

[2018] UKFTT 442 (PC)

REF/2017/0785 and 0786

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

**LAND REGISTRATION ACT 2002**

**IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY**

**BETWEEN**

**Simon Michael Carroll & Rachel Louise Carroll**

**APPLICANTS**

**and**

**David Marshall (1)  
Swallow Barn Properties Ltd (2)**

**RESPONDENTS**

**Property Address: Ivy House, 9 Chequers Lane, Gressenhall, NR20 4EU  
Title Number: NK243028 & NK299285**

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**ORDER**

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IT IS ORDERED as follows:

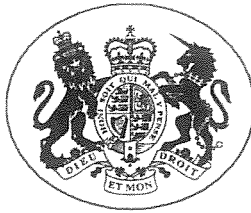
1. The Chief Land Registrar is to cancel the Applicants' application dated 3 March 2017 for a determined boundary.
2. The Chief Land Registrar is to give effect to the Applicants' application dated 3 March 2017 for the registration of an easement, subject to the following direction.
3. In giving effect to the Applicants' application for the registration of an easement, the registrar is directed pursuant to rule 40(3)(a) of the Tribunals Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to note on the relevant registers of title that the easement is for the benefit of the land shown shaded red on the Applicants' application plan, for access to the highway on

foot and with animals, whether for the purposes of accessing the land shaded red or for access to the rest of title number NK243028.

Dated this 4 July 2018

BY ORDER OF THE TRIBUNAL

Elizabeth Cooke



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**DECISION**

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1. The Applicants Dr and Mrs Carroll are the registered proprietors of Ivy Cottage in Gressenhall, Norfolk, which they bought in 2010. They have made two applications to HM Land Registry, one for the registration of a prescriptive easement over land belonging to Swallow Barn Properties Ltd, the Second Respondent, of which Mr Marshall, the First Respondent, is the director, and the other for the determination of the boundary between their property and the Second Respondent's land. Mr Marshall

has objected to both applications and the dispute has been referred to this Tribunal pursuant to section 73(7) of the Land Registration Act 2002.

2. I visited the land on 21 May 2018, and I am grateful to the parties for allowing me access to their properties. The hearing took place on 22 May 2018 at Alfred Place; Dr Carroll and Mr Marshall gave evidence. None of the parties had legal representation.
3. The determined boundary application fails and I have directed the registrar to cancel it. The application for a prescriptive easement succeeds, and I have directed the registrar to respond to it as if the objection had not been made. For the avoidance of further dispute I have made a direction to the registrar pursuant to rule 40(3)(a) of the Tribunals Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 requiring the registrar to record the terms of the easement. In the paragraphs that follow I give my reasons for the directions I have given.

#### **The land in dispute**

4. The layout of the land concerned is relatively simple. On the following page is a copy of the registered title plan for the Claimants' land. Although it is a single registered title, different parts of the land were formerly in different ownership. The shaded area on the plan represents the garden acquired by the owners of the main house in 1990, and corresponds to the area shaded red on the plan attached to the application for registration of the prescriptive easement and on the plans attached to the Statements of Truth referred to below. The hatched area is the paddock acquired in 1987. Along the southern boundary is Chequers Lane. To its west is the triangle of land belonging to the Second Respondent, purchased in 2016. He has built a new property on his land and is in the course of building a second.
5. The boundary in question is the north-south boundary between the two properties. The easement claimed is through a gate at point x on the plan.

#### **The determined boundary application**

6. There is no evidence of when the disputed boundary was created, nor of whether the Second Respondent's land was ever held in common ownership with either the garden or the paddock.
7. The plan attached to the conveyance of the paddock in 1987 to the then owners of Ivy Cottage, Dr and Mrs Hanson, has marked on it the lengths of the sides of the paddock and its diagonals.



NK243028

ROTFORD - BRECKLAND

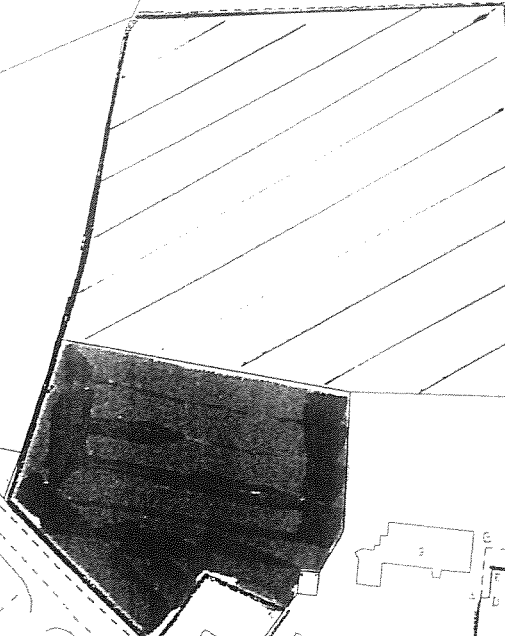
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THEY

EDITION 1985

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R2's land



WIS Wood

GREYOVERS LANE

Well

Well

2112

Well

Bramble Lodge

The Hawthorns

LODGE FARM MEADOWS

SWITWOOD

8. Dr Carroll's evidence is that when the Applicants bought the land in 2010 there was a field hedge (meaning a rough line of trees and bushes) all along the boundary. He says that he gave no thought to the precise position of the boundary at that stage, which is understandable since what is now the Second Respondent's land was open and uncultivated and there was simply no need for anyone to be precise about the boundary.
9. Dr Carroll says that in 2012 he put up a stock-proof fence around the paddock; to the west it was on his side of the field hedge. Before doing so he planted some small hawthorns within the field hedge beside the paddock, and they can be seen today with plastic sleeves for their trunks.
10. Between the Second Respondent's land and the Applicants' garden are some mature trees. Dr Carroll says that towards the end of 2016 he went along the boundary clearing up and trying to work out where the boundary was. He showed at the hearing a video of his walk along the boundary, which shows that the hedge adjacent to the garden (rather than the paddock) was quite overgrown but did have within it some barbed wire which seems to have passed on both sides of the trees, and some old fence posts which appeared to me to be standing within the body of the hedge.
11. Dr Carroll then asked his gardener to put up a new fence to replace the old posts. The new fence ran along the west side of the trees, thus claiming the whole of the hedge for the Applicants. Dr Carroll says that he instructed his gardener to replace the old fence in exactly the same position, but I doubt that that request was carried out exactly. The thickness of the trees and bushes seen on the video would have made that impracticable; it seems to me that the old fence posts were within the body of the hedge whereas the new fence enclosed the hedge for the benefit of the Applicants' property.
12. The Second Respondent bought his land in October 2016, Mr Marshall having first seen it in July 2016. It had planning permission for the construction of two houses (one of which has now been built and according to Mr Marshall has been sold, although the Second Respondent is still the registered proprietor of the whole of the triangle of land he bought in 2016).
13. In February 2017 Mr Marshall brought diggers on to the Second Respondent's land. He removed most of the hedge alongside the paddock; later (in July or August) he installed a new three-bar fence there immediately to the west of the Applicants' stock fence and of the rest of the remaining hawthorns. Alongside the garden he removed

the Applicants' fence, leaving it on their land, and dug up the bushes between the mature trees. Dr Carroll has since planted laurels between those trees.

14. Mr Marshall's explanation for his destruction of the fence and hedge is that the planning diagrams showed the boundary as being in the midst of the hedge and to the east of the tree trunks. Those diagrams are not, of course, documents of title and are of no evidential value as to the position of the boundary. He accepts that Mr Greenwood who sold the land to him said, in his replies to enquiries before contract, that the eastern boundary belonged to the neighbour, although he claims not to have paid any attention to this. For Mr Marshall the boundary was where he wanted it to be, as it had been for the Applicants when their gardener put up the fence alongside the garden to the west of the trees; but it is extraordinary that Mr Marshall destroyed the fence and hedge without first approaching the Applicants.
15. One of the conditions of planning permission is that the Second Respondent is required to plant screening along the boundary for the benefit of the applicants. Mr Marshall did so in 2017; he says that Dr Carroll destroyed it by strimming it. Dr Carroll's evidence is that he does not remember doing so, but that if he did it would be because he considered that the planting was on his land.
16. The Applicants' case is that in the light of the removal of boundary features in recent months they require a "legal boundary", as they put it. They say that the boundary lies on the line that separates the two properties on the Ordnance Survey map. They say this, Dr Carroll has explained, because they regard it as the most sensible line in the absence of anything better. They have instructed surveyors, Anglia Land Surveys Ltd, to produce a plan to support their determined boundary application.
17. That line originates, at the north end, at a fence post which Mr Marshall is willing to agree marks the northern end point of the boundary. It is also agreed that the boundary is not straight; the 1987 conveyance plan (see paragraph 7 above) indicates that it has a very slight dog-leg bending eastwards towards the paddock.
18. On the ground, the line contended for by the Applicants therefore originates at an agreed point to the north; but it then diverges from the line of the hedge and the fence; at its widest point of divergence the Applicants' line is 2m 41cm (or 8 feet) to the west of the stock-proof fence. It is therefore well within the garden of the new-built house, and a few feet away from what remains of the field hedge, and indeed from the field hedge as it stood when the Appellants bought (so far as I can tell from the photographs produced).

19. Therefore Mr Marshall says that the Applicants' line is west of the boundary, and I agree. The only physical evidence of the boundary is the field hedge as it stood in 2010 and can be seen on photographs. The mature trees that remain also give an indication of the position of the hedge. There is no evidence whatsoever that the boundary might be to the west of the western edge of the field hedge.
20. I accept Dr Carroll's evidence that his stock fence lies to the east of the boundary up against the remains of the field hedge.
21. Dr Carroll accepted at the hearing that the Applicants' line does not follow the historical boundary. As I explained at the hearing, the Tribunal cannot create a boundary. It can make findings as to where the boundary lies on the basis of evidence. In the absence of the conveyance that created the boundary, the best evidence available is the position of historical boundary features, which in this case are the position of the field hedge and the very old fencing seen in Dr Carroll's video.
22. I take the view that the boundary – doing the best I can on the limited evidence available – lies along the middle of the field hedge, some 12 to 18 inches west of Dr Carroll's stock fence adjacent to the paddock and through the midst of Dr Carroll's laurels and the mature trees.
23. The determined boundary application therefore fails.
24. The parties have a boundary, namely the general boundary indicated on the Land Registry title plan, and my finding above gives them a better indication of where the exact boundary lies.
25. For the future, the parties will wish to avoid trespassing on each other's land, particularly when Mr Marshall plants the required screening. If he interferes with the Applicants' laurels, that is likely to be a trespass since they are planted at least in part on the Applicants' own land. If the Applicants interfere with any planting or fencing to the west of the laurels they will be trespassing. The three-bar fence put up by Mr Marshall (see paragraph 13 above) is likely to be 8 to 12 inches to the east of the boundary and any planting or fencing that he puts up should be safely on the western side of the centre of what remains of the field hedge.

### **The prescriptive easement**

#### *The right of way claimed by the Applicants*

26. The main access to Ivy Cottage is to the east of the garden, down a long drive which gives ample vehicular access. Ivy Cottage is set back from the road behind number 11, as can be seen on the plan above.



27. As I have explained above the disputed boundary has a gate at its southern end. It has been there at least since the 1960s. The Applicants say that they have a right of way through it and across the corner of the Second Respondents' land, on foot, with animals and with vehicles, and that they and their predecessors in title have acquired that right by prescription for the benefit of the garden. They ask the Tribunal not only to confirm that that right has been acquired but also to define the area of the burdened land.
28. As Mr Marshall accepted at the hearing, to establish such an easement the Applicants must show that they and their predecessors in title have made use of the burdened land openly, without force and without permission, for 20 years or more. That is what the Applicants claim, on the basis of evidence going back to 1964; they say that their use of the land continued until Mr Marshall obstructed it in 2017.

*The evidence*

29. The Applicants' evidence is as follows:
30. There is a statutory declaration made by Lady Beasley in 1990. Her declaration says that she owned the garden (shaded red on her plan) from 1964 until she sold it to Dr and Mrs Hanson in 1982. She identifies a small triangle of land – hatched on her plan - next to the gate and says that during the 18 years (1964 – 1982) that she occupied the garden she used the hatched land, as did her “agents servants and friends”, without consent, without interruption and without payment, to pass and repass along it “by day or night with or without vehicles of any description with or without animals for all purposes connected with” the garden.
31. Lady Beasley has since died. There is a discrepancy in the dates because Dr and Mrs Hanson purchased in 1990, not 1982.
32. The Applicants bought the land in 2010 from Mrs Hooley, and at the time of the sale she provided a form ST4 which was intended to be submitted to HM Land Registry to support an application for the registration of a prescriptive easement. The ST4 is in standard form with boxes ticked to indicate that she is the legal owner of the benefitted land; the plan attached shows the garden as the benefitted land and the burdened land as a shaded area corresponding to Lady Beasley's hatched land. Box 10 sets out “details of user”:

“I have used the right of way with or without vehicles for access to my land since I purchased it in 1990 and we were advised on that occasion that the previous owner had exercised these rights since 1964.”

33. That is odd because the land was bought in 1990 not by Mrs Hooley but by Dr and Mrs Hanson; I expect that it is an error on the part of the solicitor who drafted it. As I understand it an application on the basis of this ST4 was rejected by HM Land Registry, and that may well be why.
34. In 2017 Dr Carroll was able to fill the evidential gap. He contacted Mrs Hanson and spoke to her on the telephone. He then prepared a Statement of Truth for her and sent it to her to sign. She did so, and returned it with a letter. The Statement says that she and her husband lived at Ivy House from 1974 until 2000, but that they bought a plot of land – the garden – from Lady Beasley in 1990. She identifies it on an attached plan, which matches Lady Beasley’s plan; she too refers to the hatched triangle of land over which Lady Beasley said she had access:

“Until we sold Ivy House we, our family and friends and those we gave permission to used the gate to access Chequers Lane on a regular basis (at least once a year, and typically a lot more often than that) with no long period of time when we did not use it. We used to access Chequers lane through the gate both with vehicles and on foot”.
35. The Statement goes on to indicate that the Hansons did not have permission to use the land, and did so openly and without force. It says “we simply continued to use [the hatched land] in the way described by lady Beasley in her Statutory Declaration of 23 February 1990”.
36. It will be recalled that Lady Beasley’s declaration says that she sold the garden to the Hansons in 1982, but it appears that she did so in 1990 – and that would explain why her statutory declaration is dated 1990.
37. In her accompanying letter Mrs Hanson says “Lucy informs me that she used it every day, when she had her pony, and I was not aware of that.” Lucy is her daughter.
38. Although the Applicants bought Ivy Cottage in 2010, Dr Carroll explained that his knowledge of the property goes back to the mid-1990s when he was a colleague and often a guest of Dr Hanson, then the senior GP at the Elmham practice – the post Dr Carroll now holds. He was aware of the pony being kept in the paddock and of the use of the gate, although he was not able to give any precise details of its use. He recalls

Lucy's wedding in 1998 or 1989 when the reception was held in a marquee and guests drove in to the garden through the gate.

39. Dr Carroll has also obtained statements from three neighbours: Pat Hall, Nick Saunders and Mark Mitchell, all dated 5 February 2017. All three are drafted by him. All three say "I can confirm that the gate from the garden of Ivy House, 9 Chequers Lane, onto the Lane has been in existence all this period and has been in regular use by the owners of Ivy House"; Ms Hall adds "for over twenty years." The period referred to as the existence of the gate is the individual's residence; Ms Hall has lived on Chequers Lane since 1970, Mr Saunders for over forty years, and Mr Mitchell for 12 years although his grandfather owned a farm on Chequers lane for over sixty years.
40. Ms Hall's statement adds "Dr David Hanson and his daughter Lucy kept a horse in the paddock and then Mr and Mrs Hooley let the paddock to the owners of High House farm who kept horses in the paddock also. They used the gate to access the paddock."
41. Dr Carroll's witness statement and Statement of Case say nothing about his own use of the claimed right of way. At the hearing he explained that he and his family have used the gate to access the lane on foot, with vehicles and with animals. On foot he and his family use it to go and see the sunset rather than walking down the drive. As to vehicles, Dr Carroll explained that while he has been renovating Ivy Cottage (a work of some years) heavy vehicles have accessed the property via the gate, to arrive to work and to remove spoil. As to animals, the paddock has to be grazed and so there have been a succession of animals in there; sheep from 2012 to 2013, a stallion for a couple of years, and Shetland ponies more recently have grazed there over the winters. The owners of the animals have accessed the paddock via the gate daily to see to their stock, and the animals have been brought in and out that way.
42. Dr Carroll also says that he has driven out of and back into the gate on a ride-on lawnmower to mow the grass outside the gate on the Second Respondent's land. I accept that he did so but that does not support a claim to a right to access the highway. He says that he taught his daughter to drive in the paddock; I am not clear whether he claims to have driven to the paddock via the garden gate. Such use cannot have happened more than a few times.
43. Mr Marshall's evidence about the claimed right of way is necessarily limited. He has no knowledge of the land prior to July 2016 and has called no witnesses. He says that when he was looking at the land in 2016 he asked neighbours over the road whether the gate was ever used, and they said not. He did not ask the owners of Ivy Cottage,

and does not claim to have attempted to do so. He relied upon his solicitor's advice, he says, that in the absence of a right of way on the register of title there was no right of access through the gate.

*Conclusions about the evidence*

44. The difficulty that the Second Respondent faces is that Mr Marshall is simply not in a position to contradict the evidence that a small corner of his land has been used to get from the highway to the gate. Indeed, at the hearing he accepted that the gate had been used for people and animals to get to and from the paddock. I understand that he has allowed the owner of the Shetland ponies to do so on at least one occasion despite the dispute, and of course he has not prejudiced his position by giving permission on that occasion. The fact remains that use was long established before the Second Respondent bought.
45. I accept Dr Carroll's evidence as to his, his family's, and his licensees' or tenants' regular and frequent use of the Second Respondent's land to access Chequers Lane on foot and with animals. He has not given evidence that he has used the land to access the highway with vehicles himself, but I accept that there has been occasional vehicular access by his contractors. The track inside the gate, across the garden to the paddock, is grassed; there cannot have been a vehicle along it for a long time, and it is difficult to see that it could have been used more than very occasionally and at times when construction work was causing a lot of mess.
46. The Applicants have used the access only for 8 years and of course the important evidence is that of Lady Beasley, Mrs Hanson and Mrs Hooley. I attach no weight to the neighbours' statements. They were unavailable to give evidence at the hearing but were only asked to attend the night before; had they been given proper notice they would no doubt have been able to do so.
47. Lady Beasley has died; Mrs Hooley cannot be traced (although Dr Carroll only tried to do so the day before the hearing). Mrs Hanson could certainly have been invited to attend had Dr Carroll given her adequate notice. I bear in mind that none of these three witnesses has been cross-examined and that at least one of them, Mrs Hanson, could have attended had proper arrangements been made. Dr Carroll says that he was not aware of the need to do so. Even so, had they attended, it is difficult to see how the Respondents could have challenged the core of their evidence, which is that the land was regularly used to access the highway through the gate.

48. What is lost through the non-attendance of the crucial witnesses is any opportunity for either the Respondents or the Tribunal to gain proper information as to the extent of the easement, and particularly about vehicular access. I bear in mind that there is alternative vehicular access to the house and the paddock down the drive, so access cannot have been needed very often. Lady Beasley's statutory declaration is in lawyers' language. I do not believe that she or her associates went through the gate *literally* with "all kinds of vehicles". The lack of precision makes it impossible to tell what vehicular use is being claimed.
49. The same is true of Mrs Hooley's ST4, again drafted by lawyers with no detail. It is not known what vehicles used the gate or how often they did so. And whilst it is easy to see why regular use would have been made of the access on foot and with animals, it is not easy to see why vehicular access would be needed. In the absence of information it is impossible to say that it is likely that vehicular use was frequent enough to establish a prescriptive easement for vehicular use. It is likely to have been only occasional and only for unusual purposes – as was the vehicular use by the Applicants.
50. Accordingly I accept that Lady Beasley, the Hansons and the Hooleys used the gate to access the highway on foot and with animals the highway from the garden, and from 1990 onwards also to access the paddock from the highway. It would have been odd if they had not done so given the obvious convenience of having a garden gate, and of being able to take animals straight in that way rather than down the front drive and close to the house.
51. I accept that that use was regular, which is not a term of art but has an ordinary meaning; the families and their licensees or tenants did so as required, daily during some periods. Twenty years' use on foot and with animals was completed at some time during the Hansons' ownership. Any gaps in use since then have no legal effect although in any event I have found as a fact that use has continued, probably at least several times a year and daily for some periods.
52. But I do not accept that there was sufficient vehicular use to establish a right of way with vehicles.

*Is the Second Respondent bound by the prescriptive easement?*

53. Mr Marshall has disclosed that he was advised that the land was not burdened by any right of way because there was nothing on the register. That of course is incorrect; section 29 of the Land Registration Act 2002 provides that the transfer to the Second

Respondent took effect subject to any rights listed in Schedule 3 to the Land Registration Act 2002, one of which (paragraph 3 to that Schedule) is a legal easement, subject to an exception as follows:

... except for an easement ... which at the time of the disposition—

(a) is not within the actual knowledge of the person to whom the disposition is made, and

(b) would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable.

(2) The exception in sub-paragraph (1) does not apply if the person entitled to the easement or profit proves that it has been exercised in the period of one year ending with the day of the disposition.

54. On Dr Carroll's evidence the easement was certainly used within the year before the Second Respondent bought. Moreover I have been shown pictures of the gate by Mr Marshall, which clearly show the bank of nettles that marked off the access and the flat grass in front of the gate. It must have been obvious to Mr Marshall, as the director of the Second Respondent, that the gate was there and could be used, and he chose not to ask the only people – the Applicants – who could have given him reliable information about it.

55. Accordingly I find that the Applicants' easement bound the Second Respondent when it bought the land.

*Is there an easement to park?*

56. There is no claim to an easement to park, although in a letter to the local planning authority in March 2014 Mr Carroll claimed that his tenant was parking on the land for 30 – 60 minutes twice a day when she attended to her horses. None of the previous owners says anything about parking. So the easement acquired by prescription does not allow the Applicants or anyone with their permission to park on the Second Respondent's land.

*The extent of the burdened land*

57. The Applicants would like to have a determined boundary to the burdened land, but that is not legally possible; section 60 of the Land Registration Act 2002 refers to the boundary of a registered estate, and makes no provision for the determination of the boundary of land burdened by an easement.
58. The plan attached to Lady Beasley's statutory declaration, and reproduced by Mrs Hanson and Mrs Hooley, depicts an area beside the gate over which the easement is said to extend. Dr Carroll has scaled that area up and has produced a marker on the ground to indicate the south-west corner of the triangle of land over which access is claimed.
59. I am unable to place any reliance on the hatched area on Land Beasley's plan. The lines drawn on it are too thick for me to take it as having intended any precision. What Lady Beasley and her successors claim is that they have walked and driven across the Second Respondent's land to the gate; and it is clear on the ground that there would be no need for them to drive or walk very far away from the gate – certainly nowhere near as far as Dr Carroll's mark on the ground.
60. The Applicants have proved that they have an easement, but they cannot show the precise extent of the land that was in fact used. The prescriptive easement is for access from the gate to the highway on foot and with animals, using only as much space as is necessary for that access. There will be no need for the landscaping of the front garden of the new house to be disturbed or indeed to be accessed; but the Respondents will have to ensure that there is enough space to get through the gate, on foot and with animals, safely and comfortably, without damaging the gate.
61. Dr Carroll has given evidence that the gate used to open outwards, but none of the other witnesses has done so and therefore there is insufficient evidence for the Applicants to show that they have a prescriptive right for the gate to open outwards.

#### **Costs**

62. In this Tribunal costs follow the event. There has been no winner in these proceedings since the Applicants have failed in one application and succeeded in the other and I am therefore minded to make no order as to costs. If either party nevertheless wishes to make an application they may do so in accordance with the directions given by letter by the Tribunal.

Dated this 4 July 2018

**Elizabeth Cooke**

BY ORDER OF THE TRIBUNAL

