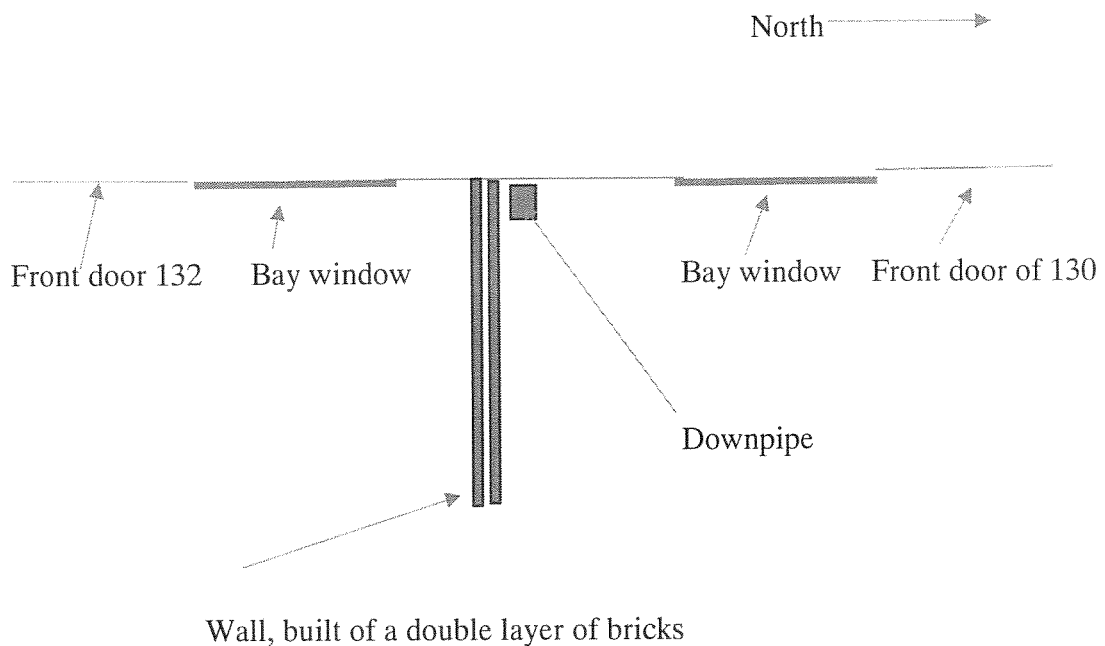
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DECISION

1. Stonefall Avenue is in Starbeck, a little way outside the centre of Harrogate, and is lined with terraced houses built of the dark stone that is so characteristic of this town. The Applicant, who is the registered proprietor of number 132, has applied for a determined boundary between his front garden and that of his neighbour, the Respondent, who is the registered proprietor of number 130.
2. The houses in Stonefall Avenue all conform to a pattern. Each has a bay window next to the front door, and the fronts are mirror images so that the front doors are in pairs.

The bay window at the front of one house is separated from the bay window of the next by some flat brickwork, on which there is a downpipe. So as one walks down the road, as I did prior to the site visit on 1 November 2017, one sees bay window, front door, front door, bay window, flat brickwork with downpipe, bay window and so on. The front gardens all have a fence, wall or hedge between them, between the pairs of doors and the pairs of bay windows. The downpipe appears to be in line with the centre of the pair of chimney pots on the roof.

3. The fronts of numbers 130 and 132 therefore look like this:



4. Number 130 is to the north of number 132. Where I refer below to left and right, for example to the left-hand layer of brickwork in the wall, I do so as if looking at this diagram, with north to the right.
5. The Applicant has asked for the boundary to be determined as a line bisecting the downpipe. The Respondent says that the boundary lies just to the south of the wall she has recently built, where the Applicant's fence stood from 1991 to 2012.
6. After the site visit on 1 November 2017 I heard the parties at the Justice Centre in Harrogate the following day. The Applicant was represented by Mr Dominic Crossley

of counsel; the Respondent was represented by her daughter Miss Kaur. I am grateful to both representatives for their clear and helpful arguments.

7. In the paragraphs that follow I summarise the relevant law, set out the evidence, and explain why I have found in favour of the Respondent and have directed the registrar to cancel the Applicant's application.

The law

8. Boundaries are shown on title plans at HM Land Registry by a red line, which indicates a general boundary and not a precise one. The red line, scaled up, may represent a strip of land a metre wide or more. It is possible to have a precise boundary registered instead, known as a determined boundary, by following the procedure set out in section 60 of the Land Registration Act 2002.
9. Where a determined boundary is applied for, the neighbouring registered proprietor will be notified by Land Registry and has the opportunity to object, as the Respondent did in this case. Where a dispute cannot be resolved by agreement the matter must be referred to the Land Registration Division of the First-tier Tribunal pursuant to section 73 of the Land Registration Act 2002; the tribunal will examine the title to the properties and decide whether the boundary lies where the Applicant says it does: *Bean v Katz* [2016] UKUT 168 (TCC). In most cases, as in this one, that can only be done by deciding where the boundary is.
10. In doing so I must apply the legal principles set out by the higher courts over the years. The judge is to start with the deeds where title is unregistered, or the registered title plan where applicable. The title plan of course shows a general boundary, and pre-registration deeds may not be any more helpful. Accordingly, as Lord Hoffmann put it in *Alan Wibberley Building Ltd v Insley* [199] UKHL 15
“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.”
11. In this case no pre-registration deeds are available. The only boundary features that exist or are known to have existed in the front garden date from long after the houses were built and the boundary created.

The evidence

The Applicant's evidence

12. The Applicant's evidence was that number 132 belonged to his mother from 1947 to 1997, when she died and he inherited the house. He says that in 1991 number 130

belonged to a Mr and Mrs Earnshaw. Until then the properties had been divided at the front by a hedge, whose centre point was where the drainpipe is. In 1991 he recalls a conversation with Mr Earnshaw who said that he could no longer maintain the hedge, due to age and infirmity. The Applicant, who was not there all the time because he was a musician and often on tour, suggested that he (the Applicant) put up a fence on his side of the hedge, so that it would not matter what happened to the hedge. It was agreed that he would do so. His evidence is that:

“The fence was positioned approximately 40cm away from the centre line of the hedge, and it was agreed between the Applicant and Mr and Mrs Earnshaw that the fence did not and would not represent the boundary line.”

13. So the Applicant built the fence – in some haste, he says – and a few months later the Earnshaws had the hedge taken out.
14. So matters stood until 2012.
15. In 2012 the Respondent bought the property. Mr and Mrs Earnshaw had died, and their daughter Mrs Terry sold the house to them. At around this time the Applicant removed his fence, which was falling to bits. The Respondent then had a lot of work done indoors and outside. She also had low walls put up at the two sides of the front garden. The one to the north, at the boundary with number 128, does not concern us; the trigger for the current dispute was the wall to the south, next to the Applicant’s garden.
16. The Applicant says that the Respondent built two walls, one in August 2013 along the line of his former fence and the second one a month later, further into his garden. He says that when the Respondent’s builders started to build the first wall he protested and said the wall was on his land; when the second wall was built he had a solicitor’s letter written requiring the removal of the walls. As the dispute could not be resolved he made an application for a determined boundary and the matter was referred to this tribunal.
17. The plan attached to the Applicant’s determined boundary application was produced by a surveyor, Mr Peter Campkin, who has sadly died since he produced the plan. Neither party asked permission to call an expert witness; and in any event Mr Campkin did not make any formal report or witness statement. In the hearing bundle is his letter to his client which states that in Mr Campkin’s opinion the boundary lies at the midpoint of the downpipe; but the letter does not say why. I take the view that Mr

Campkin could not have given any useful evidence even if he had been able to be present.

The change in the Applicant's evidence after the site visit

18. I mentioned above that I attended a site visit on 1 November 2017. The Applicant was present, without his legal representatives, and the Respondent's daughter was present but not the Respondent.
19. I observed at the site visit that the Applicant described as two walls could equally be described as a double wall, with a gap of a few inches between the two layers of brickwork; the two walls or layers were joined together with mortar in places.
20. I also observed and remarked on traces of what appeared to be the fitting that used to attach the fence to the house between the two bay windows, some eight inches to number 132's side of the downpipe. The Applicant and Miss Kaur agreed that that was what I was seeing. I said to them, and they agreed, that the right-hand layer of brickwork – whether referred to as a layer of one wall, or as one of two walls – does not appear to be on the former fence line and that the left-hand wall, or layer of brickwork, is in line with the fixture on the wall. At the hearing Mr Crossley indicated that that was agreed. A photograph in the bundle shows the remains of one of the Applicant's fence posts to the south of a wall; the Applicant thought (and I initially thought) that the wall visible in that photograph was the right-hand layer of brickwork, Miss Kaur confirmed that she took the photograph and that the remains of the fence posts are to the south of the two layers of the double wall. I accept her evidence.
21. So there is no question of either layer of the double wall being further into the Applicant's garden than his own former fence. It remains, of course, the Applicant's position that the wall is on his land because he regards the boundary as being in line with the down-pipe and the centre line of the chimney stacks above, and therefore to the left (south) of the double wall.

The Respondent's evidence

22. The Respondent's evidence was necessarily limited by the fact that she did not know the property before the autumn of 2012. She does not challenge the Applicant's evidence that he put the fence up in 1991, nor does she challenge his statement that there was a fence, but of course the hedge was long gone before she bought. The fence was still there when she bought.

23. As to the wall, the Respondent's evidence is that the work on the wall is incomplete (as is evident on inspection); she intends to put some railings along the top but the dispute has prevented her from doing so.
24. At the site visit I observed that the downpipe, together with the guttering at the front of number 130, are painted white. The white paint ends to the left – number 132's side – of the downpipe, perhaps eight to twelve inches away and therefore in line with where the fence used to be (to the left of the double wall). I also observed that the roof tiles of the little roof above the ground floor are of two different types; the Applicant said at the site visit and at the hearing that the tiles had been like that since the 1960s. The interface between white and black paint on the gutter is roughly in line with the change in the roof tiles.
25. At the hearing I asked the Respondent if she had replaced the downpipe as well as the gutter, and she said she had. At that stage the Applicant had finished giving evidence and I asked Mr Crossley if he wished to recall his client to give evidence on that point, but Mr Crossley confirmed that the Applicant agrees that the Respondent replaced the downpipe.
26. The Respondent called Mrs Diane Terry to give evidence; she is the daughter of the late Mr and Mrs Earnshaw and managed the sale to the Respondent in 2012. Her evidence too was limited; she was not living at number 130 in 1991, having married and left home. She could only say that she recalls the Applicant's fence, and that she does not recall any issue or agreement between her parents and the Applicant about the boundary.

Conclusion

27. I have to apply the law to the evidence. So I begin with the registered title plan for the Applicant's property. It is of no assistance. The boundary is a straight line, but it is a general boundary; the line on the plan represents a line one metre thick or more on the ground. The true boundary may not be completely straight.
28. Accordingly I turn to the physical features on the ground. They are of no assistance. It might be thought that the boundary would be exactly halfway between the two houses, or exactly halfway between the two bay windows, but I do not have evidence that tells me exactly where that point is although visually it appears to be roughly where the downpipe is. That said, it is not at all obvious that the centre of the downpipe would have been intended (by the parties who created the boundary) to be the boundary, and it is more likely that the boundary would lie on one side or other of the downpipe so

that the pipe – and the drain that runs under the garden out to the pavement at the front – can be in single ownership.

29. The law requires me to look at the conduct of the owners of the houses over the years insofar as it sheds light upon the intentions of those who first created the boundary, but no light is shed upon those intentions by anyone's subsequent behaviour.

30. The law recognises that where a boundary is unclear, the spoken or unspoken agreement of neighbours may resolve the uncertainty (*Nielson v Poole* (1969) 20 P & CR 909 where Megarry J said at page 919:

“a boundary agreement is, in its nature, an act of peace, quieting strife and averting litigation, and so is to be favoured in law. I also bear in mind that many boundary agreements are of the most informal nature.”

31. As one walks down Stonefall Avenue it is impossible not to notice that although the same pattern of windows, doors and downpipes can be seen all along the road, different decisions have been taken by pairs of neighbours as to where the boundary lies. Between some houses there is a fence or railings that abut directly to the downpipe. Between some there is a wall that sits to one side of the boundary. In several cases there is a hedge that extends to either side of the downpipe; and I note, as a matter of commonsense, that people generally regard a hedge as belonging to one house or the other. I do not regard the presence of a hedge between two front gardens as an indication that the boundary is at the mid-point of the hedge; it is more likely that the hedge is regarded as being in single ownership and as being the responsibility of one neighbour and not the other.

32. I find that that was the case between numbers 130 and 132 up to 1991; the hedge seems to have been regarded as the Earnshaws' responsibility, although Mr Sparrow – who was not then the owner of number 132 – says he cut it back now and then, and I accept that. But it is striking that the Applicant's response to the Earnshaws' difficulty about the hedge was not to suggest that it be uprooted and a fence built along what he says is the boundary. Instead he put up a fence to one side of the hedge. The hedge was then removed; but the fence remained in place for over 20 years. So the only visible demarcation between the front gardens of the two houses was the Applicant's fence. In no sense can it be said that the Applicant and the Earnshaws treated the boundary as being the centre line of the non-existent hedge; instead they treated the boundary as the fence, and I take the view that they did so because by 1991 it was

already well-established that the hedge belonged to number 130 so that the boundary lay on the south side of it.

33. I also note that when Mrs Kaur moved in, in 2012, the Applicant did not tell her that the boundary was in line with the downpipe. Nor, when he took his fence down in 2012, did he reinstate a fence or other boundary feature where he now says the boundary lies. Nor is there any suggestion that he protested when the Respondent replaced the downpipe and painted the gutter for several inches to the left of the downpipe.
34. Accordingly while I accept the rest of the Applicant's evidence I do not accept that there was any agreement about the boundary in 1991. Even if there had been, it would be difficult to say what the effect of that agreement would have been when Mr Sparrow was not the owner of the property. But at any rate I do not accept that there was any agreement, nor do I accept that Mr Sparrow or the Earnshaws regarded the boundary as being in line with the downpipe. The position of the hedge, the practice as to its maintenance, and the position of the change in the rooftiles all indicate to me that the neighbours had – tacitly or expressly – agreed long before 1991 that the boundary lay to the south of the downpipe, and that that was why the Applicant put up his fence at that point. His own subsequent behaviour, up until August 2013 (set out in the preceding paragraph), is entirely consistent with his having understood that that was where the boundary was.
35. It follows as a matter of law, in the light of the case-law relating to express and unspoken boundary agreements, that that is where the boundary is. It does not lie on the line now put forward by the Applicant, and I have directed the registrar to cancel his application.
36. The Respondent is in principle entitled to her costs, and if she wishes to apply for costs she is to do so with 28 days of the date of this decision. The Applicant will then have 28 days to reply, and the Respondent will then be able to respond in turn.

Dated this 16 November 2017

Elizabeth Cooke

BY ORDER OF THE TRIBUNAL

