



[2018] UKFTT 448 (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 2017/0247  
BETWEEN**

**CHRISTOPHER ALEXANDER SAUNDERS**

**Applicant**

**and**

**ROBERT BURKETT  
VICTORIA BURKETT**

**Respondents**

**6 Woodland Drive and 8 Woodland Drive, Thorpe End NR13 5BH  
Title number: NK238162**

**Before: Judge McAllister  
Norwich Magistrates Court  
29 June 2018**

**Representation: The Applicant appeared in person; Amit Karia of Counsel instructed by Rollingsons Solicitors appeared for the Respondents.**

## **DECISION**

### **Introduction**

1. The Applicant, Mr Saunders, is the registered owner of 6 Woodland Drive, Thorpe End ('Number 6'). The Respondents, Mr and Mrs Burkett, are the registered owners of the adjoining property, 8 Woodland Drive, Thorpe End ('Number 8').

2. The dispute between the parties relates to part of the eastern boundary of Number 6 and the western boundary of Number 8. By an application dated 14 September 2016 Mr Saunders applied to Land Registry for a determined boundary along the entire length of the boundary. The plan relied upon ('the Plan') is dated August 2016 and was prepared by Anglia Land Surveys Ltd ('ALS').
3. There is no dispute between the parties relating to points B to L. This line follows the centre line of the hedge marked by a number of angle bar posts, and the remains of such posts. The boundary in dispute is marked A -B. This is at the northern end of both properties, closest to Woodland Drive. The line contended for by Mr Saunders is the middle line of a row of beech trees which were felled in September 2014, as he recalls the line. This line is not a straight line, but veers slightly to the west. The line contended for by Mr and Mrs Burkett is a line drawn north from a concrete post and fence further south. It is said that this line corresponds to the outside of the row of trees. The gap between these two competing lines is between 9 and 11 inches.

#### **Requirements for a determined boundary application**

4. As is well known the boundary marked on a title plan is a general boundary only (section 60(1) of the Land Registration Act 2002) ('the Act'). Section 60(2) provides that a general boundary does not determine the exact line of the boundary. An application can be made under section 60(3) for a determined boundary. The relevant rules are set out in Rule 118 -120 of the Land Registration Rules 2003. The Land Registry publishes a number of Practice Guides. Practice Guide 40 is a detailed guide dealing with land registry plans. A supplement to this guide states that where an application to fix an exact boundary is by reference to a plan using measurements, those measurements must be accurate to  $+ / - 10$  mm.
5. In the event that such an application is made, and a dispute arises, the matter is referred to the Tribunal under section 70(3) of the Act. The jurisdiction of the Tribunal has been considered in a number of cases and most recently in the decision of Morgan J, sitting as a Judge of the Upper Tribunal, in *Lowe v William Davis Limited* [2018] UKUT 0206.

6. It is now settled that, in the event that the Tribunal is not satisfied that the boundary is as shown on the application plan, it may nonetheless make a finding as to the true position of the boundary. Morgan J rejected the contention that once the Tribunal concludes that the plan is inaccurate, it no longer has jurisdiction to make a decision as to the location of the boundary, and found that *Bean v Katz* [2016] UKUT 168 was altogether more persuasive than *Murdoch v Amesbury* [2016] UKUT 3. It is open to the Tribunal to decide all the matters in dispute; its jurisdiction is not limited to deciding whether or not the applicant's plan is accurate. Pursuant to Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal may include a direction to the registrar to give effect to the application in 'whole or in part' and may add a condition to its direction.
7. The Tribunal, therefore, is not limited to accepting either the boundary put forward by the Applicant or the Respondent. It is open to the Tribunal to find that the boundary is either wholly or partially elsewhere.

#### **The location of the boundary: background and evidence**

8. Both Number 6 and Number 8 are large detached properties built as part of an estate in the 1930s. The root conveyance of Number 6 is dated 13 August 1934. The first conveyance I have seen of Number 8 is dated 15 September 1938. It is plainly not the root conveyance.
9. The parcels clause in the 1934 conveyance is as follows: '*ALL THAT plot or parcel of freehold land situate and being in the Parish of Great Plumstead in the County of Norfolk and forming part of the estate belonging to the Vendor and known as 'The Thorpe End Estate' (formerly the Mousehold Farm) as the said Plot of land forms part of the enclosure numbered 60 on the Ordnance Survey Map for the said Parish and is with the dimensions boundaries and abuttals thereof more particularly delineated in the map or plan drawn hereon and thereon surrounded by a red verge line and distinguished by the number 76 the said plan being for the purpose of identification only and not of limitation or warranty...*'
10. Almost identical wording is used in the parcels clause of the 1938 conveyance, save that the words 'more particularly delineated' are omitted and the plan is stated to be

for identification purposes only. The use of the rubric ‘more particularly delineated’ and ‘for identification purposes only’ has been said to be ‘mutually stultifying’ (*Neilson v Poole* (1969) 20 P&CR 909) but, as explained below, even in such cases the court may have recourse to the plan.

11. The plan attached to the August 1934 plan, the September 1938 plan, and the plan attached to the conveyance dated 12 December 1941 ( showing what I believe are now s numbers 10 and 12) all show the boundary between the properties as a straight line. It is clear, and not surprising, that all the plots on the newly developed estate were rectangular in shape, and that the boundaries between the various plots were straight.
12. The dimension of Number 6 are shown at the northern (front end) as 56’, and that of Number 8 as 55’.
13. It is also worth noting the fencing covenant set out in the August 1934 conveyance at clause 8 of the second schedule. This provides as follows: *‘The Purchaser shall within three calendar months after the date of this conveyance and for ever thereafter maintain at his own expense good boundary fences in the front and rear of the sides of each plot. In the case of division fences the responsibility to erect shall be upon the Purchaser the boundary of whose Plot is marked inside with a ‘T’. All fences shall be made to the satisfaction of the Vendor. Front fences shall be a bank of earth three feet six inches in height planted with a privet hedge. All other fences shall not be less than three feet six inches in height’.*
14. The ‘T’marks in the respective conveyances make it clear that the responsibility for fencing the eastern boundary of Number 6 lies with Number 8. The 1938 conveyance refers to five earlier conveyances, and provides that the purchaser of Number 8 takes subject to restrictions stipulations and conditions contained in those conveyances. A fencing covenant in the same terms as those set out above was no doubt included in the root conveyance to Number 8.
15. Mr and Mrs Burkett purchased Number 8 in 1985 or thereabouts. They were registered as proprietors on 1 October 1999. Mr Saunders purchased Number 6 in July 2011 and moved into the property on 2 February 2012.

16. Prior to 2013 there were a number of trees on the disputed boundary. Mr Saunder's evidence (which is not disputed) is that there were 4 conifers planted in the border of Number 6, and a dense row of beech trees about 15 to 18 metres long was planted to the east of these trees on what was assumed to be Number 8's land. The beech trees, on his evidence, all appeared to have a central alignment which continued through a very large and tall laurel hedge, then along side a modern garage (leaving a gap of some 500-700mm) and finally a box hedge to the end of the eastern boundary.
17. So far as Mr Saunders was concerned, therefore, the boundary was marked by the row of beech, laurel and box. A sketch prepared by Mr Saunders on 27 June 2013 (and accepted as accurate by Mr Burkett) shows the beech trees inside Number 8's land (marked T1 to T8). T1 is the most southern tree, closest to, but not in line with the concrete fence. A further 4 conifer trees are shown on Number 6's land. Mr Saunders has drawn the boundary on the outer edge of the beech trees. In a covering note he stated that '*[the beech trees] .... Appear to belong to owners of No 8 Woodland Drive as they have been planted in a line conducive to the boundary which is clearly stated within the Title Deeds as belonging to No 8..... trees: T8-9-10 & 11 [the conifers] these appear to be planted in parallel alignment slightly west so possibly belonging to me*'.
18. The beech trees were planted before 1985 (when Mr and Mrs Burkett purchased Number 8) by their predecessors in title. In a report obtained by Mr Saunders' loss adjusters in April 2014 the beech trees were marked as 'early mature'. This evidence suggests that they were not planted at the time of the first conveyances. The conifers were planted, it seems, before 1999/2000 by Mr Saunders' predecessors in title.
19. Mr and Mrs Hancy owned Number 6 from 1997 to 2005. I have seen a letter from Mr Hancy dated 24 November 2015, and although he did not attend to give evidence, I have no reason to doubt its accuracy, which is in any event not challenged (though Mr Karia made submissions as to how I should construe the letter in relation to the fence erected by Mr Hancy).
20. The letter states that before 1999/2000 there was a corrugated tandem garage in the grounds of Number 6. This was built close to the eastern boundary. Mr Hancy demolished this garage and replaced it with a double garage and workshop in about

2000. At the same time as he did so, he erected new concrete posts and panel fencing with gravel boards in front of the garage along side the eastern boundary. This fence is some 15.5 metres long. Mr Hancy states in terms: *‘ the fence was positioned from the corner of the garage convenience and aesthetics with the entrance porch spanning the drive and does not probably reflect accurately the actual boundary line and is further away from the boundary than it needed to be’.*

21. I have seen a number of photographs showing the demolition of the garage and the new garage and panelled fence. These photographs were given to Mr Saunders by Mr Hancy.
22. The conifer trees were removed by Mr Saunders in November 2013. A photograph taken in April 2014 shows a row of tall beech trees (some as high as 23 metres) from the front of the properties, by the road, to the beginning of the concrete post and panel fence. It seem from this photograph that the trees, including two smaller beech trees, were not in line with the fence, but were set back further east, in or towards Number 8 (although I accept that photographs can be deceptive: I have seen another photograph (EX14) which appears to show the outer edge of the northern most tree aligned with the fence).
23. On 16 July 2013 Mr Saunders applied to Broadland District Council to reduce the branches and lift the crowns of the beech trees to allow for a four metre clearance to his driveway. He also applied for permission to fell the conifer trees. Mr Saunders made it clear in correspondence with the Council that the beech trees did not belong to him. By letter dated 29 August 2013 Mr Saunders was informed that the Council had no objection to his proposals.
24. In April 2014 Mr and Mrs Burkett received a report from tree specialists who had been appointed by loss adjusters for the insurers of Number 6, who concluded that a number of trees on Number 8’s land (including the beech trees) were causing subsidence to Number 6. The tree specialists recommended the removal of the trees.
25. Mr Burkett was initially reluctant to remove the trees, but agreed to do so. The work of removal was carried out on 11 September 2014 at his cost. It was his intention at

this point to erect a fence in line with the outside point of the beech trees to join the northern most concrete post but the present dispute prevented that.

26. Mr Burkett wrote to Mr Saunders on 27 February and 1 March 2015 following the placing of a string between two pieces of cane by Mr Saunders on the disputed boundary. By this time it was clear that a dispute had arisen. Mr Burkett suggested the appointment of a joint surveyor, or that both should appoint their own surveyor.
27. Mr Saunders refused to appoint a joint surveyor. Mr Burkett appointed Canham Consulting. On 11 August 2015 Mr Rose of that firm wrote a letter to Mr Burkett. Mr Rose disputed Mr Saunders's view that the boundary should follow the line of the laurel bushes to the front of the property on the grounds that the boundary could be anywhere between the outside of the branches or even down the centre line. Mr Rose stated, without any explanation, that in his opinion the boundary line is that of the concrete post and timber panel fence already erected in a straight line to the front of the property. The letter also states that he had not seen a copy of the deeds. He concluded by saying that title plans only show a general boundary which is why, as he put it, 'physical features on site take precedent (sic) over lines shown on title plans'. Mr Rose inserted, at ground level, a metal peg with a red marker at the front of the property to indicate the position of the boundary. Mr Rose did not prepare any further report nor did he attend to give evidence. I will revert to this report further below.
28. Mr Saunders has made the point repeatedly in writing and before me that Mr Rose's report has been tampered with or forged. It is not entirely clear what the basis of this complaint is. Mr Rose stated in his letter dated 11 August 2015 that he had not seen the deeds, as stated above. In a letter dated 16 March 2016 to Mr French at Canham Consulting Mr Saunders criticises the report in a number of respects and asks if the report is genuine. Mr Rose visited Number 8 again in April 2017 when, it seems, he was able to review Mr Saunders' statement of case and the title deeds of Numbers 6 and 8 and the office copy entries, and remained of the same view. It seems that the copy of the report sent to the Land Registry as part of the objection to the determined boundary application contained a hand written note next to the sentence beginning 'whilst we have not seen a copy of the plans for the deeds' which reads '*No! Seen*

March 2015.' I do not see how it can sensibly be said that the report is a forgery or has been tampered with.

29. Mr Saunders asked 'Survey Solutions' of Norwich to carry out a survey who placed two wooden stakes in the ground along the disputed boundary on 21 August 2015. This survey has not been shown to Mr Burkett or produced in the course of these proceedings.

30. Mr Saunders case is that the true line of the boundary is along the centre line of the beech trees. On his case it is possible to see this line in one of the photographs (ex14a) which shows the most northern beech tree still standing and the stumps of the other trees in a line towards the road. The footprint of the standing tree is not inconsiderable. The centre line of this tree, according to Mr Saunders, corresponds to the first laurel to the south of the tree.

### **Establishing the boundary: general legal principles**

31. The description of any property is set out in the parcels clause. In this case the description of Number 6 and Number 8 is by reference to a plot on the Ordnance Survey map and the number written on the plot. The description further refers to plans. Where, as here, the verbal description is insufficient, regard may be had to the plan even where it is stated to be 'for identification purposes only.' In such a case, the court will adopt an objective test, and ask itself, taking into account the topography, the language of the conveyance, and the plan, 'what would a reasonable person think they were buying'? (see *Topliss v Green*, February 14, 1992 CA and *Chadwick v Abbotswood Properties Ltd* [2004] EWCH 1058). This of course refers to the first sale or disposition: it is then that the boundary is fixed.

32. If, however, the location of the boundaries is clear from the conveyance, no extrinsic evidence is to be used (*Ali v Lane* [2006] EWCA Civ 1532).

33. In some cases, and most notably where there has been a dispute, the parties may reach a boundary agreement which will bind successors in title. This agreement need not be in writing, but, as a general rule, it will be necessary to establish such an agreement by evidence.



## **The competing boundary lines between A and B**

34. I have not heard evidence from either Mr Songer of ALs or Mr Rose of Canham Consulting. Neither have produced a report. I have also not seen any letter of instruction to either of the surveyors.
35. I can deal briefly with the letter (it is not in any sense a report) written by Mr Rose on 11 August 2015. Mr Rose stated that he had not seen the conveyancing plans, and had based his opinion, in effect, solely on the position of the 15.5 metre concrete post and panel fence erected by Mr Hancy in 2000. He states (to this extent accurately) that he assumed that the conveyancing plans show a straight line from the front of the property to the rear with no deviation. The fence, of course, is precisely such a deviation and is not in a straight line with the remainder of the boundary features running southwards to the rear of the gardens.
36. The fence was, in my judgment, clearly not intended to be a boundary fence. If the line of the fence had been continued southwards past the garage it would have left no space at the side of the garage, and was not in any event in line with the box hedge and remains of the fence and the position of the angle bar posts. At the southern end, the fence, if continued in the same line, would have cut into Number 8's land. Mr and Mrs Burkett have in any event accepted (in my view rightly) that this box hedge marks the boundary.
37. It seems clear to me that Mr Hancy in his letter dated 24 November 2014 was stating that the fence was erected to screen and keep at bay the laurels. The photographs taken at the time also show how dense the laurel hedge had become. I have no difficulty in finding that it was eminently sensible to create a fence for 'aesthetics and convenience'.
38. I do not know whether Mr Rose was aware, at the time of writing his letter, that the fence had only been erected in 2000. He does not comment, surprisingly, on the remains of the old fence in the box hedge or the angle bar posts. It follows, in my judgment, that the fence was not built in compliance with any obligation under his conveyance: there was no need for a fence along that part of the boundary. As is clear

from the photographs, and from my site visit, the boundary at this point was marked by the laurel fence which runs along the same line as the box hedge fence. The gap between the fence and the hedge (some 50 cm) is clear to see. Mr Burkett accepted that if you bring forward the middle line of the hedge towards the road, this line will not be line with the fence.

39. It is also clear that the fence, built as it was so as to be taller by the covered porch, was intended to be a pleasing visual feature. The fact that it has been in existence for 18 years does not make it a boundary feature.

40. The fence may well have been in line with the outer edge of the last beech tree. But some care needs to be taken regarding the position of the trees as shown on the Plan. Mr Saunders accepted in evidence some 11 months passed between the felling of the beech trees and the placing of markers (which then formed the basis of the A -B line on the Plan). Mr Saunders relied on his memory and the gap he said existed (60 mm) between the outside edge of the conifers and the outside of the beech trees.

41. I have no doubt that Mr Saunders, and, I imagine, Mr and Mrs Burkett, believed in general terms that the boundary was marked by the beech trees. The issue only became acute when the dispute arose. The beech trees were probably planted more or less in alignment with the laurels. But they are not original boundary features.

42. It follows that the criticism of the Plan in so far as it shows the line between A and B are well founded. First, the line depends on recollection as to the position of the beech trees. Secondly, as Mr Burkett accepted, beech trees will grow. There is no evidence regarding the planting of the trees, or the reason why (if it is the case) they were not planted in a straight line following the middle line of the laurel hedge. The photograph at EX4 appears to show the line of beech trees as being straight and not veering to the west, but again I accept this may be deceptive.

## **Conclusion**

43. As stated at the outset, the line on the Plan between B and L is agreed. This line represents the middle line of the laurel and box hedge. It is a straight line, conforming to the boundary as shown on the conveyancing plans. There are angle bar posts, and

remains of angle bar posts, which allow the inference to be drawn that they represent the original boundary features. These posts are plotted on the line on the Plan.

44. The conveyancing plans are, as stated above, all of a piece. It is self evident that the best description and evidence of ownership will be in the parties documents of title. The boundaries are straight. It seems to me unarguable that the front (or north part) of the boundary between A and B should be the continuation of the straight line from B to L. The first purchaser of what became Number 6, with the conveyancing plan in his hand, would have understood the boundary to be a straight line. This line may or may not represent the middle line or the outer edge of some or all of the beech trees which are now no longer there, and which were never plotted at the time on any plan. The fact that the parties may have believed that the trees marked the boundary, and acted on this belief (in the case of Mr Burkett, by paying for the removal of the trees) does not in itself assist in ascertaining the location of the boundary.
45. What is clear beyond any doubt is that the line of the fence, continued northwards, cannot be the line of the boundary.
46. In the light of my conclusion, a further plan needs to be drawn by ALS showing the line A-B in a straight line. This revised plan is to be filed and served within 14 days. Once this has been done, and I have approved the revised plan, I will make an order to the Chief Land Registrar to give effect to the amended plan so that the determined boundary will be along the (revised) line A-L.
47. As to costs, I invite the parties to make their submissions in writing as to what order should be made within 14 days. I will make a further direction regarding submissions as to quantum once the point of principle has been decided.

**BY ORDER OF THE TRIBUNAL**

*Ann McAllister*

**Dated this 11<sup>th</sup> day of July 2018**



