



[2018] UKFTT 169 (PC)

REF/ 2016/0312 and 0313

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) BRIAN EVANS
(2) SHEILA MORRISON FILLANS EVANS

APPLICANTS

and

(1) SAMANTHA GRIFFITHS
(2) KAREME SINGH

RESPONDENTS

Property Address: Land lying to the East of Redditch Road, Alvechurch

Title Number: HW47187

ORDER

The Tribunal orders that the Chief Land Registrar do cancel the application of the Applicants dated 25th November 2015 to determine the exact line of a boundary made in Form DB dated 23rd November 2015

Dated this 2nd February 2018

Michael Mitchell



BY ORDER OF THE TRIBUNAL

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(1) BRIAN EVANS
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APPLICANTS

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(1) SAMANTHA GRIFFITHS
(2) KAREME SINGH

RESPONDENTS

Property Address: Land lying to the East of Redditch Road, Alvechurch

Title Number: HW47187 and HW46825

Before: Judge Michell

Sitting at: Birmingham Employment Tribunal

On: 14th December 2018

Applicant Representation: In person

Respondent Representation: In person

DECISION

*DETERMINED BOUNDARY APPLICATION – WHETHER APPLICATION PLAN
SHOWED THE EXACT LINE OF THE BOUNDARY IN THE CORRECT PLACE -
HEDGE AND DITCH – WHETHER PRESUMPTION REBUTTED*

Cases referred to

Vowles v. Miller (1810) 3 Taunt. 137

Alan Wibberley Building Ld v. Instey [1999] 1 WLR 894

1. The Applicants, Mr and Mrs Evans are the registered proprietors of land registered under title number HW47187 (“the Land”). It is an open area of land adjacent to their home, Fairfields. The Applicants have applied to HM Land Registry to determine the boundary between the Land and two adjacent properties, 1 Redditch Road, Alvechurch, registered under title number HW46825 and 3 Redditch Road, Alvechurch, registered under title number HW89868. Samantha Griffiths is the registered proprietor of 1 Redditch Road and Kareme Singh is the registered proprietor of 3 Redditch Road. Both have objected to the application.

2. The application is made under Land Registration Act 2002 section 60 and Land Registration Rules 2003 r. 118. Section 60(3) provides

“Rules may make provision enabling or requiring the exact line of the boundary of a registered estate to be determined and may, in particular, make provision about –

- (a) the circumstances in which the exact line of the boundary may or must be determined,
- (b) how the exact line of the boundary may be determined,
- (c) procedure in relation to applications for determination, and
- (d) the recording of the fact of determination in the register or the index maintained under section 68”.

Rule 118 provides

“(1) A proprietor of a registered estate may apply to the registrar for the exact line of the boundary of that registered estate to be determined.

(2) An application under paragraph (1) must be made in Form DB1 and be accompanied by

- (a) a plan, or a plan and a verbal description, identifying the exact line of the boundary claimed and showing sufficient surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map, and
- (b) evidence to establish the exact line of the boundary

The Application Plan

3. The plan the Applicants say identifies the exact line of the boundary (“the Application Plan”) is a survey plan prepared by Tower Surveys, Chartered Surveyors. It is described on its face as “Topographic survey of features in the vicinity of the boundary between ‘Fairfields’ and No. 1 Redditch Road ... as of 02/04/15”. It also shows features in the vicinity of the boundary between the Land and 3 Redditch Road. As part of the same survey, Tower Surveys also prepared plans showing topographical detail in the area of 1 to 15 Redditch Road. The survey plans were prepared in May 2015 following a survey carried out in April and May 2015. The brief report accompanying the survey plans includes the following:-

“1.2 The brief was to survey the physical features within the vicinity of the western boundary.

...

3.2 ... Tower Surveys surveyed the features within the vicinity of the western boundary, together with sufficient surrounding features to allow comparisons with Ordnance Survey national mapping.... On 08 May 2015 GPS was used to confirm the eastern boundary and to survey a metal fence on the western boundary.

...

3.5 Plans were produced by overlapping (in Auto CAD) title documents and the actual survey (reduced in Magnet survey software) onto Ordnance Survey mapping”.

On the Application Plan there is a red line which is described in the key on the plan as “Edging/Shading” and a parallel blue line to the south and west which is described in the key as “Centreline of Proposed Boundary”. It would appear that the line marked in red is a depiction of the boundary edging on the plan to whatever title document was overlapped onto the survey plan and the blue line is said to be the boundary. The surveyor who carried out the survey and prepared the plan was not called to give evidence.

4. In an email to Ms Singh sent on 3rd June 2015 Mr Evans said
“We have employed a firm of Chartered Land Surveyors to survey the boundary and adjacent features and compare with the Ordnance Survey drawings and land registry documents.

Regarding our boundary with your property, there is good correlation between our properties and the Ordnance Survey plotted values. We propose to use the OS plotted values to determine the co-ordinates of the boundary line”.

The Land

5. The Land is a triangular area. The eastern boundary runs north-south and meets the northern boundary at 90 degrees. The western end of the northern boundary and the southern end of the eastern boundary are joined by a line forming the third side of the triangle. This line has a dog-leg or steps in (towards the west) at a point adjoining the northern boundary of the garden of 1 Redditch Road. The boundary sought to be determined is the boundary from this dog-leg running south along the boundary with 1 and 3 Redditch Road.

6. Beyond 3 Redditch Road, the Land borders 5, 7, 9, 11, 13 and 15 Redditch Road. Mr and Mrs Evans have made a boundary agreement with Bromsgrove District Housing Trust, the freehold owner of 7,9,11 and 15 Redditch Road. What was agreed with the Housing Trust does not provide evidence as to the location of the boundary the subject of this application.

Physical features

7. The Applicants state in their Statement of Case that the boundary is "the line of a hedge". There was a hedge behind the houses at 1 and 3 Redditch Road but that section of hedge was removed before the Application Plan was prepared. There remains a section of hedge in the general boundary area between the Land and the area of garden of 1 Redditch Road lying to the north of the house at 1 Redditch Road. This hedge had been cut back very severely at the time of the survey so that in substance only the stumps of the bushes forming the hedge remained. The stumps of the bushes forming the hedge are plotted on the Application Plan. There are 21 stumps shown on the Application Plan. Only six of those stumps are shown on the blue line drawn as the exact line of the boundary. One stump lies just to the east of the blue line. The remainder are marked further to the west of the line. The blue line does not therefore follow exactly the line or centre line of the hedge. To the north of the section of hedge there are some trees, the stumps of three of which are shown on the red line drawn to the east of the blue line and two of which are marked to the west of the blue line. The boundary along the northern end of the garden of 1 Redditch Road is shown as following the line of a dilapidated post and wire fence.

8. Photographs taken in 1984 show a hedge running the full length of the general boundary area between the Land and 1,3,5,7,9, and 11 Redditch Road. The photographs do not show the area behind 15 Redditch Road. There appears to be a gap in the hedge near to the north-eastern corner of the house at 1 Redditch Road and beside a tall pole carrying

electricity wires to the houses on Redditch Road. The photograph was taken before the house at 1 Redditch Road was extended to the north and rear (or west) in 2014. Ms Griffiths says that the pole was on her land. She relies on a payment advice from Central Networks showing payment to her of an annual wayleave payment for a pole, line and cable in 2004. She also relies on a letter from Fountains, a contractor contracted by Central Networks to clear vegetation encroaching on overhead electricity lines, stating that there were overhead lines on her property that required clearance from tree growth. The hand-drawn plan on an accompanying consent form shows a sycamore tree and describes the work as being to reduce the heights of stems of the tree to gain safe clearance for the cables. The sycamore tree does not appear to be shown on the Application Plan.

9. The hedge can also be seen in a photograph taken in 2002. The hedge behind 1 and 3 Redditch Road can be seen in this photograph. The electricity post visible in the 1984 photograph cannot be seen in the 2002 photograph

10. Mr Evans's evidence was that the hedge behind the house at 1 Redditch Road and behind 3 and 5 Redditch Road was taken down by the then owners of those properties in the mid 2000s and replaced with a low level fence on the same alignment. The Applicants put up a post and barbed wire fence 600mm to the east of that low level fence in April 2014. Ms Griffiths and Ms Singh in their evidence both accepted that the section of hedge was taken down in the mid 2000s but denied that the low level fence was put up on the same alignment.

11. In January/February 2015 Ms Singh and Ms Griffiths took down the post and barbed wire fence and erected a post and wooden panel fence 1.8 metres high to the east of the line of the post and barbed wire fence. That post and wooden panel fence is shown on the survey plan and is approximately in line with the top of the eastern bank of the ditch to the north.

12. On 18th September 2002 Mr Evans obtained judgment in an action in Redditch County Court against Ms Piggott, the then owner of 5 Redditch Road for damages for the loss of a tree chopped down by workmen acting on the instructions of Ms Piggott. Mr Evans said in correspondence with Ms Griffiths that the judge in that case decided that the hedge was the boundary. No copy of the judgment was produced in evidence.

13. The Application Plan shows the centre line of a ditch lying to the east of the section of hedge. This ditch is shown ending just to the south of the large trees to the north of the hedge and about 11 metres from the north eastern corner of the garden of 1 Redditch Road. It is common ground that the ditch extended further south running behind 1, 3, 5, 7, 11, 13, and 15 Redditch Road and that the section of ditch behind the houses at 1 and 3 Redditch Road was filled-in in April 2014 by contractors instructed by the Applicants. The survey plans prepared by Tower Survey showing topographical features where the Land adjoins 5, 7, 9, 11, 13 and 15 Redditch Road show marked on the plans the centre line of the ditch and the eastern bank of the ditch behind 5 to 15 Redditch Road. The centre line of a hedge behind 7 and 9 Redditch Road is also shown on those plans.

14. Both parties made some enquiries of North Worcestershire Water Management (“NWWM”) as to the ditch. Faye Tomlin of NWWM wrote to Ms Griffiths on 11th August 2014 stating that NWWM “cannot establish without reasonable doubt that the ditch is a watercourse. The land drainage act defines a watercourse as having a reliable source of water that flows (this can be temporarily) and that water that it may receive from the drainage of your gardens may not be reliable enough to argue this case well enough should it get as far as the courts”. Clive Wilson, Senior Water Management Office at NWWM wrote to Mrs Evans on 14th August 2014 stating, “Having sought further legal advice in respect of the additional information supplied to NWWM we do not believe that the ditch can be currently considered as an ordinary watercourse”.

15. It does not appear to be in dispute that the boundary in question formed part of an old field boundary. Ms Griffiths’s evidence was that the Land was shown on field maps dated 1846-1901 as part of Field no. 1311 and that the site of 1 and 3 Redditch Road was shown on field maps of the same dates as part of Field no. 1312. Mr and Mrs Evans did not dispute this evidence.

16. Marked on the Application Plan are two pieces of fencing described as “remainder rusted metal fence”. The height of both pieces is given as 1.1 metres. Each piece is shown as being about 2 metres in length. The northern of the two pieces is marked as being to the west of the southernmost of the trees shown on the northern section of the line drawn as the boundary. The southern of the two pieces is also marked to the west of the line drawn as the boundary. The pieces of rusted metal fence can be seen in photographs produced in evidence.

The sections of fence are of the type that consists of metal posts joined by longer horizontal metal bars and that is often referred to as “estate fencing”.

Conveyancing History

17. 1, 3,5,7,9,11, 13 and 15 Redditch Road form part of a development of houses constructed by Bromsgrove Rural District Council. The Council purchased the site for the development from the Earl of Plymouth and the site was conveyed to the Council by a conveyance dated 13th September 1920. The freehold title to numbers 5,7, 9,11, and 15 Redditch Road is held by Bromsgrove District Housing Trust.

18. Mr Evans purchased the Land in 1984 from Robert Spencer, a local farmer. The Land was first registered on 23rd November 1979. No title deeds preceding first registration were produced in evidence. The transfer of the Land to Mr Evans in 1984 was a transfer of part of the land registered under title number HW18976. The land transferred was described in the transfer as “the land shown and edged with red on the plan bound up within”. The transfer plan is at a scale of 1:1250. Title to the Land was transferred into the joint names of Mr and Mrs Evans in July 1987.

19. The conveyance by the Earl of Plymouth to Bromsgrove Rural District Council was not in evidence. By a conveyance dated 30th April 1984 Bromsgrove District Council conveyed 1 Redditch Road to Brian and Susan Tomlin. The land conveyed was described as
“All That piece or parcel of land containing an area of approximately five hundred and twenty five square metres situate at Redditch Road Alvechurch in the County of Hereford and Worcester Together with the dwellinghouse erected thereon and known as Number 1 aforesaid All which said land is more particularly delineated on the 1/500 scale site plan annexed hereto and thereon edged red (hereinafter called “the premises”.

The conveyance included a covenant by the purchasers to maintain the boundary walls and fences marked “t” on the conveyance plan. The “T” was marked only on the boundary between Number 1 and Number 3 Redditch Road.

20. 1 Redditch Road was transferred to Samantha Griffiths by Susan Ginder in June 1997.

21. Bromsgrove District Council conveyed 3 Redditch Road to Marjorie Mills by a conveyance dated 9th April 1990. The land conveyed was described as

“All That piece or parcel of land containing an area of approximately 310 square metres situate at Redditch Road, Alvechurch in the County of Hereford and Worcester Together with the dwellinghouse erected thereon and known as Number 3 Redditch Road Alvechurch aforesaid All which said land is more particularly delineated on the 1:2500 scale site plan annexed hereto and thereon edged red”.

The conveyance included a covenant by the purchaser “to maintain in good repair the boundary walls and/or fences to the premises marked “T” on the said plan annexed hereto”. On the plan there is a “T” mark on the rear or eastern boundary of the land conveyed.

22. Title to 3 Redditch Road was transferred to Ms Singh by a subsequent registered proprietor Mr Dean Gordon by a transfer dated 6th October 2000.

23. No party sought to rely on the contents of any pre-registration deeds to prove the exact line of the boundary.

Hedge and Ditch Presumption

24. The Respondents rely on the hedge and ditch presumption. That presumption was explained by Lord Hoffman in *Alan Wibberley Building Ld v. Instey* [1999] 1 WLR 894 as follows

“It should be noticed that this rule involves two successive presumptions. First, it is presumed that the ditch was dug after the boundary was drawn. Secondly, it is then presumed that the ditch was dug and the hedge grown in the manner described by Lawrence J. If the first presumption is displaced by evidence which shows that the ditch was in existence before the boundary was drawn, for example, as an internal drainage ditch which was later used as a boundary when part of the land was sold, then there is obviously no room for the reasoning of Lawrence J. to operate”.

Lord Hoffman was referring to the words of Lawrence J. in *Vowles v. Miller* (1810) 3 Taunt. 137 at 138 where Lawrence J. observed

“The rule about ditching is this. No man, making a ditch, can cut into his neighbour’s soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on the top of it”.

25. There is in this case evidence of a hedge with a ditch along most of its length on the western side of the hedge. Unless the hedge and ditch presumption is rebutted, the boundary is not the centre line of the hedge but the top of the western bank of the ditch.

The parties' cases

26. The Applicants' case is that the hedge was planted along a boundary that was previously marked by a fence. The evidence they rely upon for this contention is the presence of what is described as "remainder rusted metal fence" on the Application Plan. Their argument is in substance that there was a fence in place before the hedge was planted; the fence should be taken to have marked the boundary; and the hedge and ditch presumption is rebutted.

27. The Respondents say that the boundary line is not the centre line of the hedge but is the top of the west bank of a ditch on the west side of the hedge. At the time of the preparation of the determined boundary plan, the ditch existed only alongside part of the hedge by the garden to Number 1.

Discussion

28. I do not consider that I can find on the evidence that there was a metal fence and that the hedge was planted later. Only two pieces of metal fencing have been found. It is not possible to conclude from their existence that they were part of a fence extending along the boundary of the Land. Other explanations for the presence of these pieces of fencing are possible; for example, the pieces of fencing may have been put to block gaps in the hedge or places where the hedge was thin in order to keep animals from getting out of or into the garden of 1 Redditch Road.

29. Even if there were a fence along the boundary, it does not mean that the fence was erected before the hedge was planted. The sections of metal fence as shown on the Application Plan are not along the line drawn on the Application Plan as the exact line of the boundary; they are to the west of that line. A large number of the stumps of the hedge bushes lie to the east of a line projected through the two pieces of fence. That would suggest that if there was a fence along the whole of the boundary, it may well have been erected on the western side of an existing hedge. That would have been possible had the hedge bushes been cut back heavily as they had been at the time of the survey.

30. There is nothing else in this case that rebuts the hedge and ditch presumption. There is or was a ditch stretching along the whole line of the hedge. The trees to the north of the hedge do not provide any reason for saying that the boundary line is the hedge and not the ditch. They do not form a straight line projected from the line of the hedge. There is a large tree near point X on the Application Plan that is well within the Land. Point X is not marked by some solid physical feature which would enable one to say that it was a marker for the north end of the boundary. Point X is a point along a derelict wire fence that continues at least part of the way along the north side of the Land. It is not even a fence post at point X. There is no evidence that the Land and the site of 1 and 3 Redditch Road were once in common ownership. There is no evidence that the ditch was dug as a drainage ditch and is not connected with the planting of the hedge. The measurements on the Application Plan do not show that the ditch was dug and the spoil put on the east bank. In a number of places along the ditch behind 1 to 15 Redditch Road, the survey indicates that the west bank (i.e. the bank by the site of the hedge) is higher. There is no evidence of when or how the hedge was planted and the ditch was dug. These facts are lost in the mists of time. It is in precisely such a case as this that the hedge and ditch presumption applies to provide an answer.

Conclusion

31. The application to determine the boundary as being on the line shown on the Application Plan should be cancelled. The Application Plan does not show the boundary in the correct place. Where there is and was a hedge, the boundary is not along the line of the hedge because the hedge and ditch presumption applies. The Application Plan does not show the boundary in the position fixed by the hedge and ditch presumption. Where there is no hedge and no ditch at the northern end of the boundary, there are no good grounds for me to find that the boundary is as shown on the Application Plan. Such documentary evidence as there is indicates that the boundary is a straight line running south or south east from somewhere in the vicinity of point X on the Application Plan. The line drawn on the Application Plan from point X to the start of the ditch is in line with the hedge and not the ditch. It does not therefore show the exact boundary. Furthermore, point X may not be the correct northern point of the boundary. It appears to have been determined by projecting the line of the hedge northwards until it meets the line of an old fence. That is not the correct method for determining the position of point X if the hedge is not the boundary. There is no

other evidence to show that the northern point of the boundary is at point X. I shall direct the Chief Land Registrar to cancel the application.

Dated this 2nd February 2018

Michael Mitchell

BY ORDER OF THE TRIBUNAL

